

**IN THE HIGH COURT OF ZANZIBAR**

**HELD AT TUNGUU**

**CRIMINAL CASE NO. 120 OF 2022**

**DPP**

**V**

**CHUMU SAID HUSSEN**

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**JUDGMENT**

***Dated: 27<sup>th</sup> March, 2023***

**S. HASSAN (J)**

The accused person Chumu Said Hussein is 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 the 12<sup>th</sup> October, 2022 at around 13:10pm at Amani within the Urban District and Urban West Region, the accused person was found in unlawful possession of 13 packets of dry leaves bhanghi weigh 5.99.3g.

The accused person enjoyed the legal services of Mr. Juma Mussa Rashid learned Advocate, while the prosecution was represented by Mr. Mohamed Abdalla, Senoir State Attorney.

On the 1<sup>st</sup> December, 2022 the accused person entered his respective plea to the charge. In his plea, the accused person denied the charge and the plea of not guilty was entered. On the 28<sup>th</sup> December, 2022 the preliminary hearing was conducted and the facts of the case were read over to the accused person. The accused admitted his names, his arrest and arraignment before the court.

The brief facts of the case are that the accused person Chumu Said Hussein stands charged with unlawful possession of dry leaves namely bhanghi. It is alleged that on the 12<sup>th</sup> December, 2022 at around 13:00pm at Amani, the officers of ZDCEA successfully arrested the accused person after being tipped of by their informer that at Amani house no. **AZ/01/858** there is a youth by the name of Chum is dealing with selling and keeping of the drugs. They went to the house with Sheha and his Deputy and found

the accused person in the living room of the house. The accused was approached and put under arrest and his room was searched and the officers from ZDCEA found a multi colour bag near the door on the left side of the accused room and inside the bag there were 13 packets of dry leaves suspected of being bhang. After the search the receipt of seizure was signed by the accused person, Sheha and his Deputy. Thereafter the accused person and the seized bag were taken to ZDCEA office. The suspected dry leaves were sent to the Government Chemist for analysis. A report issued by Government Chemist confirmed that the dry leaves were bhang weighing 599.3grams.

At the hearing of the case the prosecution called 7 witnesses and tendered 3 exhibits in their bid to prove their case namely (1) **Analysis Report exhibit P1**, (2) **Multi Colour bag exhibit P2** and **Seizure Receipt exhibit P3**.

**Suhaila Samih Mohamed (PW1)** was the first to give her evidence for the prosecution side and she testified that, she received a form of exhibit delivery, a letter and exhibit from ZDCEA officer for analysis test. She made the officer who brought the exhibit to sign and thereafter she put the exhibit in the cupboard she uses alone. She then took a form, a letter and exhibit to her Head to be assigned the analysis work of the exhibit. She performed the test and wrote the analysis report which confirms that the dry leaves are drugs bhang. She then prepared the analysis report. The witness tendered in court **analysis report** which was admitted and marked as **exhibit P1** and also tendered a **multi color bag** which contained bhang and the same was admitted and marked as **exhibit P2**.

During cross examination she testified that, she first weigh the exhibit before testing. When testing the exhibit she took dry leaves and performed the test. She further stated that she did a random selection in all 13 packets. Moreover she stated that the weigh of bhang is 5.99.3grams. She also stated that she did bring in court the letter of her Boss assigning her to perform the test on the exhibit and that the name of the accused was not in analysis report and also not in the multi colour bag which contained the alleged drugs. She also testified that, she was not present during the arrest of the accused and she was only assigned the task of performing test on the exhibit.

In his testimony **Abdillah Juma Kona, (PW2)** testified that, she is an officer from ZDCEA and his duties as operation officer are to seek information, to arrest and to prevent drugs. He further stated that he was in court to give evidence on drug case which happened at Amani on the 12<sup>th</sup> October, 2022 at around 13:00pm. He continued to state that on 12/10/2022 at around 12:30pm he received a tip from his informer that there is a youth called Chum is dealing with selling and keeping of drugs. He and his fellow officer Mohamed Shaaban Abdalla went to the area and informed Sheha of Amani that they received a tip from their informer that there is a youth named Chum dealing with drugs. Sheha identified himself to them by the name of Maabadi Ali

