

**IN THE HIGH COURT OF ZANZIBAR**  
**HELD AT TUNGUU**  
**CRIMINAL CASE NO. 101 OF 2022**  
**DIRECTOR OF PUBLIC PROSECUTION**  
**V.**  
**ABDALLA MOH'D MARIJANI**

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**JUDGMENT**

*Dated: 15<sup>th</sup> March, 2023*

**S. HASSAN (J)**

The accused person ABDALLA MOHD MARIJANI, was arraigned on the 2/11/2022 for the charge of being found with unlawful possession of the drugs contrary to section 21 (1) (d) of the Zanzibar Drugs Control and Enforcement Authority Act, No. 8 of 2021.

Particulars of the offence is that, the accused person on the 8 /10/2022 around 10:00am at Makunduchi within South District, Southern Region of Unguja, was found with possession of thirty six (36) packets of narcotic drugs weighing 1.0451g contrary to the law.

Upon answering to the offence charged against him, the accused person pleaded not guilty to the said offence; hence the case proceeded for hearing. To prove the charge against the accused person, the prosecution paraded 6 witnesses and tendered 2 exhibits. The hearing of the case commenced on the 7<sup>th</sup> December, 2022 and concluded on 15<sup>th</sup> February, 2023

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

**Suleiman Rashid Abdallah, (PW1)** an officer from the Zanzibar Drugs Control and Enforcement Authority(ZDCEA), was the first witness to testify for the Prosecution and he stated that he is working there as arresting officer, and he was in Court to give evidence relating to possession of drugs. He testified that, the incident happened in Makunduchi on 8/10/2022 at 8:00 am. On that date he was in the office and received

call from assistant inspector of Police Mussa, who informed him that, there is a person arrested with possession of drugs. He left office with officer Moh'd Shaaban Abdalla and went to Makunduchi. They arrived at Makunduchi Police Station around 10:00 am. At police station they met with Assistant inspector Mussa and there after he handed over the accused and the letter of handing over the accused to them. He arrested again the accused and introduced himself to the accused as officers from ZDCEA. He also ask the accused to identify himself to them and the accused stated that his name is Abdalla Moh'd Marijani. He inspected the exhibit which was a red cigarette packet which read as "Winston" inside the red cigarette pockets there was 36 small packets foiled suspected to be drugs. When he was inspecting the cigarette packet the accused was present and his fellow officer Moh'd Shaaban was witnessing. After that he cautioned the accused on the offence of possession of drugs. After that they left with the accused and went back to their office at Migombani, the exhibit and suspects were under his custody.

They arrived at their office around 2: pm whereby he counted again the packets and receive the same number of 36 packets. At 2:00 pm he opened a case file against the accused for possession of drugs. The case number is ZDCEA/H2/IR/185/2022 and at 2:20 pm he put the exhibit in the Khaki envelope and sealed it with red (lakiri) he put identification number ZDCEA/H2/IR/185/2022 at 2:30 pm he handed over the exhibit to the exhibit keeper Officer Saada Moh'd Foum. He did all of that in the presence of the accused and witnessed by his fellow officer Mohd Shaaban Abdalla. He further tendered khaki envelope identified as ZDCEA/HQ/IR/2022 and it was admitted by the court as **Exhibit P1.**

In cross examination he stated that, he has received his experience in arresting at Kama for 6 months. He further stated that he was not present when the accused was arrested by the police. He only received call and they left town to go to Makunduchi. He caunted the exhibit, He opened small packet to see if there is drugs, he don't remember the color of the drugs. I did not mention a Khaki bag.

