

IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT TUNGUU

CRIMINAL CASE NO, 109 OF 2022

THE DIRECTOR OF PUBLIC PROSECUTION

V.

HAFIDH SULEIMAN MOHAMED

JUDGMENT

Dated: 1st June, 2023

S. HASSAN (J)

The accused person Hafidh Suleiman Mohamed stands charged with the offence of unlawful possession of the drugs contrary to section 21 (1) (d) of the Zanzibar Drugs Control and Enforcement Act, No. 8 of 2021.

The particulars of offence alleged that, on 8/9/2022 at around 15:30pm at Kijichi Osterbei within West District 'A', in the Urban West Region of Unguja, the accused person was unlawful found with dry leaves alleged to be drugs of the type of Bhangi weigh 1.022kg something contrary to the law.

On the 1st December, 2022 the accused was arraigned and when asked to plea he stated " Nakataa", hence the plea of not guilty was entered by the court. On the 1/2/2023 the Preliminary Hearing was conducted and the accused admitted his name.

The brief facts of the case are that, the officers of ZDCEA on the 8/9/2022 at around 15:30 pm while on patrol with community police at Bububu Kijichi went to the place which is disturbing to the community found a youth sitting alone at that area. The youth was approached by one of the ZDCEA officers who identified himself to him and

asked to search the youth. During the body search, the youth was not found with anything, but the bag was discovered near a place where the youth was sitting and upon searching the bag the dry leaves were discovered suspected to be Bhangi and thereafter the youth was arrested for unlawful possession of drugs. The suspected dry leaves were sent to the government chemist for analysis. A report issued by the Government Chemist confirmed that the dry leaves were bhangi weighing 1.022kg.

During the hearing of this case, the prosecution called 5 witnesses and tendered 2 exhibits in their bid to prove their case.

In the case, the Prosecution was represented by Senior State Attorney Mohamed Abdalla, while the accused was under the representation of learned advocate Omar Sheha.

Saada Mohamed Foum (PW1) was the first witness called by prosecution and she testified that, she is exhibit keeper at ZDCEA and she received the exhibit a multi colour bag sealed with lakiri identified as ZDCEA/HQ/IR/151/2022 from fellow officer Abdillah Juma Kona on the 8/9/2022 at around 16:25pm, she kept the exhibit until 12/9/2022 around 13:40pm where she gave it to Officer Masoud Haji Mussa for analysis test. She also gave him a letter and a form 018. The exhibit was returned to her on 24/10/2022 at around 14:40pm; the exhibit was sealed with lakiri of government chemist and had a signature of the government analyst. The exhibit stayed under her custody until it was needed in court.

Abdillah Juma Kona (PW2), on the 8/9/2022 at around 15.30pm while in patrol at Kijichi with Community Police Officer they arrived at one of the area and found a youth sitting alone. He suspected the youth and decided to approach him. He arrested the youth and after the arrest he identified himself to that youth as officer from ZDCEA, he also identified the people who were with him at the area, he also asked the youth to identify himself to them and he gave the name of Hafidh Suleiman Mohamed. He cautioned the youth that he wanted to search him, the youth did not resist and he agreed to be searched. PW2 further testified that during the body search he did not found or discover anything on the youth, he than searched the nearby area and found a

multi color bag which contained dry leaves alleged to be drugs of the type of bhang. Upon discovery of the bag, PW2 showed it to the community police officer Ali Habib Ali, after that he cautioned the youth for being found with dry leaves alleged to be bhang. After that, they left the area and went back to their office at Migombani with the suspect and exhibit under his custody. They arrived at the office at around 16:15pm he re-check the exhibit in the presence of the community police Ali Habib Ali and the suspect was witnessing. He further opened a file case and gave it identification number ZDCEA/HQ/IR/151/2022 and at around 16:20pm he sealed the exhibit with lakiri and gave it the identification number ZDCEA/HQ/IR/151/2022 in the presence of Ali Habib Ali and the suspect and after that he handed over the exhibit to the exhibit keeper Saada Mohamed Fom for her custody. PW1 went on to identify the multi color bag and prayed to tender it as exhibit. The exhibit was admitted and marked as **exhibit P1**.

During cross examination he testified that he wrote his statement on 9/9/2022 at around 8:00am. He further testified that exhibit P1 was not found in the hands of the accused but it was discovered near to him.

In re examination he insisted that his statement is the testimony he gives in court.