Makame and they went together to collect Deputy Sheha who identified herself by the name of Kiembe Maulid Khamis. He further stated that they all went together to the house no. AZ/01/858 described to them by the informer. They all entered the house and saw a youth in the living room. He approached the youth and put him under arrest at around 13.10pm. Thereafter they identified themselves to the suspect and they asked the suspect to identify himself to them and he identified himself as Chum Said Hussein. He continued to testify that, the house was for tenants and they asked the suspect to show them his room, they entered the room and search and found a multi colour bag nearby the door on the left side of the room. The bag had 13 bundles of transparent plastic bags contain dry leaves in each plastic bag. He seized the bag and the seizure receipt was signed by Sheha, Deputy Sheha and the suspect. After that they left with the suspect and the seized bag was under his custody and went back to their office and arrived there at around 13:50pm where he inspected the seized bag again and the items numbers seized were the same as before. At around 14:00pm he opened the case file against the suspect for unlawful possession of dry leaves suspected to be bhangi and was witnessed by his fellow officer Mohamed Shaaban Abdalla and the suspect himself. At around 14:05pm he sealed the exhibit and put lakiri and put identification number ZDCEA/HQ/IR/192/2022 and at 14:10pm he gave the exhibit to the exhibit keeper officer Saada Mohamed Fom for her safe custody. The witness tendered the **seizure receipt** and the same was admitted in court and marked as **exhibit P3**.

During cross examination he stated that he did not go with his informer to the house of the accused and before he arrested the accused he did not know him. He further stated that his informer gave him enough description of the accused to identify him and he was informed by the informer that the accused was inside the house, and that he arrested the accused inside the house. He further stated that he went to the house of the accused with Sheha and Deputy Sheha and they asked the accused to show them his room. He further stated that the seizure receipt was dated 12/10/2022. He further stated that the house which they found the accused is used as tenants house (nyumba ya kupangisha) and at a time of arrest no one was in the house except the accused.

**Maabadi Ali Makame (PW3)**, gave his testimony and testified that, he is a Sheha of Amani and he was sworn to be sheha on 31/3/2021 and his main functions are to identify people in his shehia, to resolve minor social problems. He further testified that on 12/10/2022 he received a phone call from one officer of ZDCEA and he was informed that he was needed with his Member. They were picked by the officer from ZDCEA and went to the house. Upon arriving at the house they knocked and the door was opened by the person named Chum Said Hussien. He asked Chum if he knows him as Sheha and Chum replied that he did not know him. He asked the accused to open his room to be searched by the officers from ZDCEA. He further testified that, the

officer from ZDCEA was first searched by his fellow officer and after that the door of the room was opened and they found cupboard and a multi colour bag. The bag was searched and it was found with 13 transparent plastic bags which contained dry leaves. He further stated that, he did not know what was the dry leaves. Thereafter they filled the form with their names and signatures and after that the accused was arrested and put in the car and they were told to go back and continue with their duties. He went on to name the number of the house they searched as AZ/1/858, the witness identified the accused in court and did not identified the seizure receipt because they were not given a copy.

In cross examination he stated that in his shehia there is a Register Book for people living in is shehia. He further stated that the owner of the house was named Said Alibojo who is deceased. He further stated that he does not know the number of people living in that house and that he did not bring the Register Book in court which shows that Chum Said Hussein is living in the house AZ/1/858. He further stated that, he received a phone call from officer of ZDCEA at around 13:00pm and he asked the officer to wait for him at a Pharmacy shop at Amani Freshi because he was in the nearby area of zainu which took him 5 minutes to arrive at Pharmacy shop at Amani Freshi. Upon his arrival they went to Amani Mlingotini to get Kiembe his deputy sheha. He further stated that he did not see the accused arrested at Amani Mlingotini but they met the accused inside the house after they knocked and door opened. He further stated that, when they arrived at the house the found other officers of ZDCEA at the house. He stated that he did not remember if the accused was arrested together with Bahati Usi. He admitted that there are many multi colour bags in Unguja and that he did not put any mark on the bag or in the plastic bags for identification.

In re examination he stated again that they found the accused in the house and it was the accused who opened the door.

