

**IN THE HIGH COURT OF ZANZIBAR
AT TUNGUU
CRIMINAL CASE NO. 54 OF 2022**

DIRECTOR OF PUBLIC PROSECUTION ... PROSECUTOR

VS

MUSTAFA KHAMIS SEIF

.....

ACCUSED

JUDGEMENT OF THE COURT

25/05/2023 & 27/06/2023

KAZI, J.:

The accused in this case, Mustafa Khamis Seif, is indicted with the offence of possession of narcotic drugs contrary to section 21 (1)(d) of the **Zanzibar Drugs Control and Enforcement Authority** Act No. 8 of 2021 (ZDCEAA). According to the Information, it is alleged that on 11th June 2022 at about 4:30 pm at Daraja Bovu, West B, within the Urban West Region of Unguja, the accused was found in unlawful possession of 5 packets of narcotic drugs, namely bhang weighing 531 grams. The accused person pleaded not guilty to the information, and thus a preliminary hearing was conducted, followed by a full trial.

At the trial, the prosecution called five witnesses and tendered two exhibits to prove their case, while the accused was the sole witness in his defence.

The pertinent facts of the case, as can be amassed from the prosecution witnesses, is that on 11th June 2022 at about 4:30 pm, Ramadhan Rashid Ramadhan (PW2), an officer from the Zanzibar Drugs Control and Enforcement Authority (ZDCEA), was patrolling at Daraja Bovu area along with his co-worker Simba Makame Kombo (PW5). When patrolling, PW2 saw an accused person holding a mixed-coloured bag in his right hand. He suspected accused that he possessed narcotic drugs because of the bag he was having and the surrounding circumstances. He contended that the accused was walking while talking on the phone, and he was anxious. Therefore, he decided to arrest him. He then disclosed their identity to the accused, and they asked him to introduce himself. The accused responded by revealing his name. Later PW2 searched the accused's bag and discovered five newspaper packages containing dry leaves he suspects to be bhang. After the search, PW2 informed the accused of his offence while PW5 witnessed it. PW2 testified further that they took the accused and the exhibit he seized to their office at Kilimani, where they arrived at about 5:30 pm. PW2 contended that while at their office, he counted the exhibit and verified it was the same five newspaper packets containing dry leaves. Then, while PW5 was witnessing, PW2 put the exhibit back into the bag and opened

the case against the accused, which was numbered ZDCEA/HQ/IR/86/2022, concerning the offence of possession of five packages suspected to be bhang. PW2 then sealed the exhibit bag with the ZDCEA/HQ/IR/86/2022 mark. When testifying, PW2 managed to recognize the exhibit, which was five newspaper packets containing dry leaves. He also recognized the accused person. It was PW2 evidence that on the same day, at about 5:50 pm, he handed over the exhibit to a storekeeper, Zuwena Mussa Makame (PW3), for safe custody.

PW3, in her evidence, confirmed that on 11th June 2022 at about 5:50, she received the exhibit, a mixed-colour bag from PW2, in the presence of PW5 and the accused person. After receiving the exhibit, PW3 recorded its particulars in the exhibit book and placed them in the cabinet, which is under her control. It was PW3 evidence that on 14th June 2022 at about 1:15 pm, she handed over the exhibit to another ZDCEA officer, Maua Kauleni Mapacho (PW1), to send it to the Government Chemist Laboratory Agency (GCLA). She also handed over to PW1 a special form for sending exhibit to GCLA and a request letter for exhibit analysis. After receiving the exhibit on 14th June 2022, PW1, who is also an investigator in this matter, went to GCLA. He arrived at about 1:55 pm and was received by Mohamed Saleh Khamis (PW4), a Government

Chemist. PW1 then handed over to PW4 the exhibit analysis request letter, handing over form and the mixed colour bag, which was sealed and marked ZDCEA/HQ/IR/86/2022.

PW1, in his evidence, claimed to see five newspaper packets containing dry leaves after the mixed colour bag was opened in his presence by PW4 after the same being handed over to him.

The exhibit, five newspaper packages of dry leaves, was examined by PW4. At his evidence, PW4 stated that he first weighed the exhibit and found it to be 531 grams. After that, he conducted a preliminary test from the sample taken from the exhibit, which showed the presence of bhang. After completing a Thin Layer Chromatography (TLC) on the exhibit's sample, he confirmed the exhibit as bhang. When completed the test, he put a seal on the exhibit and prepared a certificate of analysis. In his evidence, PW4 recognized in Court the exhibit (a mixed-colour bag containing five newspaper packets of dry leaves), and the certificate of analysis. The certificate of analysis was tendered in Court by PW4 and admitted as exhibit P2. Afterwards, PW4 read out its contents, confirming that the five newspaper packages of dry leaves were bhang weighing 531 grams. Exhibit P2 also revealed that bhang affects the nervous system and can cause lung cancer, mental disorder

and breathing problems. After the analysis, exhibit P2 and the mixed bag containing five packets of bhang were handed over to PW1 by PW3 on 20th June 2022 at about 1:45 pm. On the same day, at about 2:30 pm, PW1 returned the exhibit to PW3 for safe custody.

