

IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT TUNGUU

CRIMINAL CASE NO.108 OF 2022

DIRECTOR OF PUBLIC PROSECUTION

v

TAUFIQ ABDALLA MOH'D

JUDGMENT

Dated: 11th April, 2023

S. HASSAN (J)

The accused person Taufiq Abdalla Moh'd was arraigned in this court on 21st November, 2022 for the charge of unlawful possession of narcotic drugs contrary to section 21 (1) (d) of the Zanzibar Drugs Control and Enforcement Authority Act No. 8 of 2021.

In the particulars of offence, it is alleged that the accused person on 01/08/ 2022 at around 10:00am at Jumbe Central District in the Southern Region of Unguja, was found and arrested with unlawful possession of narcotic drugs of heroin type weigh 1.2693g.

Upon answering to the offence charged against him, the accused person denied the charge and plea of not guilty was entered. On the 19th December, 2022 the Prosecution submitted a complete record of evidence and thereafter the case was fixed to commence hearing. The accused person prayed for 2 weeks to prepare for the case and hence the case was fixed to commence hearing on the 3rd January, 2023.

To prove the charge against the accused person, the prosecution presented 7 witnesses, namely, Othman Juma Bakari (PW1), Mohamed Shaaban Abdalla (PW2), Aziza Amour Pandu (PW3), G7108 Coplo Ali Mzee Ali (PW4), F9629 Coplo Hussein Khamis Hassan (PW5), Suleiman Rashid Abdalla (PW6) and Mussa Fadhil Mzee (PW7). The prosecution also tendered in court 2 exhibits namely;

Government Chemist Analysis Report (exhibit P1) and Khaki envelope (exhibit P2)

During the hearing of the case, the prosecution was represented by the learned State Attorney Mohamed Abdalla, while the accused person was unrepresented and defended himself.

Othman Juma Bakari, (PW1) government analyst was the first witness called by the prosecution, in his testimony he stated that, he was the one who performed the test and prepared the result by using **form 009** which was tendered in court and admitted as **exhibit P1**, he further stated that the result confirmed that the exhibit was drugs type of heroin and **weighing 1.2693grams**.

In cross examination he stated that he did not remember the total number of the small packlets stones, but he took sample on each of the packlets and performed colour test which gave the result that the drugs was heroin, he went to state that the colour of the drugs was brown. When asked if he agrees that the drugs belong to Officer Mussa Fadhil Mzee he denied and stated that Officer Mussa was the one who brought the exhibit for analysis test at the government chemist.

Mohamed Shaaban Abdalla, (PW2) an officer of ZDCEA, gave his evidence and testified that, the incident occur at Tunguu Police Station on 1/8/2022 at 11:30am. He was in operation at Tunguu Police Station with his fellow officer Suleiman Rashid Abdalla when they received information that there is a person arrested on suspicion of possession of drugs. They went to the Police Station and met with G7108 coplo Ali who handed over the suspect to him with the exhibit and a handing over letter. Thereafter he identified himself to the suspect that they were officers from ZDCEA and he also asked the accused to identify himself to him and he identified himself by the name of Taufiq Abdalla Mohamed. After that, he inspected the exhibit which was a transparent plastic bag which contained substance in the form of stones alleged to be drugs. Furthermore he stated that he then cautioned the suspect on the offence of being found in unlawful possession of drugs, he performed all that while witnessed by his fellow officer Suleiman Rashid Abdalla. After that he arrested the suspect and went

back with him in the ZDCEA office while the exhibit and the suspect were under his custody. They arrived in their office at around 13:00pm and immediately he re counted the exhibit and received the same total number as before. Afterthat he opened a case file against the suspect with identification number ZDCEA/ HQ/ IR/ 120/ 2022, he performed all that while witnessed by the suspect and his fellow officer Suleiman Rashid Abdalla. PW2 went on to testified that, he put the exhibit in the khaki envelope and gave it identification number ZDCEA/ HQ/ IR/ 120/ 2022 and sealed the envelope with red "lakiri". At around 13:20pm he gave the exhibit to the exhibit keeper officer Aziza Rashid Abdalla for her safe custody. The witness pointed to the accused person for identification. **PW2** further tendered khaki envelope as evidence and the same was admitted as **exhibit P2**.