Ali Habib Ali (PW3) gave his evidence and stated that, on the 8/9/2022 he was in patrol with officers from ZDCEA and the purpose of the patrol was to show the officers dangerous areas in their Shehia. He further testified that, at around 15:30pm they found the accused sitting and approached him and was arrested by officer Abdillahi who identified himself to the accused and identified us to the accused as well. He stated further that, the accused was searched and nothing was found with him. They continued with the search at the surrounding area and managed to discover the bag near the surrounding area where the accused was sitting. The bag was opened by officer Abdillahi and found dry leaves alleged to be bhang. He went on to state that, after the discovery of the bag they left the area with the suspect and went to the ZDCEA office. He stated that he saw the IR number which was written in case book and the exhibit was handed over to officer Saada in his presence while the suspect was present as well. He stated that he knows the accused, as a person from his shehia and used to play football together.

During cross examination he stated that, he has been community police shehia for 2 years and on the 8/9/2022 when the accused was arrested he went to the ZDCEA office and from that day he did not go there again. He further stated that on the 10/9/2022 he was not at the ZDCEA office. He further stated the statement which was written on the 10/9/2022 at around 9:00am not his statement. He went on to state that, it was enough for him to establish that the bag which was found near the place where the accused was sitting belong to the accused.

In re examination he stated that his statement was taken by officer Abdillahi at ZDCEA office on the 8/9/2022.

Mohamed Saleh Khamis (PW4), testified that, he is working at the government chemist as analyst of drugs. He went on to testify on procedures after they receive a request for analysis. He stated that, after he received the exhibit from ZDCEA he opened it to compare it with the the letter which accompanied the exhibit to see if the contents of the latter march the exhibit, afterthat he registered the exhibit and keep it under custody and thereafter he goes to his Head to get permission to proceed with the test. He further stated that, at the lab he first weigh the exhibit and afterthat he perform preliminary test and final test. He stated that, after he finished with the test he prepares the analysis report and returned the exhibit with report to the officer concerned to continue with their legal process. He went to identify his analysis report by his name, his signature and the stamp of the government chemist.

During cross examination he testified that, he took the maximum of 2 weeks to perform test on the exhibit because he had other office duties. He further stated that he don't know the reasons the letter which gave description of the exhibit is not in court. He stated that he gave back the exhibit to officer Masoud Haji Mussa on the 24/10/2022. He further testified that he did not remember who satisfied his analysis report.

In re examination he stated that the person who satisfied his report was Farhat Abdalla Khamis.

Masoud Haji Mussa (PW5) investigator of this case, gave his evidence and stated that, on the 12/9/2022 at around 13:00pm while in his office, he received a file from his

Incharge concerning unlawful possession of bhangi, the file had identification number ZDCEA/HQ/IR/151/2022 and the complainant was Abdillahi Juma Kona and the suspect was Hafidh Suleiman Mohamed. He went on to state that he took the exhibit from exhibit keeper Saada Mohamed Fourn on the same day at around 13:40pm and proceeded to the government chemist and arrived there at around 14:00pm and met with analyst Mohamed Saleh Khamis and handed over to him the exhibit, the form and the letter. The exhibit was open in his presence and he saw the dry leaves alleged to be bhangi, afterthat he signed on the register book and went back to his office. At his office he interviewed the witnesses and went to identify the suspect. He went on to testify that he went at a crime scene at Kijiji and on the 24/10/2022 at around 14:00pm he went back to the government chemist to collect the exhibit and the analysis report which confirmed that the dry leaves were bhangi weighing 1.022kg, afterthat he went back to his office with the exhibit and the report and gave the exhibit to the exhibit keeper for custody.

During cross examination PW5 testified that, the crime scene is Bububu Kijiji where he went to investigate. He did not take the accused at the crime scene because of the security concerns. He further stated that, he did not communicate with the accused relatives when he was at the crime scene. He went to describe the crime scene as foundation and in front of it there are banana trees and a pound (bwawa). He went on to state that he was informed by the complainant of this case that he arrested the accused with the bag in his hands.

After the evidence of **PW5**, the prosecution closed its case and the court was tasked to determine if the case is made out against the accused person to enter his defence or otherwise. After the analysis of the evidence adduced by prosecution witnesses, the court was satisfied that the evidence adduced was sufficient to make the accused enter his defence. The court explained the legal rights of the accused available under section 216 (1) (a) and (b) of the CPA No, 7 of 2018 and the accused opted to give his defence under oath.

Hafidh Suleiman Mohamed (DW1) testified as sole witness for defence side and stated that, he denied the charge labeled against him, he further stated that on that

particular day his was not at place alleged he was arrested because he was at work doing casual construction work. He stated that he was arrested by the community police by the name of Bahama and was taken to Bububu Petrol Station, and the white car approached with 3 people who after the discussion with the community police arrested him. The people identified themselves as officers from ZDCEA. He went on to deny having connection with the **exhibit P1**. He further testified that, the **exhibit P1** was showed to him at the office of ZDCEA and he was informed that the exhibit was found with him.

