

**IN THE HIGH COURT OF ZANZIBAR  
HELD AT TUNGUU  
CRIMINAL CASE NO. 94 OF 2022**

**DIRECTOR OF PUBLIC PROSECUTION**

**V.  
OTHMAN AKIDA JUMA**

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**RULING**

***Dated: 22<sup>nd</sup> February, 2023***

**S. HASSAN (J)**

The accused person Othman Akida Juma stands charged with one offence of unlawful possession of drugs contrary to section 21 (1) (d) of the Zanzibar Drugs Control and Enforcement Authority Act No. 8 of 2021. The particulars of offence allege that, on the 20<sup>th</sup> day of September, 2022 at or about 6:30pm at Nungwi within North A District in the Northern Region of Unguja Island, the accused person was found in his house numbered 96 located within Kiungani Shehia, in unlawful possession of 2,398 packets, each containing powder alleged as narcotic drug of heroin type, weighed 58.3742g

On the 11<sup>th</sup> day of October, 2022 the accused person entered his plea to the charge. In his plea the accused person denied the charge and a plea of not guilty was entered. On the 31<sup>st</sup> day of October, 2022 preliminary hearing was conducted and the facts of the case were read over to the accused person. The accused person admitted his name, his arrest and arraignment before the court

During the hearing of the case, the Prosecution was represented by learned Senior State Attorney Mr. Mohamed Abdalla, while the accused person was in the service of Mr. Mohamed Idriss.

The brief facts of the case are that the accused person Othman Akida Juma stands charged with unlawful possession of heroin drugs. It is alleged that, on the 20<sup>th</sup> day of September, 2022 officers from ZDCEA while on patrol in Nungwi were tipped by their informer that at house number 96 located within Kiungani Shehia of Nungwi. The officers from ZDCEA with Sheha and Deputy Sheha went to the said house and found Othman Akida Juma inside

the house. They started searching inside the house where they did not find any drugs but continued with their search at the back of the house on an unfinished house (boma) and managed to find a Khaki envelope which contained a plastic bag and inside the plastic bag there were 20 plastic packets containing a total of 2,398 packets. Thereafter the accused person was arrested and the drugs were seized and taken to the Office of ZDCEA. The suspected drugs were then sent to the Chief Government Chemist for analysis. A report issued by the Government Chemist confirmed it was narcotic drugs namely heroin weighing 58.3742g.

To prove the charge against the accused person, the prosecution paraded 6 witnesses. The witnesses were **Haji Pandu Suleiman (PW1), Juma Othman Bakari (PW2), Ali Khamis Suleiman (PW3), Makame Machu Ali (PW4), Saada Mohamed Fom (PW5) and Bakari Yussuf Juma (PW6)**. A total of 2 exhibits were tendered and admitted namely, a **certificate of seizure form ZDCEA 10 dated 20/9/2022 Exhibit P1** and the **report of Government Analyst form 009 dated 23/9/2022, Exhibit P2**.

On the 6<sup>th</sup> day of February, 2023 the prosecution side presented its last witness and thereafter closed its case and the matter was left in the hand of the court to determine based on the evidence presented by prosecution whether a case is not made out against the accused person sufficiently to require him to make his defense (**section 215 of CPA No 7/2018**) or the case is made out against the accused person sufficiently to require him to make his defense, (**section 216 (1) of CPA No 7/2018**).

Advocate Idriss for the accused person had no issues with prosecution closing its case and what the court required to do at the stage of the prosecution closing its case, but he alerted the court that while the court is to make its determination on whether there is prima facie case or not, the court has to consider that a multi colour bag which is alleged to contain narcotic heroin drugs found in the house of the accused person which is identified by all 7 prosecution witnesses marked as **ZDCEA/HQ/IR/164/2022** was not tendered in court as Exhibit to form part of the prosecution evidence, also the alleged **house number. 96** and the **brick (tofali)** not identified and tendered in court as evidence and the money found with the accused not tendered as exhibit to form part of the prosecution case.