During cross examination he testified that, the accused was arrested by police officer and not him. He further stated that, the suspect is arrested only once. He further stated that he did not found the accused with drugs, but the drugs were handed over to him by the police officer G7108 coplo Ali. He denied the allegations that the drugs belong to the police officer. He went on to stated that he believed the accused was the owner of the drugs because he was handed over to him with a handing over letter and he stated that the police did not inform him the date which the accused was arrested by them.

Aziza Amour Pandu (PW3), exhibit keeper at ZDCEA, testified that, she received the exhibit from the arresting officer and recorded it the register book and thereafter he kept the exhibit in the special cabinet for keeping exhibits which the keys of that cabinet stays with her only as exhibit keeper. She went on to state that, she received the exhibit from officer Mohamed Shaaban Abdalla on 1/8/2022 at around 13:20pm. She kept the exhibit in custody until on the 5/8/2022 at around 8.45am when he gave the exhibit sealed with red lakiri identified as ZDCEA/ HQ/ IR/ 120/2022 to officer Mussa Fadhil Mzee, together with the request analysis letter and a form of delivery sample to the government chemist for analysis test. On 19/8/2022 at around 11:30am while she was in her office she received back the exhibit from officer Mussa Fadhil Mzee in khaki envelope sealed with the lakiri from the government chemist with identification

number ZDCEA/HQ/IR/120/2022. She kept the exhibit under custody until the day it was needed in court as evidence.

During cross examination she stated that, she did not bring in court the register book which she recorded the exhibit, she further went on to state that, she does not know the contents of the exhibit she kept under custody and that she only received it from officer Mohamed Shaaban Abdalla for custody and she was informed by that officer that, the exhibit was for Taufiq. She further stated that she did not see Taufiq with the exhibit because she was not an arresting officer.

G7108 coplo Ali Mzee Ali (PW4) testified that, he is a police officer at Tunguu Police Station. He went on to state that he was in court to give evidence on the case of Taufiq which occurred at Jumbi. He stated that on 1/8/2022 at around 10:00pm they were in patrol in the unfinished houses at Jumbi where they found the accused and searched him and found in possession of drugs in the form of stones and after that he arrested him while witnessed by his fellow police officer F9629 coplo Hussein. PW4 went on to testify that, the drugs which found with the accused were in the form of stones and in the plastic bag, after that, they took the accused to the police station. They arrived at police station around 11:00pm and handed over the suspect to CRO and informed the Authority about the arrest. He further testified that, he knows the accused person as someone who deals with drugs.

During cross examination he testified that he did not write his own statement which is in the records of evidence, it was officers from ZDCEA who wrote that statement, he concluded by stating that he arrested the accused on 1/8/2022.

F9629 coplo Hussein Khamis Hassan (PW5), also gave his evidence and testified that he is a police officer working at Tunguu Police Station and that he was in court to give evidence on the case which took place on 1/8/2020-2021. He went on to state that, they were in patrol in the Central area of Tunguu with his fellow officer G7108 coplo Ali. At 10:00pm they reached Jumbi Kiza at one of the unfinished house and he witnessed his fellow officer G7108 arresting an accused person. He went on to state that he witnessed his fellow officer searching the accused and discovered a transparent

plastic bag which had drugs in the form of stone. He also witnessed his fellow officer cautioned the accused on the suspicion of being found with drugs and there after they took the accused to the Tunguu Police Station, upon arriving at the station the accused was put in lock up until the officers from ZDCEA arrived.

During cross examination he stated that he witnessed G7108 coplo Ali arresting the accused on 1/8/2021 at around 10:00pm at Jumbi Kiza.