During cross examination he denied being taken to Bububu Police, he also denied that he was arrested at Maskani. He went on to state that, he was at construction site with 3 other people who were fundi, kibarua and himself. He further stated that he cannot called the fundi and kibarua as his witness because he was informed by his relatives that they have left the area. The accused had no further witness to call and thereafter he closed his defence.

Having heard the evidence from the prosecution side and the defence side, this court is now asked to make findings and give judgment on the matter in hand by determine whether the prosecution has managed to prove the charge against the accused person beyond the standard required which is beyond reasonable doubt or not.

In this case the accused person is charged with unlawful possession of narcotic drugs namely bhangi, for the charge of unlawful possession to stand, the prosecution has a duty to prove that the accused person was ***unlawfully in physical possession or in control of the drugs***. The prosecution has also a duty to prove that the accused had knowledge of the possession of the drugs as it was held in the case of **Peter Mwangai Kariuki v. R (2015) eKlr**, Mativo J, stated the following:

" In my view, possession included two elements, namely being in physical control of the item and knowledge of having the item. To be guilty of possession, an accused person must be shown to have knowledge of two things, namely, that the accused knew the item was in his custody

and secondly he knew that the item in question was prohibited. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it".

Furthermore, in the case of **Moses Charles Deo v. R [1987] TLR 193** where the Court held that:

" For a person to be found to have had possession, actual or constructive of good, it must be proved that either he was aware of their presence and that he exercised control over them, or that the good came, albeit in his absence at his invitation and arrangement".

Having established the essential ingredients of unlawful possession of drugs to be proved by the prosecution, this court will first determine and discover whether the accused person was unlawfully in physical possession of the drugs or not. In this case as testified by **PW2** who is the arresting officer of the accused, he stated that when he searched the accused he did not found him with anything. The evidence of **PW2** was also corroborated by **PW3** community police officer who stated that when the suspect was searched by **PW2** nothing was found in his possession. So, the key witnesses in this case have confirmed in this court that the accused person when searched he was not found in possession with the alleged drugs **exhibit P1**, therefore this court will conclude that, the accused person was not in physical possession of **exhibit P1** when he was searched and arrested by **PW2**, thus the prosecution has failed to prove the 1st essential ingredients of unlawful possession as articulated Justice Matovi in the case of **Peter Mwangai Kariuki v. R (2015)**

Having established that, the accused was not in physical control of the **exhibit P1**, this court will determine if the prosecution has laid the foundation to link the accused with the **exhibit P1**.

The testimony of **PW2** and that of **PW3** is that the **exhibit P1** was discovered in the surrounding area where the accused was sitting. For this court to convict the accused,

the prosecution is under legal obligation to link the accused with **exhibit P1**, the prosecution was to move extra mile by collecting traces of the **exhibit P1** through various measures including among others, fingerprints evidence to prove that the **exhibit P1** has traces of the accused, but the prosecution has also failed to provide evidence of traces connecting the accused person with the **exhibit P1**. The essence of fingerprints evidence was observed by the Supreme Court of Canada in the case of **R v. Beare, R v. Giggins [1988] 2 SCR 387:**

“ Fingerprinting is an invaluable tool of criminal investigation because of the ease and rapidity of the process and because it is infallible”

Furthermore, the evidence **Act No 9 of 2016**, has put strict condition on the burden of proof for anyone who desire a court to give judgment must prove on the existence of those facts as stated in **section 117** of the Act:

117(1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) *When a person a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

In this case as in any other criminal cases, the burden of proof lies on the prosecution. The legal burden of proving the fact that the **exhibit P1** which was not found in physical possession of the accused but in the surrounding area where the accused was sitting rest on the shoulder of the prosecution. So far the testimony from **PW2** and that of **PW3** have failed to connect the accused with the **exhibit P1** or at least to show the accused had knowledge of the existence of **exhibit P1** near the area he was arrested, it is my view that the prosecution has failed to prove the link and connect the accused person with the **exhibit P1**.

The prosecution has failed to meet the threshold conditions for unlawful possession set by the case of **Peter Mwangai Kariuki v. R (2015) ekr**, and **Moses Charles Deo v. R [1987] TLR 193**

Furthermore, the arresting officer **PW2** was under legal obligation to issue receipt on the seized drugs as required by section **48(g) of the Act No. 8 of 2021** which reads the following:

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.

In his evidence **PW1** did not state that he issued a receipt after he seized the alleged drugs as required section **48 (g) of the Act No. 8 of 2021**.