On the other side, Senior State Attorney Mr. Mohamed for the prosecution admitted that it was an error that the exhibits named by the accused

advocate were not tendered in court as evidence. When the court asked the parties what is the court need to do at this stage no clear answer came from both sides, they all left the matter in the hands of the court to decide.

At this stage as I have mentioned before, after the closure of prosecution case, the question is whether the evidence so far presented by prosecution warrant calling upon the accused to enter his defence ( **a Prima Facie case**) or not. In simple language does the accused has a case to answer?

The essence of closure of prosecution case was well emphasized in the case of **Abdalla Kondo v. R, Criminal Appeal No. 322 of 2015** (unreported) where the Court stated that:

***“ The prosecution is at liberty to close its case when satisfied that the evidence adduced by their respective witnesses is sufficient”***

Having established the essence of prosecution to close it case, I shall first make determination on Prima Facie case and there after I shall address the issue raised by the advocate for the accused person.

What is meant by prima facie case has been elaborated in the case of **Romania Trambaklal Bhatt v. R [1957] EA 332 – 335**, where it was stated by the Court among other things that:

***“ It may not be easy to define what is meant by a prima facie case, but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”***

Also in the case of **R v. Abdi Ibrahim Owl [2013] eKLR**, a prima facie case was defined as follows:

***“ Prima Facie” is a Latin word defined by the Black’s Law Dictionary, 8<sup>th</sup> Edition as “ Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. Prima facie case is defined by the same dictionary as “ The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with”***

Also **Oxford Companion of Law** at page 907 defines prima facie in the following terms:

***“ A case which is sufficient to all an answer while prima facie evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive”***

Moreover, in the case of **S v.Naftali Kondja & others case No CC 04/2006 (unreported), HC Namibia, Parker J**, observed the following:

***“ The State bears the onus of presenting sufficient evidence before the court in order for the court to call on the accused person to defend himself or herself. If at the close of the State case there is no case for the accused to answer, he or she must be acquitted. The accused person must not be put on his or her defence in hope that his or her evidence would supplement the State case.”***

In this case without giving much details, the accused person is charged with unlawful possession of the narcotic drugs contrary to **section 21 (1) (d) of the Act No 8 of 2021**. The Act itself does not define the word **“possession”** hence I will refer to the definition of the word **“possession”** as defined by the **Penal Act No. 6 of 2018 of the Laws of Zanzibar. Section 3 (2)** of the Act has defined **“possession”** as follows:

***“ possession” “ be in possession of” or “ have in possession” include:***

- (a) Not only having in one’s own personal possession , but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place, whether belonging to, or occupied by oneself or not for the use or benefit of oneself or of any other person.***

The definition has para (a) and (b) but for the purposes of this case I shall make reference only to para (a) above.

It is therefore well settled law that the word possession embraces both a **factual** and **mental element**. The **factual element is that of control. The mental element is that of knowledge.**

Having established what is a prima facie case and the essential ingredients to be proved for the charge of unlawful possession of drugs to succeed, at this stage based on the evidence adduced by prosecution witnesses, even though the evidence is tainted with grave discrepancies and contradictions, I would have still make a ruling that the accused person has a case to answer and put him in his defence, because at this stage the court is only asked to

determine the prima facie case only and not to make conclusive determination as to whether the accused stands convicted or not.

However, the issue raised by Mr. Idriss advocate for the accused person, also need the determination and consideration of this court. Hence I will now turn to discuss the issue raised by Mr. Idriss in order to determine if it is worth to put the accused person in his defence or otherwise.

The issue which need determination is whether failure by the prosecution to tender as evidence in court the alleged multi-color bag identified by all 7 witnesses as **ZDCEA/HQ/IR/164/2022 weighing 58.3742g** is fatal or not? Before I determine whether the error is fatal or not, I shall in brief make discovery on who is legally capable of tendering the exhibits in court.

