

**IN THE HIGH COURT OF ZANZIBAR**  
**HELD AT TUNGUU**  
**CRIMINAL CASE NO 08 OF 2023**

DPP

VS

OTHUMAN OMARY OTHUMAN

**RULING ON PRIMA FACIE CASE**

**18.07.2023 & 15.08.2023**

**S.A.HASSAN,J.:**

Othuman Omary Othuman was arraigned before this Court on 25<sup>th</sup> day of January, 2023 on one count under section 21(1)(d) of the Zanzibar Drugs Control and Enforcement Authority Act, No 08 of 2021 laws of Zanzibar. Particulars of the offence charged are that the accused on 10<sup>th</sup> day of December, 2022 at or about 14:30hrs at Mikunguni, within Urban West Region was found in unlawful possession of ten (10) plastic packs of narcotics drugs of heroin type weighed 1.1908g contrary to the laws.

Hearing of this case started on 23.02.2023. DPP was represented by Mr. Ali Bilal, Principal State Attorney while the accused was unrepresented.

In proving the case beyond reasonable doubt the prosecution side brought in seven witnesses, three exhibits were tendered and admitted. The prosecution case was closed on 18.07.2023 and I am left with the noble duty to decide if the accused person has a case to answer or not, in other words this Court is to decide if the prosecution side has managed to **establish prima facie case** against the accused.

Whereas prima facie case is said to be established where a reasonable Court properly directing its mind to the law and the evidence on record, could convict if the accused is not called upon to defend himself, as decided in the case of **DPP Vs Philipo Joseph Ntonda, Criminal Session No. 217 of 2020, CAT at Zanzibar (Unreported)** where it was stated that:

*"In any criminal trial, at the closure of Prosecution case, be it at the subordinate Courts or the High Court, the trial Court is required to consider the evidence and make finding as to whether the Prosecution had sufficiently made out a case against the accused person to require him to mount his defense. If a prima facie case is not made out, the trial Court is required to find that the accused is not guilty"*

In deciding whether the prosecution has established prima facie case or not, this court scrutinized the evidence adduced and delivered by the prosecution witnesses PW1, PW2, PW3, PW4, PW5, PW6 and PW7 who summarily stated as follows:

Juma Othman Bakar (PW1) a Government Chemist told this court that on 12.12.2022 he did receive form ZDCEA 018 (exhibit P1) and a request letter for analysis of exhibit P3 from Abdalla Ali Haji (PW2) and upon his completion he prepared the report (exhibit P2) and returned the exhibits to PW2 for further action. Being a government chemist, PW1 proved to this court that the tests conducted on exhibit P3 gave the results that indeed the exhibit was narcotics drugs of heroin type weighing 1.1908g.

Abdallah Ali Haji (PW2) investigating officer from the Zanzibar Drugs Control Enforcement Authority (ZDCEA) told this court that on 11.12.2022 he was handed a case file numbered ZDCEA/HQ/IR/231/2022 and on 12.12.2022 he received the exhibit related to this case from PW4, exhibit keeper so that he can send the exhibit to the Government Chemist for analysis. He also went at the crime scene together with PW5 who is the arresting officer. When he was asked about investigation procedures according to the ZDCEA Act PW2 said that he does not understand what the legal procedures according to that law.

Kazija Khatib Bakar (PW3) a business woman who does her business online told the court that on 10.12.2022 at 14:30hrs together with PW7 they passed behind Utapoa Hospital and saw three men and PW3 and PW7 were called by one of those men and

introduced themselves as they are from ZDCEA and they wanted to search a man amongst them. She went on stating that while witnessing the search she saw that the man being searched had a pack of cigarette inside which there were ten plastic wraps which were in stone form. After the search officer Khalid (PW5) took PW3's and PW7's telephone numbers and told them they will be called when needed.