Suleiman Rashid Abdalla (PW6) an officer from ZDCEA also gave his evidence and stated that, he remembered on the 1/8/2022 at around 11:30am while he was on duty with his fellow officer Mohamed Shaaban Abdalla, they arrived at Tunguu Police Station after they received information that there was a suspect arrested for unlawful possession of drugs. They arrived at Police Station and the accused was handed over to them with the exhibit. He went on to testify that, he witnessed his fellow officer Mohamed Shaaban Abdalla identified himself to the accused person and the accused was asked to identified himself to them, he further witnessed his fellow officer inspecting the exhibit which was a transparent plastic bag which contained drugs in the form of stones. They left Tunguu police station with the accused and went back to their office at Migombani while the accused and the exhibit was under the custody of officer Mohamed. He further stated that, they arrived at their office at around 13:00pm and at the same time he witnessed his fellow officer opened a case file against the accused person with identification number ZDCEA/HQ/IR/120/2022 and after that he also witnessed his fellow officer putting the exhibit in the khaki envelope and sealed it with the red lakiri. At around 13:20pm he witnessed his fellow officer handing over the exhibit to the exhibit keeper officer Aziza Amour Pandu for her custody.

In cross examination he testified that, the accused and the exhibit was handed over to them by the police at Tunguu Police Station, he further stated that he does not know the name of the police officer who handed over the accused to them. Furthermore he testified that, he did not know when exactly the accused was arrested.

Mussa Fadhil Mzee (PW7), an investigation officer of this case also gave his testimony and stated that, on 5/8/2022 at around 8:45am while in his office, he

received a file from his Head which had identification number ZDCEA/HQ/IR/120/2022 the complainant was officer Mohamed Shaaban Abdalla, and the accused person is Taufiq Abdalla Mohamed. Furthermore he stated that, he also received a form 018, a letter for analysis request and an exhibit khaki envelope sealed with red lakiri from officer Aziza Amour Pandu and send them to the government chemist for analysis test. He arrived at the government chemist office at around 9:15am and received by analyst Juma Othman Bakari and gave him the letter, form 018 and an exhibit. Moreover he testified that, he witnessed the analyst unsealed the exhibit and removed a transparent plastic bag which contained alleged drugs in the form of stones, after that he signed on the register book and went back to the office to continue with his investigation of the case. In his investigation he interviewed the witnesses and went to the crime scene at Jumbi Kiza where he did not managed to get anything related to the offence. Furthermore on 19/8/2022 he went back to the government chemist to collect the exhibit and he was again received by the same analyst who gave him the exhibit in khaki envelope sealed with red lakiri of the government chemist and signature of the analyst on top of the envelope with identification number ZDCEA/ HQ/IR/120/2022 and also he was given a analysis report which confirmed that the alleged substance was drugs heroin weighing **1.2693grams**. He went back to the office after he collected the exhibit and arrived there at around 11:30am and immediately he gave the exhibit to the exhibit keeper.

During cross examination he stated that, he gave the accused his basic rights, he took the accused statement on 5/8/2022 at around 12:00pm to 13:00pm and he further stated that he did not took the accused when he went to visit a crime scene.

On 6/2/2023, the prosecution closed it case and the court upon analyzing of the evidence so far adduced by the prosecution witnesses found it sufficiently to require the accused to enter his defence. The rights of accused person under **section 216 (1) (a) and (b) of CPA No,7 of 2018** were explained to the accused person by the court, and the accused person opted to give his evidence under oath and he was the sole witness for the defence.

On the 22/2/2023 **Taufiq Abdalla Mohamed, (DW1)**, enter his defence and testified that, he remembered on the 12/7/2022 at around 8:00pm he was at Jumbi Jangwani coming from visiting his aunty and he was waiting for a "boda boda" to take him home, suddenly a car model IST stopped infront of him and 3 people came out of the car one of them is a police officer who is his neighbor who had a plot issue with him. The people identified themselves as police officers and they took him to Tunguu Police Station. At police station he was searched and found with a phone and a wallet. He went on to state that, one of the police officer came with the package and gave it to the counter and stated that the package was found with him (the accused). He was put in lock up and after 20 days and on 1/8/2022 the officers from ZDCEA came to collect him with the package and he was sent to the ZDCEA offices where he stayed there until the date of 21/11/2022 where he was brought in court. He stated that he denied the charge in court and that all prosecution witnesses gave different stories in their testimonies and he denied being found the drugs. He further stated that he had issues with one of the police officer who framed him with the charge.