In her testimony, **Kiembe Maulid Khamis (PW4)**, testified that, she is a member of sheha since 2020 and her duties are to assist sheha. She further stated that on the 12/10/2022 at around 13:00pm she received a call from Sheha informing her that she was needed by the officers from ZDCEA, who have suspicion with one of the house in the shehia and the officers wanted to search it. She further stated that, she went to the house no. AZ/1/858 with sheha and 2 officers from ZDCEA, and upon arriving at the house sheha knocked the house and the accused opened the door. They went inside the house where the accused was first search and was not found with anything, after that they went and search the accused room and inside the room on the right side there was a multi colour bag and inside the bag there were 13 packets of dry leaves. After the search they were given a form to put their signatures and thereafter they were told to go outside and that was the end of their role.

In cross examination she stated that she assist sheha in zone one and the incident happened in zone one. She further stated that she does not know the number of people living in that house and also she does not know the number of people living in the accused room. She further stated that the accused was not found with anything in his pocket during body search. She further stated that they found other people inside the house and she met the owner of the house who is sick in bed. She further stated that the people they met inside the house were not called to witness the search. She also stated that it was herself and sheha who signed the seizure form. She further stated that, she did not put any mark on the seized bag and she does not remember if mark ZDCEA/HQ/IR/192/2022 was there during the seizure. She also stated that they did not put any mark on the 13 plastics bag for identification purposes.

**Mohamed Shaaban Abdalla (PW5)**, also gave his testimony and stated that, he is an officer of ZDCEA and working there as operation officer responsible of arresting people dealing with drugs. He remembered that on 12/10/2022 at around 13:00pm while in patrol with fellow officer Abdillah Juma Kona, he witnessed his fellow officer receiving a call from the informer that there is a youth dealing with drugs, he further witnessed his fellow officer making call to sheha and his deputy to inform them about the tip they received at their shehia and his fellow officer asked for their co operation. He further stated that sheha and his deputy arrived and they identified themselves to them. The 4 of them went to the suspected house no. AZ/1/858 and arrived there around 13:10pm. He further stated that he witnessed his fellow officer arresting the suspect and then identified himself to the suspect as officer from ZDCEA, He also witnessed sheha identified himself to the suspect. He further stated that he witnessed his fellow officer searching the room of the suspect and found a multi colour bag which contained inside it 13 plastic packets of dry leaves suspected of being bhangi. The bag was found in the right side of the room. He further witnessed his fellow officer given seizure form to sheha and his deputy and the suspect and they put their signatures. After that they went back to the office while the suspect and the accused were under the custody of his fellow officer. They arrived back at the office at about 13:50pm and he witnessed his follow officer re inspecting and recounting the exhibit and received the same number of 13 plastic packets. He further witnessed his fellow officer opened a case ZDCEA/ HQ/ IR/ 192/ 2022 against the suspect for unlawful possession of drugs. He further saw his fellow officer seal the exhibit and put identification number ZDCEA/ HQ/ IR/ 192/ 2022, thereafter at around 14:10pm he further witnessed his fellow officer handing over the exhibit to the exhibit keeper officer Saada Mohamed Fom for her safe custody until the exhibit is needed in court as evidence.

In cross examination he stated that, they met Kiembe deputy sheha at Amani Mlingotini and that they did not drive to pick her. He further stated that his fellow officer phoned sheha and his deputy and he denied that they arrested the accused and Bahati Yussuf

at Amani kwa Wazee. He denied that the informer informed them that there is a house suspected of selling drugs and not a person he insisted that the informer tipped them about the person dealing with a drugs in the house. He agreed that the informer did not go with them in the suspected house. He further agreed that sheha did not know in the house there is a person named Chum dealing with drugs. He further explained that inside the house its where he witnessed his fellow officer approaching and arresting the suspect. He also explained that the house was well described to them by the informer. He admitted that they did not put any identification mark on the seized bag and the identification number was put in the office by his fellow officer.

In re examination he stated that, when they arrived at the house they found the accused alone and he took them to his room.

**Saada Mohamed Fom (PW6)**, also testified and stated that, she is exhibit keeper at ZDCEA and she received the exhibit a multi colour bag sealed with lakiri identified as ZDCEA/HQ/IR/192/2022 from fellow officer Abdillah Juma Kona on the 12/10/2022 at around 14:10pm, she kept the exhibit until 18/10/2022 around 12:35pm where she gave it to Mbarouk Zahran Mbarouk 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 14:35pm; 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.