Aziza Amour Pandu (PW4) exhibits keeper at ZDCEA, told the court that on 10.12.2022 at 15:15hrs while at the office she had received a sealed khaki envelop (exhibit P3) from PW5 and kept it in safe custody until 12.12.2022 at 08:00hrs she handed it to PW2 who is the investigating officer. The same was returned on 13.12.2022 at 10:00hrs plus the report of analysis (exhibit P2) and Form ZDCEA 018 (Exhibit P1).

Khalid Khamis Haji (PW5) arresting officer from ZDCEA on 10.12.2022 at 14:30hrs while on patrol with PW6 they passed behind Utapoa Hospital and saw a young man whom they had prior knowledge that he deals with drugs and stopped and arrested him and called upon two people who were passing by and requested those people to witness while the man arrested being searched, as the result of that search a cigarette pack was retrieved from that man's right hand and when that pack was opened inside it there were ten transparent packs and inside those packs there was "unga" in stone form (grains). The man searched is the accused in this case, and on cross examination PW5 affirmed that he knew the accused previous the incident and that he knew he was using drugs.

Omar Salum Omar (PW6) also officer from ZDCEA who confirmed what PW5's statement as the duo were patrolling together, he also stated that he knew the accused before and that he know that he is dealing with drugs.

Khamis Mbarouk Khamis (PW7) a business man who is a friend to PW3 confirmed that the duo were together when they were called to witness search done to the accused. He also confirmed that there was no form that was signed after the search, and that only their telephone numbers were taken.

This court is left to decide whether from the evidence adduced is enough to convict the accused if the accused will not be called to defend himself.

Before I give my answer to the above, I believe it is very important if I point out of the importance of arresting and investigating officers to know the legal steps set by the law on arrest, searching and investigation as all those need extra care while implemented before a case can be prosecuted prosecution, a step missed will cause the whole case to flop. In the other hand the prosecution needs to direct the investigators on what information to be collected before a charge can be brought to the court. Well investigated cases and well planned prosecution are what the criminal justice requires so that the courts can convict the criminals and set free the innocent persons, whereas poor investigation leads to bad prosecution which might cause criminals to continue to be in the streets committing crimes and cause fear to the society.

Coming back to the issue in hand which started with the wrong foot as the arresting officers left important steps needed to be followed when searching the suspect in the presence of independent witnesses, as evidence shows that arresting officers had called on two independent witnesses prior searching the suspect as per the requirement of the law, see section 42(2) of the Act, however, the procedure does not end only on obtaining two independent witnesses while searching but there is also a requirement placed on Commissioner General or an authorized officer ***to record and issue a receipt for an article or thing seized.*** Importance of recording and issuing receipt has been well explained in the case of **Selemani Abdallah and others V Republic, Criminal Appeal No. 354 of 2008 (unreported)** where the court held that:

*"...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."* See also the case of **Samweli Kibundali Mgaya Vs Republic [2022] TZCA 342 (unreported)** where the Court of Appeal held that lack of

issuing of receipt after search was conducted creates doubts if at all the search was conducted.

All four prosecution witnesses who stated to be at the crime scene namely PW3, PW5, PW6 and PW7 explained how the arrest and search was conducted, however, none of them was able to produce the receipt issued after search was conducted as all of them told this court that no receipt was issued nor signed after the search. This court is not surprised on that as PW2 affirmed that he does not understand the legal requirements during the arrest.

Saying that, this court is of the opinion that the prosecution failed to establish prima facie case against Othuman Omary Othuman and with that I proceed to record a finding of not guilty in his favour as per section 263(1) of Criminal Procedure Act, No 7 of 2018 and therefore I order that he is released from custody with immediate effect unless he is otherwise lawfully held.

It is so ordered.



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**S.A.HASSAN**

**JUDGE**

**15.08.2022**

This ruling is delivered in open Court in the presence of Ms. Dawa Suleiman, Senior State Attorney for DPP and the accused.

A handwritten signature in blue ink, appearing to be 'S.A. Hassan', with a long horizontal line extending to the right.

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**S.A.HASSAN**

**JUDGE**

**15.08.2022**