**Mohamed Shaaban Abdalla, (PW2)** being an officer named by **PW1**, as fellow officer who accompanied him to Makunduchi, his testimony was more of the same of that of **PW1**, nevertheless he stated that, he is also working at ZDCEA, as operation Officer. He remember on 8/10/2022 around 8:00 am he was in the Office with his fellow Officer Suleiman Rashid Abdalla and that they received information that at Makunduchi Police Station there is a person arrested on possession of drugs. They decided to go to Makunduchi. They arrived at Makunduchi about 10:00 am and meet with assistant inspector Mussa, and introduced themselves to him as Officers from ZDCEA. He further stated that he witnessed Officer Suleiman Rashid being handed over the accused and a letter of handing over. Officer Rashid introduce himself to the accused as

officer from ZDCEA, he look at the exhibit which is a cigarette packet winston the packet had 36 packet foiled in aluminum and inside each packets contain drugs suspected to heroine. After that I witness Officer Suleiman caution the accused for the offence of unlawful possession of drugs, after that we returned to the Officer while the exhibit and the suspect under the custody of officer Suleiman. They arrived in the Office at 14:00 pm, I witness Officer Suleiman recounted the exhibit and he received the same number as it was before. He opened a case file against the accused for unlawful possession of drugs which had identification no, ZDCEA/H2/IR/185/185/2022. After that Officer Suleiman put the exhibit on the Khaki envelope. He sealed the Khaki envelope with lakiri and he also put identification no. ZDCEA/H2/IR/185/2022. At 14:30 pm I witness my fellow officer handing over the exhibit to the exhibit keeper Officer Saada Moh'd Kombo for safe keeping I can identify the accused, he is present in Court, I know the accused. By his name Abdalla Moh'd Marijan. I stated to know the accused on 8/10/2022 when he was handed over to us. The accused was found with 36 packets foiled with aluminum which inside the Cigarette packet of wiston. He further tendered analysis report form 009 and was m arked by the court as **exhibit P2**.

In cross examination he stated that he is not given any false evidence in court and he present at the Police Station when the accused was handed over to Officer Suleiman. I know the person who owns the exhibit P1. I am not the one given the exhibit but I witness my fellow Officer given the exhibit. I did not open the packets. I studied at kinduni and ziwani for 1 year. I know the owner of the exhibit when he was handed over to my fellow Officer. My fellow Officer did not give me the exhibit. I only witness.

**Bakari Salum Juma, (PW3)** government analyst also gave his testimony and stated that, he was the one who perform the test on the exhibit, the test confirmed that the item is narcotic drugs and weigh 1.0451g. He further stated that after he finished testing, he sealed the exhibit with lakiri, and handed it over with the analysis report to the officer who brought the exhibit. He went on to tender the analysis report and the same was admitted and marked as **exhibit P2**.

In cross examination he testified that, when the exhibit was given to him it was in the Khaki envelope and there was no another envelope. He further stated that he weighed the exhibit by using scale of the Lab, by unfoiled the exhibit and put the substance on the scale and there after he returned the exhibit in its original form. Moreover he testified that, he used the scale of analytical balance. He performed the test on the 10/10/2022 and finished on 13/10/2022.

**Assistant Inspector Mussa Ameir Ali (PW4)** testified that he is working at Makunduchi Police Station as Head of the Station. He stated that on the 7/10/2022 at around 8:30pm they were in their patrol in different areas of Makunduchi with Coplo Mwadini F6242. They arrived at Kiovyu by car driven by E7383 police sergeant Makame. He asked the driver to stop the car when he saw youth sitting and he thought they were criminals or they were planning to commit crimes. He further testified that when the car stopped the youth ran away but coplo Mwadini managed to arrest the accused at around 9:30pm who had with him khaki bag. They went with the accused to Makunduchi Police Station where he order coplo Mwadini to body search the accused and found him with khaki envelope inside it was cigarette packet of Winston with 36 foiled packlets suspected to be drugs. Thereafter he called the officers of ZDCEA to collect the accused.

In cross examination he stated that he handed over the Winston cigarette packet to the officer of ZDCEA. He further stated that he does not know where the khaki envelope is which he gave to the officers of ZDCEA which contained Winston cigarette packet. He went on to state that he wrote his own statement on the incident but the statement does not bear his signature. On the handing over letter he stated that he did not bring it in court. He further testified that at a time of arrest of the accused there were not civilian at the scene but they were far away from the scene of crime.

