

**IN THE HIGH COURT OF ZANZIBAR**

**HELD AT TUNGUU**

**CRIMINAL CASE NO. 06 OF 2023**

DIRECTOR OF PUBLIC PROSECUTION

V.

HUSSEIN SALEH JAFFAR

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**JUDGMENT**

Dated: *24<sup>th</sup> August, 2023*

**S. HASSAN (J)**

The accused person **HUSSEIN SALEH JAFFAR**, was arraigned on the 23/1/2023 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 offence is that, the accused person on the 24<sup>th</sup> December, 2022 at around 15:30pm at Mkunazini in the Urban District within Urban West Region of Unguja, was found with unlawful possession of 5 plastic bags containing drugs of the type of bhangi weigh **502 grams** contrary to the law.

Upon answering the offence facing him, the accused person pleaded not guilty to the said offence and therefore the matter proceeded for hearing. On the 20<sup>th</sup> February, 2023 the prosecution submitted a records of evidence and since the accused was represented by an Advocate, the matter was fixed for Preliminary Hearing (PH). On the 3<sup>rd</sup> March, 2023 the Preliminary Hearing was conducted and the accused person only admitted to his name and fact that he was arrested and arraigned in court on allegations whose commission he denied. The prosecution listed to present **7**

**witnesses during the Preliminary Hearing and listed 4 exhibits** intended to be tendered in court.

On the 30<sup>th</sup> March, 2023 the hearing of the case commenced and the prosecution was represented by Senior State Attorney Mr. Mohamed Abdallah while the accused was represented by learned advocate Mr. Said Ali Said.

However during the hearing of this case the prosecution only managed to call 5 witnesses instead of 7 namely: **Khamis Makame Salum (PW1), Amina Said Ali (PW2), Saada Mohamed Fum (PW3), Stefano Khamis Meza (PW4) and Mohamed Hamduni Khamis (PW5)**. The prosecution also tendered the following exhibits: **Seizure Certificate (exhibit P1), Khaki envelope marked as ZDCEA/HQ/IR/243/2022 (exhibit P2), Form 018 (exhibit P3), Analysis Report (Exhibit P4)**

**Khamis Makame Salum (PW1)** an officer from ZDCEA was the first witness called by prosecution to kick start the prosecution case. In his testimony **PW1** stated that On the 24/12/2022 at around 15:00pm while on patrol at Mkunazini with his fellow officer Amina Said Ali, they received a tip from their informer that there is a youth dealing with drugs. They were not far from the area they decided to go to the area together with two civilian witnesses of Mkunazini area named *Asya Hija Khamis* and *Khairat Mohamed Salum* for the purpose of searching the house and for the civilian witnesses to witness the search. He further stated that, at around 15:30pm they arrived at house No. ZHC 2054, they knocked the door and the door was opened and they entered the house. While inside the house, they managed to see the youth who was described to them by the informer. They approach the youth and put him under arrest and thereafter they identified themselves to the youth that they are officers from ZDCEA. The youth was asked to introduce himself and he gave the name of Hussein Saleh Jaffar. **PW1** went on to state that, after each side had introduced itself, he ask to body search the suspect and the house. In his body the suspect was not found with anything, but during the search of the house **PW1** managed to discover the plastic bag contain five plastic bags and inside each plastic bag there was harsh suspected to be drugs. **PW1** went on to testify that he managed to discover the alleged drugs in the fridge which was located at

the open space inside the house. **PW1** further testified that, he did everything while witnessed by his fellow officer and 2 civilian witnesses. After the discovery of the drugs, **PW1** signed the seizure certificate (**exhibit P1**) which was also signed by the suspect and 2 civilian witnesses. Thereafter **PW1** cautioned the suspect for unlawful possession of harsh suspected to be drugs. After that they went back to their office while the suspect and the alleged drugs were under his custody.

At 16:30pm they arrived back at their office at Migombani and immediately **PW1** recounted again the exhibit and received the same total number of alleged harsh as before and at around 16:40pm **PW1** opened the case file against the suspect and gave it identification number ZDCEA/HQ/IR/243/2022. **PW1** put the alleged drugs into the khaki envelope and sealed it with lakiri and marked it by identification number ZDCEA/HQ/IR/243/2022. At around 17:00pm **PW1** handed over the exhibit to the exhibit keeper officer Saada Mohamed Fum for her safe custody. **PW1** emphasized that, he did all that while witnessed by his fellow officer Amina Said Ali and the suspect. **PW1** went on to identify and tender certificate of seizure which was admitted in court and marked as **exhibit P1** and Khaki enveloped marked as ZDCEA/HQ/IR/243/2022 which was marked as **exhibit P2**.