During cross examination he stated the police who he had issues with was not brought in court to testify and he know him by the name of Said Kificho and that their difference happened in April when the said police officer bought a piece of plot from his friend and paid half of the money and promised to pay the remaining amount later on which he did not do and the plot was sold to someone else and they returned the money to the police officer. DW1 stated further that, the police officer claimed that it was him (the accused) who persuaded the owner of the plot to sell it to another person and that is why he had issues with him. He further stated that he was arrested at Tunguu Jangwani and not Jumbi Kiza.

Having heard the testimonies of all prosecution witnesses and the testimony of the defence side, and after going through all tendered exhibits in support of the prosecution case, now it's time to get to the bottom of this case and determine whether the prosecution has managed to prove the charge against the accused person beyond all reasonable doubt.

In order to reach the bottom of this case, I find there are three issues which need determination by this court: **firstly**; is whether there is variance and uncertainty in the date, place and time of arrest and the charge sheet, **secondly**; whether chain of custody is broken and **lastly**; whether the accused has raised any doubts in his evidence.

To start with the first issue, I will start by make reference to the charge sheet and make comparison with evidence adduced by the prosecution side particularly **PW2, PW4, PW5, PW6, PW7** and **DW1** for defence.

The charge sheet in this case reads as follows:

KATIKA MAHKAMA KUU YA ZANZIBAR

IMESIKILIZWA TUNGUU

KESI YA JINAI NAMBARI 108 YA MWAKA 2022

ZDCEA / HQ/ IR/ 120/ 2022

BAINA YA

MKURUGENZI WA MASHTAKA

NA

TAUFIQ ABDALLAH MOH'D

TAARIFA YA MASHATAKA

Mnaomo siku ya tarehe 21 mwezi wa Novemba Mwaka 2022, Mahkama Kuu inataarifiwa na Mkurugenzi wa Mashtaka kwamba:

TAARIFA YA MSHITAKIWA

TAUFIQ ABDALLAH MOHD, Mwanamme, Mtumzima, Miaka 32, Mmakuwa wa Tunguu Unguja, anashitakiwa kwa kosa lifuatalo:

KOSA NA KIFUNGU CHA SHERIA

KUPATIKANA NA DAWA ZA KULEVYA: Kinyume na kifungu cha 21 (1) (d) cha Sheria ya Mamlaka ya Kudhibiti na Kupambana na Dawa za Kulevya, Sheria Nambari 8 ya Mwaka 2021, sheria ya Zanzibar;

MAELEZO YA KOSA

TAUFIQ ABDALLAH MOHD, Siku ya **tarehe 1 / 8 / 2022** majira ya **saa 04: 00 za asubuhi** **maeneo ya Jumbi** Wilaya ya Kati, Mkoa wa Kusini Unguja, bila ya halali ulipatikana na Unga mfumo wa vijiwe ambao ni madawa ya kulevya aina ya Heroine yenye uzito wa **1.2693g**, jambo ambalo ni kosa kisheria.

Signed by

ILHAM SULTAN MALIK

WAKILI WA SERIKALI

AFISI YA MKURUGENZI WA MASHATAKA

ZANZIBAR.

The particulars of offence alleges that the accused person was arrested on **1/ 8/2022** at **10:00am** at **Jumbi, Central District, in the North Region**, now I shall link the particulars of the offence and evidence adduced by the prosecution witnesses.