In cross examination she stated that she was not present when the accused was arrested and she does not know where the accused was arrested. She further stated that she wrote her own statement on the exhibit she received and in her statement she did not stated that she received the exhibit from Abdillah Juma Kona. She further stated that she was not the one who put the identification number on the exhibit and also she did not put any identification number when she received the exhibit. She further stated that, she did not put any mark when she received back the exhibit from the government chemist. She admitted to know the signature of the government analyst but denied being presence when the analyst was signing on the exhibit.

In re examination she stated that the exhibit belong to the accused because when she received the exhibit the accused was present. She further stated that she knew the signature of the analyst for the reasons that when the exhibit was sent for analysis test it did not have any signature but when the exhibit returned it had a signature.

**Mbarouk Zahran Mbarouk (PW7)** was the last witness for the prosecution to give his testimony, and he testified that, he is an officer of ZDCEA and his duties are to arrest and investigation. He explained on the investigations process he undertook. He first went to the government chemist to hand over the exhibit for lab test where he was received by analyst Suhaila Sahim Mohamed. The exhibit was opened in his presence

and he saw dry leaves suspected of being bhang in 13 plastic bags. After that he went back to continue with his investigation by interviewing witnesses and also he interviewed the suspect. He further went at a crime scene at Amani Mlingotini at the house which the accused was arrested. On the 24/10/2022 at around 14:00pm he went back to the government chemist to collect the exhibit and again he was received there by analyst Suhaila and gave him the exhibit sealed with government chemist lakiri and analysis report which confirmed that the dry leaves are pure bhang weighing 599.3grams. After he collected the exhibit he went back to the office and handed over the exhibit to the exhibit keeper for her custody until the exhibit was needed in court as evidence. He concluded his investigation on the case and sent the file to the officer In charge. He further stated that after he received the analysis report from the government analyst which confirmed that the dry leaves were pure bhang they decided to send the suspect in court to be charged with unlawful possession of drugs.

In cross examination he stated that during his investigation he did not find out the number of people living in the house where the accused was arrested. He further stated that his investigation was to identify the house and the room where the accused was arrested. He explained further that he received the information about the house from the complainant of the case who the work together. He went on to state that people living in the house did not tell him that the accused was arrested in the house because there was no one when he went to investigate. He further explained that he received the exhibit from the exhibit keeper which had lakiri on the top. He identified the lakiri from the government chemist but stated that the lakiri from ZDCEA where not in the exhibit which was brought in court. He also explained that he was not present when the government analyst performed the test on the exhibit.

On the 1/2/2023 the prosecution closed it case and the court based on the evidence adduced in the court found the accused person to have a case to answer and he was put in his defence. The court explained the right of the accused under section **216 (1)(a)(b) of the CPA Act No. 7 of 2018** and the accused opted to defend himself under oath.

In his testimony, the accused person **Chum Said Hussein (DW1)**, denied the charge facing him and stated that he remembered on the 12/10/2022 at around 13:30pm he was with his friend Bahati Yussuf walking going to Kibanda Maiti. Near the road at Amani kwa Wazee 2 cars passed and stopped in front of them. One of the car was black crown and the other one was Ist. On the black crown 3 people got out and on the other car 2 people got out, and they were put under arrest and they were put in the black crown car the driver of the car was told to drive to their office at Kilimani Mnara Mbao. At headquarters they were searched in the pockets and took 2 phone, one Samsung note 8 and the other one I phone 6+ and Tzs 50,000/= after that the officers identified