In cross examination, **PW1** insisted that they received a tip from their informer and they invited 2 civilian witnesses to witness the search. He stated that, none of the civilian was a Sheha and that they did not involve Shesha in their exercise even though the area of Mkunazini has a Sheha. **PW1** further testified that they did not have a search warrant during the search. He went on to state that the exhibit P1 was signed at the accused house and completed in their office. **PW1** testified that **exhibit P1** had no any stamp and that the 2 civilian witnesses only witnessed the search and they witness him when he discovered the alleged drugs. He went on to testify that, he discovered the alleged harsh in the fridge and witnessed by 2 civilian witnesses. **PW1** denied the discovery of dry leaves during the search of the house.

**Amina Said Ali (PW2)** was another witness called by prosecution to give her side of story and she started by stating that, on the 24/12/2022 at around 15:00pm she was in her usual patrol with fellow officer Khamis Makame Salum when they received a tip

from the informer that there is a youth dealing with drugs. They instantly went to the area and met with the suspect and she witness her fellow officer introduce himself to the suspect. The suspect was asked to be searched and he was not found with anything. They went on to search the house where **PW1** managed to discover plastic bag containing 5 bags each contain harsh alleged to be bhang. **PW2** went on to state that 2 civilian witnesses Khairat and Asia witnessed the search. She stated that the witness were called by neighbours. **PW2** went on to testify that, she witnessed **PW1** taking the suspect and the exhibit and put them under his custody while they went back to their office. At 16:00pm they arrived back at their office and **PW2** witnessed **PW1** re count the exhibit and received the same total amount as before. **PW2** further witnessed **PW1** putting the exhibit in the khaki envelope and sealed it with red lakiri which was given identification number **ZDCEA/HQ/IR/243/2022**. **PW2** further testified that at 16:40pm she witnessed **PW1** handing over the exhibit to exhibit keeper of the office, officer Saada Mohamed Fum.

During cross examination, **PW2** stated that in their patrol they were only 2 people and that they had a search warrant when they went to search the house of the accused they had a search warrant. **PW2** was shown document marked as H1 and stated that it was a search warrant. **PW2** went on to state that, 2 civilian witnesses were called after the search was completed and that only herself and **PW1** knew where they discover the alleged drugs. She further testified that when 2 civilian witnesses were called they had 2 suspect under arrest, and each suspect had his exhibit, she went on to state that one suspect was sent to Vuga Magistrate Court and the other suspect is Hussein Saleh Jaffar. **PW2** stated that, 2 suspect were arrested at the same time and at a same place but each had his own case. **PW2** admitted that, she saw the accused given keys of the fridge where the discovery was made to **PW1**.

In re examination **PW2** stated that she did not know the reasons why they did not have any search warrant and insisted that, the exhibit in court is for the accused.

**Saada Mohamed Fum(PW3)**, an exhibit keeper from ZDCEA also was called to testify by the prosecution and she stated that on the 24/12/2022 at around 17:00pm while she was in her office, **PW1** went to her office and handed over exhibit khaki

envelope marked with identification number ZDCEA/ HQ/ IR/ 243/ 2022 and she kept that exhibit in the cupboard she uses alone and the key of that cupboard stays with her alone. She went on to testify that, on the 27/12/2022 at around 13:35pm while she was in her office, she gave the exhibit, a letter of analysis request and sample form 018 to officer Stefano Khamis Meza for the purpose of taking the exhibit to the government chemist for chemical analysis. She further stated that, on 9/1/2023 at around 15:10pm while she was in her office, the exhibit was returned to her by officer Stefano which was sealed by the government chemist seal. She kept the exhibit until the day it was needed in court as evidence.

During cross examination, **PW3** stated that she was given the exhibit which was sealed by **PW1** and she did not open the exhibit. **PW3** further stated that, when the exhibit was returned to her from government chemist it was also sealed and she did not open it. **PW3** stated that she did not know what was inside the khaki envelope and she was not told where the exhibit came from and also she was not informed who was found with the exhibit. **PW3** stated further that, the accused was not present when the exhibit was handed over to her and she saw the accused when he was sent to Kidimni.

In re examination **PW3** stated that, when the exhibit was given to her, the accused and **PW2** were present.