In his testimony **PW2** testified that the incident occurred at **Tunguu Police Station** on **1/8/2022** at around **11:30am**. Herein it is established that, the time of arrest alleged in the charge sheet and the place of arrest is different from what was testified by **PW2**. Moreover the testimony of **PW4** stated that on **1/8/2022** at around **10:00pm** they were in patrol in unfinished houses at Jumbi where they found the accused person in one of the houses. Also **PW5** testified that on **1/8/2020- 2021** they were in patrol at **Jumbi Kiza** at around 10:00pm at one of the unfinished house they found the accused person arrested him on the offence of unlawful possession of the drugs. Furthermore **PW6** stated that he was in patrol with his fellow officer on

1/8/2022 at around **11:30am** they arrived at **Tunguu Police Station** after being tipped off that there was a suspect arrested on suspicion of unlawful possession of drugs, they went there and the accused was handed over to them. The evidence of **PW2, PW4** and **PW6** established that the date of arrest was **1/8/2022** apart from **PW5** who stated that the date was **1/8/2020/2021**. But all differ on the time of arrest and place of arrest. **DW1** in his defence stated that he was arrested in **12/7/2022** at around **8:00pm** at **Jumbi Jangwani** and not **Jumbi Kiza**.

From the above testimonies it is clear that the date, time and place of arrest is uncertain the prosecution witnesses differ each other from what is stated in the charge sheet, the date of arrest is alleged to be **1/8/2022** has different time of arrest at **10:00pm night and 11:30am morning of the same date**.

It is trite law that in any criminal charges prosecution must lead evidence disclosing the offence was committed on the date alleged in the charge sheet, failure of which is to render the preferred charge fatally incurable defective for being unproved unless the same is amended, failure of which entitle the accused person to acquittal. This position of law was taken by the Court of Appeal in the case of **Abel Masikiti v. R, Criminal Appeal No. 24 of 2015 (unreported)**. Furthermore, it is the view of this court that, it is now settled law in our jurisdiction that when the evidence does not prove what is alleged in the charge sheet it may not lead to the conviction. In the case of **Salum Rashid Chitende v. R, Criminal Appeal No. 204 of 2015 (unreported)** and in the case of **Mathias s/o Samweli v. R, Criminal Appeal No. 271 of 2009 (unreported)** the Court held as follows:

" When specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed on that specific date, time and place".

As I have mentioned earlier on, the charge sheet in this case alleged that the incident or the arrest occurred on the **1/8/2022** at around **10:00am** at **Jumbi** in the Central District, but there was variance between the charge sheet and evidence on the time of arrest and place of arrest. It is the view of this court that, the prosecution in this case

was supposed to amend the charge sheet before the close of prosecution case because it was defective as provided under section 219 (2) of the CPA No. 7 of 2018 which reads as follows:

" Where, at any stage of a trial before the close of the case for prosecution, it appears to the prosecutor that the charge is defective, either in substance or form, the prosecutor may apply for the permission of the court to alter the charge."

This point alone is enough to dispose of this case for failure of prosecution to link evidence and charge sheet as provided in the case of ***Sylivester Stephano v. R, Criminal Appeal No. 527 of 2016 (unreported)*** where the Court held:

" When there is failure of the prosecution to link evidence and charge sheet same may not lead into conviction"

However, for the sake of further elaborations, I will also make findings on the second issue which is whether the chain of custody in this case has broken or not. In this case ***Zainabu Nassoro @ Zena v. R, [2017] TLR 84***, the Court of Appeal outlined three steps for the chain of custody:

" Firstly the underlying rationale for establishing chain of custody was to show a reasonable possibility that the item that was finally exhibited in court as evidence has not been tempered with or contaminated along its way to the court. Secondly, it was extremely important for the police to ensure proper custody of the suspected substance and to avoid possibility of tempering or contamination with other substances. Thirdly, by the time the specimen of suspected narcotics reached the office of Government Chemist, its chain has been irretrievably broken down while in the police hands"

The confusion in this case as outlined therein, is variance of time of the arrest and the date which leads to conclusion that there was indeed tempering of the exhibit P2, the

police alleged to have arrested the accused person on the **1/8/2022** at around **10:00pm at night** but the accused according to particular of offence was arrested on **1/8/2022 at 10:00am in the morning**, there is no prove on how the **exhibit P2** was kept in the custody from the time and date it was under the police hands to the time it was given to the officers of ZDCEA and thereafter tendered in court. The paper trail and documentation of the exhibit is not clear in this case in hand.