themselves that they are the officers from ZDCEA and they are in operation to search and arrest people dealing with drugs. They were told that they will be freed if they co operate with ZDCEA officers under 2 conditions (1) to name the people who sale drugs in their area (2) to name the "maskani" in the area they live associated with selling drugs. They replied that they were visitors and have only 2 weeks in Zanzibar so they cannot gave answers to their conditions. He further stated that while at ZDCEA offices they were bitten on the foot by electric wire and there after they took the officers to the house they stay. Furthermore **DW1** stated that one of the Officer went to the crown car and took a black package and that he did not know what was inside the package. Upon arriving at the house they stay at around 14:30pm one of the tenants opened the door and they took the officers to the room they live. The room was searched and Tanzania shillings 239,000/= were found. After that they were told to go out of the room and other officers remained inside the room. One of the officers went out and took the black package and went in the room with it, after they put the package in the room officers came out and called Sheha and went to pick Sheha and deputy Sheha. Upon arriving Sheha was put in the room while accused was in the living room. He further explained that after a while the officers and Sheha came out of the room with a bag and opened it and the found 13 packets of dry leaves alleged to be bhangi. Furthermore he explained that, the bag which was found in the room was a black bag but the bag tendered in court is a multi colour bag. **DW1** explained further that, after the search and seizure they were taken back at ZDCEA officers and the next day they were told to give their 3 names and after that they were in lock up for 3 weeks and taken to Kidimni thereafter whereby on 22/11/22 at around 7:00am Bahati Yussuf was brought in court and on the 1/12/22 he was taken to court and charged with unlawful possession of the drugs. He denied written any statement at ZDCEA officers and claimed he was forced to put a thumb after he was bitten. In the end he prayed to be acquitted.

In cross examination he stated that he came to Zanzibar to sign and play for Kipanga Football Club. The team rented the room for him. He further stated that he did not know the people who arrested him and he has no problem with any of them. Furthermore he explained that when they were walking they passed a lot of people and he was surprised why only them being arrested. When cross examined on why he knocked the door at te house he replied that because the officers of ZDCEA took their things even though in his own written statement he did not stated about his things being taken by officers of ZDCEA.

In re examination he testified that during operation anyone can be stopped and the key to the house were with Bahati.



The defence did not call any further witness and opted to close their defence. The parties were asked by the court if they wish to make closing remarks they all stated they do not wish to do so and prayed for judgment date.

Having gone through the evidence adduced by the prosecution and the defence, now it's a time for the court to make its deliberation and come up with the determination and findings of this case. As always the prosecution has a duty to prove the charge against the accused person beyond all reasonable doubts as held in the case of **Christian s/o Kaale and Rwekeza s/o Bernald v. R [1992] TLR 302**, the Court held as follows:

***" the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case"***

Moreover in the case of **Milburn v. Regina [1954] TLR 27**, the Court noted 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"***

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 **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 his evidence **PW2** who is the arresting officer, testified to search the room of the accused person and discovered the multi colour bag near the door on the left side of the room. **PW3** who is a Sheha of Amani testified as an independent witness who witnessed the search and arrest also testified that, he witnessed **PW2** doing search inside the room of the accused and he found cupboard and a multi colour bag and the bag was search and

found with 13 packets of dry leaves, **PW4** deputy Sheha also testified as independent witness and stated that the accused was first searched by **PW2** in his pockets and was not found with anything and thereafter **PW2** searched the room and inside the room on the right side the multi colour bag was discovered and inside it there were 13 packets of dry leaves. **PW5** co officer of **PW2**, narrated on the same story that he witnessed his fellow officer searching the room and on the right side of the room the multi colour bag was discovered containing 13 packets of dry leaves alleged to be bhangi. Hence from the testimonies of **PW2**, **PW3**, **PW4** and **PW5** it is well established that the accused was not in physical possession of the alleged multi colour bag which contained the 13 plastic bags of dry leaves alleged to be bhangi, but the bag was discovered and found in his room, which the accused person did not denied the room to be his, so this court is of the view that, the accused person was in control of the item and hence the prosecution has managed to prove based on the evidence adduced that the accused was in control of the item found in his room, as 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".***

And also the search was conducted in the presence of two independent witnesses in conformity with section 42 (2) of Act no. 8 of 2021 which read as follows:

***(2) "the Commissioner General or an authorized Officer shall, while exercising the powers of inspection and search, invite two independent witnesses during inspection and search"***

Having established that, the accused person was in the custody and control of the item found in his room after the search which was conducted in the presence of two independent witnesses, now this court will determine whether the search was conducted in accordance with the law.