**Stefano Khamis Meza (PW4)**, gave his evidence and stated that he was the investigation officer of the case and that on the 27/12/2022 at around 13:35pm he received a file from his Incharge. He further stated that, the same day he also received a letter, exhibit and a form from **PW3** for the purpose of sending an exhibit to the government chemist lab. He went to the lab and arrived there at around 14:00pm and met with analyst Mohamed Hamduni Khamis. **PW4** went on to testify that, he gave a letter, an exhibit and form 018 to the analyst who unsealed the exhibit in front of him and there he witnessed a plastic bag being removed from the exhibit wrapped which had 5 plastic bags each containing alleged harsh. After that he signed the register book and went back to his officer for further investigation work. **PW4** went on to state that during his investigation he interviewed the complainant in this case and also had a talk with the accused. **PW4** also testified that, he went to the scene of crime at Mkunazini

at house no. ZHC 2054. On the 9/1/2023 **PW4** went back to the lab to collect the exhibit and while he is there he met again with analyst Mohamed Hamduni who have him the exhibit sealed with government chemistry seal, analysis report and form 018. **PW4** signed the handing over register and went back to the office and gave the exhibit to the exhibit keeper **PW3**.

In cross examination, **PW4** stated that, the accused put his left thumb in his statement to show that the statement was his and authentic. He further stated that, he met with independent civilian and took their statement in his office. He stated that the Statement in the records of evidence marked as C2 does not state that it was read over to the witness and verified to be correct. **PW4** further stated that the arresting officers in this case were 2 who informed him that only the accused was arrested at a crime area.

**Mohamed Hamduni Khamis (PW5)**, a government analyst also gave his evidence and started by given a procedure of their office from the time they received an exhibit, chemical analysis and handing over the exhibit back to the ZDCEA officer. **PW5** went on to submit and tender in court his analysis report and the same was admitted in court and marked as **exhibit P4**.

In cross examination, **PW5** stated that he was not informed where the exhibit was seized and he was not informed from whom it was seized.

After the evidence of **PW5**, the prosecution opted to close it case and the court after analyzing all the evidence produced so far by the prosecution side it was satisfied that the prima facie case was made and the accused was asked to enter his defence after the court had explained his legal right available under ***section 216 (a) (b) of the Criminal Procedure Act No. 7 of 2018***.

The accused decided to give his evidence under oath and he was the only witness on the defence side.

In his testimony **Hussein Saleh Jaffar (DW1)** stated that he lived in Mkunazini with his wife and two children. He went on to state that, he remembered on the 24/12/2022 at around 15:00pm while he was inside the house resting with his wife and children,

suddenly he heard the door knocked and he went out and found five police with guns. When the police saw him, they called him and after that he was joined with other people who were already arrested. **DW1** went on to testify that, the police told one of the arrested person Arif Hafidh Saad to show them the package and that person replied he don't know where the package is. He further stated that, they were told to remove everything they have and they replied they don't have anything. Furthermore **DW1** stated that, one of the people who arrested them was wearing a bag (begi la nyuma) told them that they will go to with them to the office to answer the charges of drugs. **DW1** stated further that, he denied that charge and asked them to call "Sheha" to witness. The police made chaos and neighbours started gathering and the neighbours also asked to be called a "Sheha" and his Deputy. **DW1** went on to testify that he remembered that there were individuals witnesses Asya and her friend who came after. After that he was taken to Kilimani and over there he asked about his crime and he was told that he was too much know and he was locked until the day of 23/1/2023 when he was sent to the court. **DW1** further testified that, the independent witnesses were not called by prosecution to testify because the prosecution knew the witness will testify that he was not found with drugs. He further stated that, he does not know if the prosecution purposely decided not to call the civilian witnesses or not. He went on to state that there were two people arrested but the other person was not charged. **DW1** denied being found with drugs.

In cross examination **DW1** affirms that he live at Mkunazini with his wife and 2 children. He affirmed that, at the house he lives there are neighbours surrounding. He also affirmed that he was arrested on 24/12/2022 at around 15:00pm. He stated that he was arrested by officer Khamis Makame Salum. He further stated that he knows Hafidh Arif Saad but he denied knowing where he is coming from. He also testified that the said Hafidh was not charged. He went on to stated that the civilian witnesses are not his neighbours but he knew their names through the records of evidence which was given to him and further stated that the said witnesses came after he was already arrested. He went on to deny that in the fridge the officer discover the heroin.