In the case of *Paul Maduka & 4 others v. R, Criminal Appeal No. 110 of 2007(unreported)* the Court of Appeal defined chain of custody in the following terms:

" By the chain of custody we have in mind the chronological documentation and or paper trail showing the seizure, custody, control, transfer, analysis, and disposition of evidence be it physical or electronic"

Furthermore, the police officers, **PW4** and **PW5** did not issue any receipt or tendering a handing over letter which it was alleged to exist to show the accused was indeed arrested with the drugs as alleged in the charge sheet. **PW4** and **PW5** in this case being police officers, ought to have known better that they are under legal obligation under section **17 of CPA No. 7 of 2018**, to issue a copy of receipt of things found with the accused.

Section 17 reads as follows:

17. Whenever a person is arrested:

(a) by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail; or

(b) without warrant, or by a private person under a warrant, and the person arrested cannot legally be admitted to bail or in unable to furnish bail,

the police officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested **may search such person and place in safe custody all catalogued and registered articles, other than necessary wearing apparel found upon him, and provide a copy to such arrested person.**" Again in this case, the procedure of section 17 was not adhered to by the PW4 and PW5. This court is of the firm view that, the procedures laid down under the above cited section of the **Criminal Procedure Act No. 7 of 2018** are there for the purpose and therefore must be followed accordingly, in fact the law has put strict procedures to be followed when the accused is arrested by the police officers, anything short of that makes the whole exercise of arrest and search null and void. It is well settle law that, anything done contrary to the law is null and void. See the case of **DPP v. Doreen John Mtemba, Criminal Appeal No. 359 of 2019** (unreported).

The essence of issuing a receipt is well elaborated in the case of **Shaabani Saidi Kindomba v. R, Criminal Appeal No. 390 of 2019** while citing the case of **Mbaruku Hamisi and 4 Others v. R, consolidated Criminal Appeals No. 141, 142, 143 & 145 of 2016** and the case of **Selemani Abdallah v. R, Criminal Appeal No. 354 of 2008** (unreported) at page 15 and 16, the Court of Appeal held that:

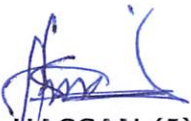
" The purpose of issuing receipt under section 38(3) of the CPA Act [CAP 20 R.E 2019] is to minimize complaint of fabrication and that the seized item come from the purported place or person"

Having established that there is variance and uncertainty in the date, time and place of arrest and the charge sheet, also having determined that the chain of custody of **exhibit P2** is broken beyond repair, I am of the settle view that, this court does not need to search and discover if whether the accused person has raised any doubt in this case, the doubts and shortfalls from prosecution side are very much vividly which are difficult to resolve and get conviction in this case, hence there is no justifiable reasons

for this court to make any further findings or analysis in the side of the defence. The trite law is that the accused person is to be convicted on the strength of the prosecution case and not on the weakness of his defence, see the case of *Christian s/o Kaale and Rwekeza s/o Bernald v. R*, [1992] TLR 302.

All being said, it is for this court to state that the prosecution has failed to prove the charge of unlawful possession of drugs, contrary to **section 21 (1) (d) of the Act No. 8 of 2021** against the accused person Taufiq Abdalla Mohamed beyond reasonable doubt.

The accused person Taufiq Abdalla Mohamed is acquitted and ordered to be released in custody immediately unless otherwise he is held there for other lawful reasons.


S. HASSAN (J)
11/4/23

Ordered accordingly.

Dated: 11th April, 2023.

Court:

Right of Appeal is explained to the parties

Court:

This Judgment is delivered today 11th April, 2023 in the presence of SSA Mohamed Abdalla for the prosecution, and in the presence of the accused person Taufiq Abdalla Mohamed.


11/4/23