**F6241 Coplo Mwadini Ali (PW5)** testified that he works at Makunduchi Police station as an investigator. He testified further that on the 7/10/2022 at around 8:30pm they were in patrol in different areas of Makunduchi with Inspector Mussa, with E 7383 sgt Makame a driver and Incharge F6132 Coplo Ali. During the patrol they reached at Kiovyu the car stopped, the youth ran away but he managed to arrest the accused who was holding a khaki envelope. He put the accused under arrest and took him to Makunduchi Police Station where he searched again the suspect to see what was in the khaki envelope. After the search he found Winston cigarette packet with 36 foiled packets of drugs. He further stated that during the search the accused was present. He handed over the accused to Inspector Mussa after the search and the accused was put in the cell.

In cross examination he stated that the khaki envelope is not the same they arrest the accused with. He further testified that when he arrested the accused he asked what is inside the packet but the accused replied there is nothing. Moreover he explained that he managed to arrest the accused while he was trying to ran away and no civilian were present during the arrest.

**Ruwaida Suleiman Nuhu (PW6)** gave her evidence and testified that she is an officer from ZDCEA and her duty is investigation and prevention of drugs uses. She

stated that the case concerning the accused happened at Makunduchi on the 8/10/2022 at around 10:00am. She interrogate the witnesses, she took the exhibit to the office of government chemist on 10/10/2022.

In cross examination she stated that she was given the exhibit while it was sealed and that she knew the exhibit was heroin after the analysis report from the government analyst. She further stated that she knew about the Winston cigarette packet at the office of government chemist when the government analyst opened the exhibit. She further stated that inside the cigarette packet there was no any khaki envelope. She testified further that she interrogated the accused on the 8/10/2022 and during interrogation there was no any close family from the accused present. She further stated that the crime scene is Makunduchi Police Station and she did not take the accused during her investigation visit at the crime scene and she went there with officer Suleiman Rashid Abdalla from ZDCEA and no pictures were taken from the crime scene.

**Saada Moh'd Foum (PW7)** an exhibit keeper of ZDCEA stated that she was given the exhibit Khaki envelope sealed with Lakiri ZDCEA/ HQ/IR/ 185/2022 by officer Suleiman Rashid at around 2:30pm on the 8/10/2022. The exhibit was returned to her on 24/10/2022 at around 2:40pm by Ruwaida Suleiman Nuhu. The exhibit was sealed with lakiri of government chemist and had identification ZDCEA/HQ/IR/185/2022 and it had a signature of the government analyst

During cross examination she was asked if she had brought the handing over document of the exhibit and replied that she did not brought it in court but it is available in their office. She further stated that the accused did not sign on the exhibit and the exhibit was sealed when she received it. Moreover she stated that the exhibit is the envelope and not what is inside the envelope, and she did not know what was inside the envelope because the envelope was sealed.

On the 31/1/2023 the prosecution closed it case and the court gave ruling that the accused person has a case to answer and his legal right under section **216 (1) (a) (b) of the CPA No. 7 of 2018** were explained to him and opted to defend himself without calling any witness.

The accused person entered his defence on the 15/2/2023 and for the purpose of his defence the accused shall be referred to as DW1.

**Abdalla Moh'd Marijani (DW1)** testified as a sole witness for the defence and stated that, he remembered on the 5/10/2022 while he was coming back from Makunduchi Main Hospital where he brought food and clothe for his brother, the police car stopped and 8 policeman came out of the car. Some of the police officers he knows them and

other he don't. The police officers identified themselves to him, he then wanted to know the reason of him being stopped by the police. The police informed him that his offence is vagrant (mzururaji). He was taken to the police station till on the 7/10/2022 at around 16:00pm he was told to sign on the statement contrary to his will and without presence of his family. On the 8/10/2022 he was taken to unknown place and thereafter he was brought in court and charged with an offence he did not commit. He further stated that during cross examination of some of prosecution witnesses he asked about the witness statement and whether they were written by them or not and both witness replied to have written their own statement but the signature is not theirs. He further stated that the witness testified that the exhibit found in his possession was khaki envelope but the exhibit tendered in court was not khaki envelope. He further stated that the officers from ZDCEA did not submit any handing over document between the police and ZDCEA officers. He further submitted that at police station the officers from ZDCEA did not open the exhibit to see if it contain drugs or not. Moreover he submitted that the arresting officer stated in court that he was arrested on 7/10/2022 at around 9:30pm while the charge sheet stated that the accused was arrested on 8/10/2022 at around 10:00am. He also stated that the prosecution witness did not state where exactly he was arrested at Makunduchi, and that the investigator of this case did not take him during crime scene visit and no sheha or civil was present.