After cross examination, the defence side closed its case and the matter was left in the hands of the court to decide whether based on the evidence adduced, the prosecution has managed to prove the charge against the accused person beyond the standard required which is beyond any reasonable doubt or not.

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”***

To kick start, I shall first determine the evidence of **PW5**, a Government Analyst an expert who discharged his duty to testify on how he conducted analysis to the samples of dry leaves in order to prove that the substance is narcotic drugs known as 'bhangi'. There is no any other evidence which shade a doubt on his findings. **Section 64 (2) of the Zanzibar Drugs Control and Enforcement Authority Act, No. 8 of 2021**, provides:

***“ 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 admissible as evidence of the fact stated therein without formal proof and such evidence shall, unless rebutted, be conclusive”***



From the findings above, I hold that the findings made by **PW5** supported by **exhibit P4** are conclusive evidence that alleged drugs contained in the **exhibit P2** were narcotic drugs namely bhang **weighed 502 grams**.

Moreover, the role and duty of the expert to furnish the court with necessary scientific criteria for testing was observed by the Court of Appeal in the case of **Sylvester Stephano v. R, Criminal Appeal No. 527 of 2016** at Arusha (unreported) where it was held as follows:

***" that the duty of an expert is to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the court to form its own independent judgment by application of these criteria to the facts proven in evidence"***

Furthermore, in the case of **Charo Said Kimilu v. R, Criminal Appeal No. 1 of 2015** (unreported) where the Court held:

***"Narcotic drugs or psychotropic substances should be submitted to the Government Chemist Laboratory Agency for weighing and analysis before tendering it as evidence in court"***

Having determined that the **exhibit P1** is conclusive evidence and it was weighed and analyzed as required by law, now it is time to make findings on the following issues:

1. Whether the search and the discovery of **exhibit P2** was conducted in accordance with the law
2. Whether the court can draw adverse inference for failure of prosecution to call vital and key witnesses
3. Whether the accused has raised any doubt

Starting with the **first issue**, it is a trite law that no search shall be conducted without there being a search warrant. The authorized officers of ZDCEA are under legal obligation not to conduct search 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 words **may exercise and if** on the above provision 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 or shielded to conduct search in premises without a search warrant.

Moreover, **section 148 (1)** of the CPA (supra) 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, as testified by **PW1**, **PW2** and **DW1** the search was conducted on 24/12/2022 at around 15:30pm at Mkunazini house number **ZHC 2054**. **PW1** and **PW2** stated that they were in their normal patrol when they received a tip from their informer that at house no. **ZHC 2054** there is a youth dealing with drugs and since they were not far from the area they decided to go to the house with two civilian witnesses named as *Asya Hija Khamis* and *Hairat Mohd Salum*. The search was conducted and **exhibit P2** was discovered in the fridge in the presence of the named civilian witnesses. I will deal with the civilian witnesses later on after I finished with the search.

In cross examination **PW1** was asked if they had a search warrant and replied that they did not have a search warrant when they search the house **no. ZHC 2054** and discover the heroin in the fridge as alleged. Also **PW2** in re examination was asked why they did not have any search warrant and her reply was that *'I don't know the reasons why we did not have a search warrant'*

May be the authorized officers **PW1** and **PW2** in this case did not see the reason 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 the authorized officer 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 CPA. 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 have failed to show and prove before this court that, the search was emergency so as not to require them to obtain a search warrant, in that respect they 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 conducted the search.

To support my view, on the importance of conducting a search with a search warrant if the search do not fall under the provision of section 42 (1) of the ZDCEA Act No. 8 of 2021, 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 therefrom 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 well guided by the law and authorities cited herein above, this court also declare that the search which was conducted at Mkunazini house No. ZHC 2054 was illegal search and the ***Exhibit P2 discovered without a search warrant is hereby treated as evidence illegally impounded.***

Having determined the issue of search, now I shall make my determination on the ***second issue*** on whether this court can draw adverse inference on prosecution for failure to call vital and key witnesses. In this case both **PW1** and **PW2** have testified that the search was conducted and witnessed by the two civilian independent witnesses who were also listed by the prosecution in the PH as witnesses to be called by prosecution. Sadly the said witnesses were not called, the question is why? **DW1** raised doubt and stated that the civilian witnesses came after the search, seizure and the discovery of the harsh was conducted and completed and went on to testify that the prosecution did not call them as witness because the prosecution knew the civilian witnesses will testify that he (the accused) was not found with harsh.