It is a trite law that no search in premises shall be conducted without there being a search warrant. The authorized officers of ZDCEA are under legal obligation not to conduct search in private premises without a search warrant except in the circumstance stipulated under section **42 (1) of the Act No. 8 of 2021** which provides the following:

***(1) The Commission General or an authorized officer may exercise any of the powers conferred under this Act without a search warrant if he believes that:***

- (a) It is necessary to do so in order to prevent the concealment, loss or destruction of anything connected with an offence; or***
- (b) The circumstances are of such seriousness and urgency as to require the immediate exercise of the power without a warrant or order of the court.***

I have underlined the word **may exercise** on the above section to show and highlight that the section has made the search without obtaining a search warrant as discretionally based on the prevailing circumstance provided under that section, but mandatory obligation remain there to always conduct search with a search warrant. The power to issue a search warrant is provided under section **145 (1) of the Criminal Procedure Act No. 7 of 2018**, which reads as follows:

***145 (1) " Where it is proved on oath to a court that in fact or according to reasonable suspicion anything upon, by or in respect of which an offence has been committed or anything which is necessary for the purpose of an investigation of any offence in any building, vessel, carriage, box, receptacle or place, the court may by warrant, called a "search warrant" authorize a police officer or other person therein named to search the building, vessel, carriage, box, receptacle or place which shall be named or described in the warrant for any such thing and, if anything searched for be found, to seize it and carry it before the court issuing the warrant or some other court to be dealt with according to law"***

it is the view of this court that, the same procedures also applies to the authorized officers of ZDCEA when conducting search in premises, hence they are not at all immune to conduct search in premises without a search warrant.

Moreover, **section 148 (1)** of the CPA (supra) has put strict condition of executing search warrant, the section reads as follows:

**148 (1) " Before making a search under section 145, 146 or 147 of this Act, the officer or other person about to make it, shall call upon two or more respectable inhabitants of the locality in which the building or other place to be searched is situate to attend and witness the search, and may issue an order in writing to them or any of them so to do".**

In this case, the search was conducted on 12/10/2022 in a bright afternoon at around 13:00pm and in accordance with the testimony of **PW2**, they received a tip from the informer at around 12:30pm. I have looked at a calendar and discovered that, the date of 12/10/2022 was Tuesday a working day and the time of 13:00pm was within working hours, even if 12/10/2022 was holiday still the law allows the police officer or other person to get a warrant as under section **148 (6) of CPA No, 7/2018 which states that "the search warrant may be issued on any day, including holiday, and may be executed on any day, including holiday, between the hours of sunrise and sunset"**. So there is no any justifiable excuse for **PW2** and **PW5** not to get a search warrant. They could have a search warrant either from Vuga Magistrate Court in town or at Mwanakwerekwe Magistrate Court on their way to Amani house no. **AZ/01/585** in order to undertake a legal search. **PW2** knew where he was going and what he was going to do. So the search of the house was not something which came out of the blue, **PW2** was well informed about the house prior to his journey there, and had an intention in his mind to search the said house. In that sense, the prosecution in this case did not prove that the search was such serious and urgent as to require the immediate exercise of the powers of search without a search warrant, the searching and arresting officer **PW2** in this case had enough time in his disposal to call sheha and deputy sheha as independent witnesses, he could have also spare some time and get a search warrant. Failure of which, make the whole exercise illegally and everything else crumble.

May be **PW2** and **PW5** in this case did not see the need to have a search warrant when they searched the house because they had in mind the provision of **section 41 (1)** of the ZDCEA Act No. 8 of 2021 which reads as follows:

**41 (1) " Notwithstanding the provisions of the Criminal Procedure Act, the Commissioner General or an authorized officer shall have the powers to inspect, search, seize, arrest, detain and investigate in relation to offences under this case"**

If that is so, then they should have also looked at **subsection (2) of section 41** to discover that they are obliged to comply with the procedures laid down under the Criminal Procedure Act (supra) which is a controlling and mother law in the conduct of the criminal trials.

For ease of reference I shall provide the text of **section 41(2)** which reads as follows:

**41 (2) " Subject to the provision of subsection (1) of this section, the Commissioner General or an authorized officer may, for better implementation of the provision of this Act, comply with the provision of the Criminal Procedure Act as the case may be"**

For the reasons that I have made herein, I am of the view that the authorized officers in this case **PW2** and **PW5** should have complied with the provisions of **section 41(2)** and obtained a search warrant under the provisions of the Criminal Procedure Act (supra) before they enter the house and conducted the search.