During cross examination he stated that he was arrested on 5/10/2022 at Makunduchi Hospital and that the arresting officer testified that he was arrested at Makunduchi Kiovyu, but the investigator did not go to investigate his crime scene at Kiovyu. He went on to state that the procedure to weigh the drugs as testified by government analyst had doubt on whether each packet was weigh or the whole drugs to determine the total weigh of the drugs. DW1 did not call any other witness and closed his defence by denying the charge labeled against him.

Having heard the evidence from the prosecution witnesses and the defence sole witness, the court is now tasked to make its findings and give judgment on the matter in hand by determine whether the prosecution has managed to prove the charge against the accused person Abdalla Mohamed Marijani beyond the standard required which is beyond reasonable doubt or not.

To start with, in this case it is not disputed nor rebutted that **Bakari Salum Juma, (PW3)** a government analyst who is his testimony stated that he performed the analytical test in the **exhibit P1** and the test shown in **exhibit P2**, gave conclusive result that the alleged substance is drugs of the type of heroin **weighing 1.0451g**. The law is very clear on how the court is to treat the analysis report signed by the

government analyst if the said report is not rebutted. **Section 64 (2) of the Act No. 8 of 2021** states the following:

***(2) " Notwithstanding anything contained in any other law for the time being in force, any document purporting to be a report signed by the Government Analyst shall be formal proof and such evidence shall, unless rebutted, be conclusive.***

The defence in this case did not rebut the contents of the analysis report hence; this court shall treat the said report as conclusive evidence. Now what remains is for the prosecution to prove that the drugs were indeed in unlawful possession of the accused.

I shall begin my determination by refreshing my mind on the duty of the prosecution to prove the charge against the accused person beyond any reasonable doubt. In the case of **Milburn v. Regina [1954] TLR 27**, the Court held that:

***" It is an elementary rule that it is for the prosecution to prove its cases beyond reasonable doubt and that should be kept in mind in all criminal cases".***

Having refreshed my mind on the duty of prosecution to prove the case beyond all reasonable doubts, now this court shall make its findings and determine if whether indeed the prosecution has managed to prove this case in the required standard.

In order to reach the bottom of this case, the following issues shall form the basis of my determination namely: **how the arrest was made, chain of custody, and seizure of the alleged drugs**

In this case, Assistant Inspector of Police Mussa Ameir Ali (**PW4**) testified that on the 7/10/2022 at around 8:30pm they were in patrol in different areas of Makunduchi with Coplo Mwadini Ali (**PW5**) and sergeant Makame. Upon arriving at Kiovya the saw some youth sitting and immediately they suspect them as criminal or about to plan the criminal activities. All other youth ran away but **PW5** managed to arrest the accused, they search him and discover khaki envelope containing cigarette packet of Winston with 36 foiled packets of drugs. The suspect was arrested taken to Makunduchi Police station where he was searched again and thereafter put in lock up till next day when he was handed over to the officers of ZDCEA, **PW1** and **PW2**. On the other hand **PW1** testified that on the 8/10/2022 at around 8:00am while he was in his office, received a call from **PW4** that they have arrested a person for suspicion on found with drugs and

they were told to go there and pick him up. From the above narration it is clear that the accused was arrested on the 7/10/2022 at around 9:30pm by police officer **PW5**. Here I want to discuss the role of police officer in arrest.