It is the view of this court that, since **PW1** and **PW2** are all authorized officers having interest in the outcome of this case, it was important for the prosecution to call as witness the civilian witnesses who in fact have no any interest in the outcome of this case and as testified by **PW1** and **PW2**, the said civilian witnesses were present during the search, seizure and discovery of the drugs.

In determine this matter, as much as I am aware that in terms of **section 150** of the **Evidence Act No 9 of 2016** no particular number of witnesses is required for any proof of any fact.

*Section 150* reads as follows:

***"Subject to the provision of the Penal Act or any other law for the time being in force, no particular number of witnesses shall in any case be required for the proof of any fact"***

However, the law is also very clear and well settled that, where a vital and crucial witness who is within the reach is not called to testify in court, failure to call such material witnesses entitles the court to draw adverse inference see the case of **Aziz Abdalla v. R [1991] TLR 71** where it was held that:

***"The general rule and well known rules is that the prosecution is under a prima facie duty to call all those witnesses who from their connection with the transaction in question are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reasons been shown, the court may draw an adverse inference to the prosecution"***

Furthermore, the question of failure of prosecution to call witness has been the subject of numerous determination by the court. For example in the case of **Julias Kalewa Mutuaga v. R, Criminal Appeal No. 31 of 2005**, the Court of Appeal of Kenya held that:

***" As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion."***

Also in the case of **Daitany v. R [1950] 23 EACA 493**, the Court held the following:

***" The prosecution has general discretion to call someone as witness, but if he does not call a vital witness, one risks the court presuming that the evidence if produced could have been prejudicial to the prosecution"***

See also the case of **Bukenya & Others v. Uganda Criminal Appeal No. 68 of 1972**, which underscored the need to call witnesses whose evidence appears essential to the decision the East African Court of Appeal went on to held as following:

***"The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent"***

In this case both **PW1** and **PW2** testified that, the search and seizure was conducted in the presence of 2 civilian witnesses named as **Hairat Mohd Salum** and **Asya Hija Khamis**, but those witness were not called by prosecution without given any sufficient reason for not calling them. So this court will draw an adverse inference and agree with **DW1** that the search and seizure of the alleged drugs was conducted in the absence of the civilian witnesses and that is the reason the prosecution decided not to call them as witnesses for obvious reasons.

In addition to what I have stated, the issue of conducting search and inspection in the presence of independent witness is a matter of law and not a choice, the law has made it mandatory under the provision of section **42 (2) of the Act No. 8 of 2021** which reads as follows:

***42 (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"***

So the invitation of two independent witnesses is not a matter of choice whether to invite them or not, it is a matter of law and the authorized officers are bound to adhere the law, failure to invite them make the whole exercise of inspection, searching and



seizure doubtful. Furthermore, it is also a settled principle of law that, it is not fatal for the arresting officer to arrest a person or go to a crime scene without an independent witness. However, if a search is conducted without the presence of the independent witness it becomes fatal. In that regard, no search can be conducted without the presence of an independent witness and the witness has to testify in court on the search and seizure.

Having determined that the search was illegal conducted without a search warrant and **exhibit P2** was illegal impounded also after this court has made adverse inference for failure of prosecution to call vital and important independent witnesses, it is very clear now that, there are a lot of 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, in Criminal Appeal No. 28 of 2010*** where the Court of Appeal 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 and an onus of prosecution to prove the charge against the accused person beyond all reasonable doubts as held in the case of ***Jonas Nkize v. R, [1992] TLR 213***, where Katiti J (as he then was) stated the following:

***" The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, it is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking"***

In this case, the prosecution has failed to prove this case beyond the required standard which is beyond all reasonable doubts.

Therefore, I hereby state that, the prosecution have failed to prove the charge against the accused person **Hussein Saleh Jaffar**, 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. Furthermore, I also order **Exhibit P2** be disposed and destroyed in accordance with the provisions of ZDCEA Act No. 8 of 2021 and its Regulations.

***It is so ordered.***

S. HASSAN (J)  
Sgd. 24/08/2023

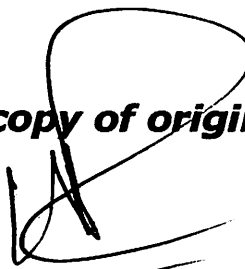
Dated: **24/8/2023**

**Court:**

Right of appeal is explained.

S. HASSAN (J)  
Sgd. 24/08/2023

***I certify that this is a true copy of original.***

  
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DEPUTY  
REGISTRAR.

**HIGH COURT - ZANZIBAR**