The test of tendering the exhibit has been well elaborated in the case of **DPP v. Mirzai Pirbakhshi & Hadji and 3 Other, in Criminal Appeal No. 493/2016** (unreported) where the Court held that:

*“ A possessor or a custodian or actual owner or alike are legally capable of tendering the intended exhibits in question provided he has knowledge of the thing in question”.*

In this case, **PW1** the arresting officer from ZDCEA and **PW2** Government Analyst who performed laboratory test which confirmed that the substance is heroin, were legally capable of tendering the exhibit in this court because they all had a knowledge of the exhibit in question but they failed to do so.

Having determined the issue of who is legally capable of tendering the exhibits in court, I shall now conclude by making finding on the pending issue. I doing so, I shall take refuge and inspiration from the case of **R v. Mustapha Ally Khatibu, Economic Criminal Case No. 07/2018 (unreported)**. In that case the accused person Mustapha Ally Khatibu, was charged with trafficking in narcotic drugs heroin hydrochloride the nylon packets seized from the accused containing a narcotic drugs was not tendered in court as proof that the accused was trafficking narcotic drugs heroin hydrochloride, **Mashaka J**, had this to say:

*“ Failure of the part of the prosecution to tender into evidence the narcotic drugs heroin hydrochloride leaves a shadow doubt in this case, there is no narcotic drug said to be trafficked by the accused. The prosecution did not sufficiently discharge its duty to tender the narcotic drugs heroin hydrochloride, which I hold in favor of the accused person”* In the end the court found the prosecution did not prove

the charge of trafficking heroin hydrochloride weighing 211.36grams and acquitted the accused person.

In the case in hand before this court, the situation is almost similar to that faced by **Hon Judge Mashaka**, here the prosecution has closed its case and all **7 witnesses** have identified the multi-color bag containing heroin drug **weighing 58.3742g** as **ZDCEA/HQ/IR/164/2022** but none of them tendered it in court as evidence, the question is whether that error is fatal at this stage of the case or not?

I am sober and alive to the fact that, the decision of **Hon Mashaka (J)** do not bind this court, but I am very much persuaded by his findings, and state that the prosecution error is fatal and hence, they did not sufficiently discharge their duty to tender the heroin drug in court to form part of the evidence and therefore there is no need for this court to put the accused person in his defence for the sake of rollercoaster joyriding of asking for an explanation or the gratification of knowing what the accused has to say about the prosecution evidence. To cement my position, I will also refer the case of **(1) Emmanuel Saguda @ Sulukuka (2) Sahili Wambura v. The Republic in Criminal Appeal No. 422 'B' of 2013** (unreported) where the **MJASIRI J.A** held that:

***" It is well establish practice in cases where witnesses are required to testify on a document or object which would subsequently be tendered as exhibit that the procedure is not simply to refer to it theoretically as was the case here, but to have it physically produced and referred to by the witness before the court either by display or describing it and then have it admitted as exhibit"***

Having being well guided by the authorities above, I am now in a better position to make my ruling on the error of prosecution not to tender crucial evidence in court and on prima facie case. I hereby state that, the prima facie case against the accused person Othman Akida Juma is not sufficiently made to warrant him to enter his defence. Failure of prosecution to tender the crucial evidence identified and described in court as **ZDCEA/HQ/IR/164/2022** has cast shadow and doubt in the prosecution case, the error in my view is fatal and not curable under our **Criminal Procedure Act No. 7 of 2018**.

I therefore, in accordance with section **215 of the CPA No. 7 of 2018**, dismiss the charge and consequently discharge the accused person against the charge of unlawful possession of narcotic drug heroin, contrary to

section **21 (1) (d) of the Act No. 8 of 2021**. The accused person is to be released from the custody with immediate effect unless otherwise is held there for other lawful reasons.

**It is so ordered.**

**S. HASSAN (J)**  
**JUDGE.**

The Ruling is delivered this **22<sup>nd</sup> day of February, 2023** in the presence of the accused person Othman Akida Juma, his Advocate Mr. Idriss and SSA Mr. Mohamed Abdalla for the Prosecution.

**S. HASSAN (J)**  
**22 /2/ 2023**

**Court:**

Right of Appeal is explained.

**S. HASSAN (J)**  
**22 /2/ 2023.**