The essence of issuing a receipt of seizure is well elaborated 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. & 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 Criminal Procedure Act [CAP 20 R.E 2019] is to minimize complaint of fabrication and that the seized item come from the purported place or person"

The prosecution has flawed the law and procedure for failure to issue and tender in court a receipt in respect of seized drugs as required by the above section of the law, therefore this creates doubts and in fact it has maximize the complaint of fabrication because this court has already establish that the accused person was not physical found with alleged drugs and no link was established which connect the accused person and drugs found in the surrounding area where the accused person was found sitting.

Now I will determine the evidence of **PW5**, who is the investigator in this case and see whether he has collected any evidence which consists of facts and circumstances surrounding this case. In order to understand the role of investigator in criminal cases, I shall refer the case of **Simon v. R (1970) HCD 335**, where the Court described the terms ***"investigation to include collection of evidence by police officer which primary consists of facts and circumstances of the case"***.

So a good and well trained investigator will go to the crime scene to conduct investigation for the purpose of **collecting evidence which consists of facts and circumstances of the case**, as required by **section 47 (1) (a) (b) and (c) of Act No. 8 of 2021** which reads as follows:

Section 47 (1) "***In the exercising of power conferred under section 41 (1) of this Act, the Commissioner General or an authorized officer shall:***

- (a) Personally, go to the scene of crime to investigate and take stock of every article suspected to be used for commission of an offence,***
- (b) Take every measure necessary for discovery and impound every article which may potentially be used as evidence,***
- (c) Examine orally every person acquainted with the facts and circumstances of the crime committed***

Now let see if the investigator of this case **PW5** has collected any evidence of facts and circumstances of the case at a crime scene.

In his testimony **PW5** stated that he started his investigation at exhibit keeper where he was given the exhibit to send it for chemical test at the Government Chemist after that he interviewed the complainant in this case and interrogate the accused person and thereafter went at the crime scene Bububu Kijichi for investigation. The accused was not present during investigation as he was under the custody of ZDCEA. In cross examination he stated that he did not involved any person from accused side during investigation because of the security concerns. He described the crime scene as a foundation and infront of it there is banana trees and "bwawa".

In their testimonies **PW2** and **PW3** did not state about the crime scene being a foundation and in front has banana trees and bwawa, so there is a contradiction which goes to the root of this case between the evidence of **PW2**, **PW3** and **PW5** on the description of a crime scene. Furthermore **PW3** testified that he knows the accused, as a person from his shehia and used to play football together. It is the view of this court that, **PW5** as an investigator of this case was supposed to at least investigate on the character of the accused person based on the evidence of **PW3** that the accused is locally resides at Bububu Kijichi so his character is well known, and **PW5** would have established and gather more evidence on whether the accused is a drug dealer from the local residents of Kijichi, failure to do so creates another doubt if at all the accused person was arrested at the place testified by **PW2**, **PW3** and **PW5**. It is the view of this court that **PW5** has failed to **collect evidence which consists of facts and circumstances of the case**, as required by **section 47 (1) (a) (b) and (c) of Act No. 8 of 2021**. Such failure creates doubts surrounding this case.

The law is well settled in the situations where there is doubt as established in the case of **Abuhi Omary Abdallah & 3 Others v. R, Criminal Appeal No. 28 of 2010** where the Court held that:

" where there is any doubt, the settled law is to the effect that in such situation an accused person is entitled as a matter of right to the benefit of doubt or doubts".

At this stage, it is very obvious that the prosecution witnesses have not managed to clear all these doubts and uncertainties, it is very clear that the prosecution has failed to prove without a reasonable doubt the link and connection of the seized drugs and the accused person.

This court, having established many gaps, remains alive to the fact that, it is a duty of prosecution to prove the charge against the accused person beyond all reasonable doubts and that duty never shifts to the accused, refer the case of **Akwino Malata v. R, Criminal Appeal No. 438 of 2019** (unreported). The prosecution have failed to

established clear evidence which link or connect the accused person and the alleged drugs after the accused was not found in possession with such drugs.

Therefore, I hereby state that, the prosecution have failed to prove the charge against the accused person Hafidh Suleiman Mohamed, beyond the required standard which is beyond reasonable doubt and therefore it is for this court without further delay, to acquit the accused person against the charge of unlawful possession of drugs, contrary to **section 21 (1) (d) of the Act No. 8 of 2021**. The accused person is ordered to be released from custody with immediate effect unless otherwise he is held there for other lawful purposes.



S. HASSAN (J)

01/06/2023

It is so ordered

Dated: 1st June, 2023

Court:

Right of Appeal is explained