Furthermore, the right to dignity and privacy is a Constitutional Right (see **Section 15 (1) (2) of the Zanzibar Constitution, 1984**) and that, every person is entitled to respect and protection of his personal security, privacy of his life and his resident, to avoid mayhem and chaos in the investigation and conduct of the criminal trials, a legal mechanism available to encroach those Constitutional Rights must be observed.

To support my view, on the importance of conducting a search with a search warrant, I shall make reference to the following authorities; In the case of **Badiru Musa Hanogi v. R, Criminal Appeal No. 118 of 2020** (unreported), a search was mounted without a search warrant and a stolen motorcycle was recovered in the process of the illegal search and the trial court admitted it. On appeal the Court of Appeal observed the following:

**" Unfortunately, the trial court did not realize that the motorcycle was illegally seized hence it could have not taken that course. Conversely, it went ahead to receive, admit it as exhibit and acted on it to ground the appellant's conviction. That was irregular and disentitled the trial court the right to act on illegally obtained evidence"** Moreover in the same case at page 10 to 11 the court further held that:

**" We think that the procedure was purposely set out to avoid abuse of authorities on the part of police officers for; it controls unauthorized and arbitrary searches in premises**

***that may be conducted by unscrupulous police officers and therefore avoid the possibility of fabrication of evidence by planting things subject of a criminal charge"***

Also in the case of **DPP v. Doreen John Mlemba, Criminal Appeal No. 359 of 2019 (unreported)** the Court of Appeal while citing the case of **Badiru Mussa Hanogi (supra)** and the case of **Mbaruku Hamisi and Four Others v. R, consolidated Criminal Appeals No. 141, 143 and 145 of 2016 and 391 of 2018 (unreported)** the Court observed the following:

***'' Exhibit impounded without a search warrant were treated as evidence illegally obtained and the court expunged the said exhibits from the records, consequently to expunging the basic evidence (exhibit P2) upon which the conviction could only be based, any other evidence in support of the recovery of or trafficking in the same drugs like exhibit P1 (the report ascertaining that the substance were narcotic drugs), exhibit P6 (certificate of seizure) and exhibit P4 (the certificate of value of the drugs), including any oral evidence accompanying such documentary exhibits, spontaneously, crumble under their own weight for being nothing to support''***

Furthermore, in the case of **Shaabani Saidi Kindamba v. R, Criminal Appeal No. 390 of 2019 (unreported)**, in that case, on 29/09/2018, at Chumo village in Kilwa District, a search of the house of Shaabani Kindamba was conducted during the night and the police officers recovered there from 92.28kg of cannabis sativa also known called marijuana. The officers did not have any search warrant authorizing them to enter upon the house of Shaabani and conducted the search therein.

***Underscoring the rationale and significance of the search officers to be in possession of search warrant being protection of citizen's Constitutional right to dignity and privacy, the Court declare the search illegal, and allowed the appeal on that basis.***

As guided by the above cited Court of Appeal authorities, I don't think I will want to fall in trap of convicting an accused person based on the **exhibit P2** illegally obtained without a search warrant. I am also of the view that, I have elaborated enough on this point and I have made my determination very clear, hence I don't think I will want to dig further to make findings in other issues which will not help prosecution get conviction in this case. I am also aware to the trite law that the accused person does

not need to prove his innocent, it is for the prosecution to prove his case 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).

Therefore, I hereby state that, the prosecution has failed to prove the charge against the accused person Chum Said Hussein, beyond reasonable doubt, the accused is hereby acquitted against the charge of being found in unlawful possession of the drugs contrary to **section 21 (1) (d) of the Act No. 8 of 2021**. The accused is ordered to be released from the custody immediately unless otherwise he is held there for other lawful purpose.

***Dated: 27/ 03/2023.***

***It is so ordered.***


**Court:**

Right of Appeal is explained.

S. HASSAN (J)  


**Court:**

The Judgment is delivered this 27/03/23 in the presence of SSA Moh'd Abdalla and in the presence of Accused Chum Said Hussein and in the presence of Advocate Daud Isak.

  
**S. HASSAN (J)**  
**27/03/2023**