Our **Criminal Procedure Act No. 7 of 2018** still gave mandate of arrest to the police officer as provided under section **12 (1)** which reads as follows:

***" In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action"***

Having established the legal role of police in arrest, now I will determine whether accused person was given his legal right when he was arrested on the 7/10/2022. **Section 13 (2) of the Criminal Procedure Act No. 7 of 2018** provides the following:

***(2) " A person arrested shall have the right to inform his or her family, or the body to which he or she belongs, and contact the same about the arrest."***

The accused person in this case was to given his legal right of contacting his family when he was arrested by the police officer. Moreover the police officer who made the arrest was required by law after the search to place in safe custody all catalogued and registered articles and to provide a copy to the arrested person as provided under **section 17 of the Criminal Procedure Act (supra)** which 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 search 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 sections of the **Criminal Procedure Act No. 7 of 2018** are there for the purpose and not for cherry picking, 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 settled 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"***

In this case **PW2** who was handed over the accused to him by the police officers at Makunduchi did not tender in court the handing over letter which **PW4** alleged to give to **PW2**, the missing letter could have explained on the **exhibit P1**, failure of tendering the letter in court raises a lot of doubts on the handing over of the accused and on the chain custody of the **exhibit P1**. The defence raised doubt on the khaki envelope which alleged to be under his possession when he was arrested and also **PW4** and **PW5** testified that the envelope in court is not the same they gave to the officers of ZDCEA. The testimony of **PW4** and that of **PW5** on the envelope established that the chain of custody of the **exhibit P1** was broken while in the hands of officers of ZDCEA, the fact that the envelope was changed has raised suspicion of it being tampered with or contaminated in the hands of ZDCEA officers.

It was held in the case of **Zainabu Nassoro @ Zena v. R, [2017] TLR 84**, where the Court of Appeal outlines 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 chair has been irretrievably broken down while in the police hands"*

The police officers who were the arresting and searching officers in this case were under legal obligation as mandated so by the Criminal Procedure Act (supra) to ensure the proper handling of the alleged item and the accused person, I did not see in our Criminal Procedure Act (supra) or in the ZDCEA Act No. 8 of 2021 that the police officers are prohibited by law to arrest or search any suspected criminals of drugs offences, in fact that is also their role as police officers under **Police General Orders (PGO) No. 226** issued pursuant to the **Police Force and Auxiliary Service Act Cap 322**, in my opinion, what the police did in this case to hand over the accused and the alleged drugs to officers of ZDCEA was not legally authorized and contrary to their duties vested to them under Criminal Procedure Act (supra), PGO No. 226 and the Act Cap 322.

I acknowledge and appreciate the fact that, ZDCEA Act (supra) has vested powers of arrest, search and seizure to the Commissioner General or to the authorized officers in drugs offence cases, but also the police officers are generally vested with the same powers under Criminal Procedures Act (supra) reads together with Police General Order No. 226, hence they both have same powers under the above named Acts to perform their duties respectively.

Now this court will turn to discover whether **PW2** issued a receipt of the seized **exhibit P1** when he re - arrest and search again the accused person as mandated so by **section 48 (g) of the Act No. 8 of 2021** which reads as follows:

**48. In exercising of powers conferred under section 41 (1) of this Act, the Commissioner General or an authorized officer shall:**

**(g) record and issue a receipt for an article or thing seized.**

Section 48 created a mandatory obligation, which was not adhered to, there was supposed to be a receipt of seizure for the **exhibit P1** tendered in court, but the same does not exist in the entire records of evidence, hence there is no such prove that the

**exhibit P1** was under the accused custody at a time of arrest either by the **PW5** or **PW2**. This creates another doubt in this case.

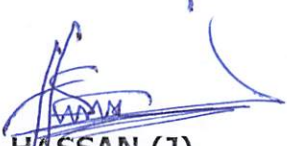
Having established many gaps in this case created by non adherence to the mandatory procedures laid down by the **Criminal Procedure Act** (supra) and **ZDCEA Act** (supra), this court is of the firm view that the doubts surrounding this case are difficult to resolve and get conviction. The Prosecution has failed to provide sounding explanation surrounding all the gaps in this case, hence failed to prove the case against the accused person beyond the standard required which is beyond all reasonable doubts.

In respect of that, this court can no longer continue to detain in custody the accused person, therefore the accused person Abdalla Moh'd Msafiri is acquitted against the charge of unlawful possession of the drugs contrary to section **21 (1) (d) of the ZDCEA Act No. 8 of 2021**. The accused person is to be released from the custody immediately unless otherwise he is held there for other lawful reasons.

***It is so ordered.***

**Court:**

Right of Appeal is explained.

  
**S. HASSAN (J)**  
**15/3/2023**