As revealed earlier, an investigation of this matter was conducted by PW1. In his evidence, he stated that on 14th June 2022 at about 12:00 pm, he was assigned by his boss a file with reference number ZDCEA/HQ/IR/86/2022 concerning possession of narcotic drugs, namely bhang. The complainant was Ramadhan Rashid Ramadhan, and the accused person was Mustafa Khamis Seif. In his investigation, apart from sending the exhibit to GCLA, he interviewed witnesses and visited the crime scene at Daraja Bovu. In this Court, PW1 managed to recognize the exhibit, a mixed-colour bag containing five newspaper packets that have dry leaves confirmed as bhang. The exhibit was tendered in evidence by PW1 and was admitted as exhibit P1.

There was also evidence of PW5, which confirmed what was testified by PW2. PW5 narrated in his evidence how he witnessed PW2 arresting the accused and everything that happened after that, up to when PW2 opened the file at their office concerning this offence against the accused person.

In his defence, when testified on oath as DW1, the accused person denied committing the crime. He contended that on the material date at about 5:30 pm, he was at the stand waiting for the car when a pickup car passed near his leg and splashed rainwater over him. So, he raised his hands, complaining. The vehicle then stopped and reversed towards him. Then people who were in the car claimed to be insulted by him, but DW1 refuted the allegation and asked them why they splashed water over him. DW1 testified that he was told by the said persons that 'unaonyesha wewe una mafuta' (meaning, it looks like you have an attitude). Then he was taken to an unknown house and beaten. Later he was taken to their office and told that he would be released in the morning. But in the morning, he was charged with this offence he did not commit.

During the trial, Mr. Suleiman Yusuf Ali, learned State Attorney, represented the Director of Public Prosecutor (DPP), while the accused person was unrepresented hence, he fended for himself.

Generally, from the evidence adduced from both sides, it is undisputed that on 11th June 2022 at about 5:30 in Daraja Bovu area, PW2 apprehended the accused person who was at

the roadside. Moreover, PW4's testimony, exhibit P1 and exhibit P2, were unchallenged. Therefore, it is incontestable that exhibit P1 is a narcotic drug known as bhang weighing 531 grams. Thus, the only issue that needs to be resolved is whether the accused person was found with unlawful possession of exhibit P1.

It is a well-settled principle that the prosecution has a duty to prove the offence beyond a reasonable doubt. In determining this matter, I will be guided by that principle. According to the evidence brought by the prosecution, PW2 and PW5 were the key witnesses in the instant case. The question now is whether the evidence adduced by PW2 and PW5 is sufficient to establish that the accused was found in possession of exhibit P1. PW2, in his evidence, recounted how they found the accused at the roadside holding exhibit P1 while looking anxious, and as they suspected him, he searched him and proceeded to arrest him. PW5, an officer from ZDCEA, witnessed the arrest. Nevertheless, no independent witness was called to witness the search, and this fact was confirmed by PW2 when cross-examined by the accused. Additionally, no reasons were advanced to justify PW2's failure to secure the independent witness before searching the accused. The evidence adduced also suggested that a certificate of seizure

was not filled at the time exhibit P1 was seized from the accused. The accused person, in his defence, also narrated how he was arrested, and that was after PW2's car splashed rainwater over him and after he confronted them to know why they splashed water on him. Accused evidence suggested that his act of asking PW2 and his colleague on why they splashed water on him begets his arrest and later the indictment for this offence.

Failure of the prosecution witnesses to secure an independent witness before searching the accused and to fill in the certificate of seizure creates serious doubt as to whether the accused was found possessing exhibit P1. Because the evidence of independent witnesses would have been significant to support PW2 and PW5 evidence, and the certificate of seizure could have been material evidence to prove that exhibit P1 was indeed found from the accused person.

It is instructive that, in our jurisdiction, it is the mandatory requirement of the law for the search to be done in the presence of at least two independent witnesses and for the details of any items or articles discovered from the search to be filled into the certificate of seizure which will be signed by the

arresting officer, independent witnesses and the accused. Thus, section 42 of the ZDCEAA Act provides: -

"The Commissioner General or an authorized officer shall, while exercising the powers of inspection and search, invite two independent witnesses during inspection and search."

[Emphasis added].

Furthermore, the requirement of a certificate of seizure is uncovered under section 49 (g) of the ZDCEAA. Section 49 (g) makes it mandatory after the search for the arresting officer to record and issue a receipt for an article or thing seized.

The necessity of a certificate of seizure was underscored by this Court in **DPP V. Ashirak Kombo Bakari** (Criminal Case 58 of 2022) [2022] TZZNZHC 95 when quoted the authority in **Selemani Abdallah and others V Republic**, Criminal Appeal No. 354 of 2008 (Unreported) when the Court of Appeal of Tanzania observed as follows:

".. The whole purpose of issuing receipt to the seized items and obtaining signature of the witness is to make sure that the property seized came from no place other

than shown therein. If the procedure is observed or followed, the complaints normally expressed by the suspects that the evidence arising from such search is fabricated will to a great extent be minimized."

Based on the requirement of the law, as I have demonstrated above. With the absence of evidence from the independent witnesses and want of a certificate of seizure, it cannot be established beyond reasonable doubt that the accused person was found in possession of exhibit P1.

In the event, relying on the reasons stated herein, I find that the prosecution case has not been proved beyond a reasonable doubt. The accused person is found not guilty of the offence of being found in unlawful possession of five packets of bhang, and he is acquitted forthwith. It is so ordered.

Dated at Tunguu, Zanzibar this 27th date of June 2023.



G. J. KAZI
JUDGE
27/06/2023