

IN THE HIGH COURT OF ZANZIBAR

AT TUNGUU

CRIMINAL APPEAL NO 49 OF 2023

ABDALLA SUKU ABDALLA.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

**(Appeal from the decision of the Regional Court of Zanzibar, at Vuga, Dated
the 9th day of June, 2021**

(Hon. Hamisuu. S. Makanjira RM)

In

Criminal Case No. 333 of 2019)

JUDGEMENT

28th Feb, & 23th April, 2024

H S.K. Tetere J.:

Before Regional Court of Zanzibar at Vuga, the appellant, **ABDALLA SUKU ABDALLA** was charged with the offence of being found in unlawful possession of narcotic drugs to wit; heroin contrary to section 15 (1) (a) of Act No. 9 of 2009, as amended by section 11 (a) of Act No 12 of 2011 of



the laws of Zanzibar. It was alleged that, on 06/06/2019, at Kisiwandui, in Urban District within the urban West Region of Unguja, the appellant was found in possession of narcotic drugs, namely, Heroin weighing 2.82 grams. The appellant denied the charge and as a result, the case had to proceed to a full trial.

Having heard the evidence of five prosecution witnesses and the appellant, who was the only defence witness, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. It thus convicted and sentenced him to seven (7) years imprisonment. Aggrieved by the decision of the trial court, hence this appeal.

The facts which led to the appellant's arraignment, conviction and consequently, the decision giving rise to this appeal, maybe briefly stated as follow: - on 6/6/2019, while at Michezani bodaboda stand, the appellant came upon of two policemen who were on patrol, amongst them were F. 7566 D/Cpl Moh'd (PW2) and F. 6335 D/Cpl Shauri (PW3). Following the suspicious they had against the appellant they decided to approach him. Then, they introduced to him and the appellant did likewise.



Later PW2 searched the appellant while witnessed by PW3. Following the said search, 30 packets of what was suspected to be narcotic drugs were found in his trouser. Thereafter, the appellant was arrested and taken to their office head quarter. The exhibit was marked ANSZ/IR 52/2019 and was later on taken to an exhibit keeper at the police station who is WP3565 D/Cpl Tatu (PW4) for safe custody.

Hassan Vuai Is-haka (PW1), chemical analyst of the laboratory of Government Chief Chemist whom the suspected substance was taken to by E. 7448 D/Cpl Maulid (PW5) from the Anti-Narcotic Drugs Department, tested it and confirmed that it was heroin and after all process the exhibit was returned to PW5. The appellant was then charged as indicated above.

The prosecution's story was not accepted by the appellant who, in his affirmed defence claimed that he was, on the material time, at his way to Mkunazini, came crossed with three people and one of them had no good terms with him. He then attacked the prosecution witnesses' testimonies for being fabricated. All the same, he was, at the conclusion of the trial, convicted and sentenced as indicated above.



Being dissatisfied by the conviction and sentence imposed by the trial court, the appellant, filed a memorandum of appeal containing seven (7) grounds, which can be conveniently paraphrased as follow: - **First**, the appellant was convicted based on contradiction evidence between PW2 and PW3. **Second**, the charge is at variance with the evidence of PW2 and PW3, **Third**, absence of independent witness at the time of search and arrest. **Fourth**, the chain of custody of evidence was not properly handling, **Fifth**, the appellant was convicted without being brought and identified by PW4, **Six**, the appellant was convicted based on contradiction of evidence of PW5 and PW1, **Lastly**, the case against appellant was not proved beyond reasonable doubts.

At the hearing of the appeal, the appellant appeared in person without legal representation, whilst the respondent/Republic had the services of Mr. Suleiman Maulid, Principle State Attorney assisted with Mr. Ahmed Moh'd and Ms. Fatma Saleh, both Learned State Attorney.

When given the chance to argue his grounds of appeal, the appellant opted to adopt ground six and seven of appeal to be part of his submission and elaborate the 1, 2, 3, 4 and 5 ground of appeal as follow: -



The appellant started his submission with second ground of appeal in which a complaint was on the variance of the charge sheet and evidence adduced at the trial. He contended that the charge is the foundation of criminal case and if the same goes contrary to the witness statement the case stand fail to be prove beyond reasonable doubt. He stressed that the evidence of PW2 and PW3 are contrary to the charge sheet.

Submitting on third ground, the complaint was on absence of independent witness at the time of search and arrest. The appellant contended that he was arrested by PW2 and PW3 in an open space during evening hours in absence of independent witness. He argued that independent witness is very important to help the court to make justice. He was on the view that in the presence of independent witness this argument would not be exists.

Regarding the fourth ground, he submitted that the chain of custody of the exhibit was not established. He said that there was no common identity to identify the exhibit. He further submitted that when PW4 received the exhibit marked ANS2/IR/52/2019, he was the same require to



put his own mark. But that was not done. He urged. As a consequence, a certificate of seizure was not submitted to be part of the evidence in court. He therefore doubted the handing over of the exhibit between PW2 and PW4.

In fifth ground, the complaint was on failure for the appellant to be brought and identified by exhibit keeper (PW4). The appellant argued that since PW2 was the one arrested him but failed to take him to exhibit keeper. He therefore, argued that the omission to that effect signify the handing over of the exhibit from PW2 to PW4 didn't take place.

Regarding to first ground, the appellant submitted that the evidence of PW2 and PW3 are contradicted to each other. He argued that the evidence of PW2 shows that the appellant was arrested at Michezani bodaboda stand whereas PW3 indicated that the appellant was arrested at Michezani Tobolapili.

In reply to the Appellant's submission Mr. Ahmed, learned State Attorney started with the same second ground as it was started by the appellant. He denied the existence of contradiction of charge sheet and evidence adduced at the trial. He argued that the charge sheet explained



clearly on the possession of narcotic drugs and all two witnesses came before the court to testify and the same proved that 30 pockets of narcotic drugs; namely heroin was found to the appellant possession.

On third ground of appeal, the learned State Attorney denied on the requirement of independent witness. He submitted that at the time the appellant was arrested on 6/6/2019, the law applicable was Act No. 9 of 2019 as amended by section 11(1) (a) of act No. 12 of 2011. He said that, in the said law, there is no requirement of independent witness. He stressed that the requirement of independent witness is provided under section 42(2) of the Act No. 8 of 2021. He further stressed that since the law does not operate retrospectively this ground of appeal is baseless and bound to fail.

As to the fourth ground, the complaint was on the common identification of the exhibit. Mr. Ahmed, contended that the mark that was kept in the exhibit was sufficient to establish the recognition of the exhibit in question. He said that it could be more contradiction on the chain of custody if every witness is allowed to keep his own mark.



On five ground, Mr. Ahmed, learned state attorney referred this court to page 29 of the typed proceeding where the record shows that the handing over of the exhibit took place in the presence of the appellant. He argued that even if the appellant was not present, it would not be a problem because what is considered is the chain of custody of the exhibit. Therefore, he prays to the court to dismiss this ground of appeal.

Regarding the first aground of appeal, learned State Attorney submitted that the place where the appellant was arrested is close to each other. Thus, according to him it depends the choice of the name to call it but in law there is no legal effect. He therefore, claimed the ground lacks merit.

On ground six, the complaint was on the contradiction of the weight of the exhibit. The learned State Attorney submitted that what transpired in the trial court proceeding is the typing error in recording the weight of the exhibit. He said that the statement of PW1 at page 12 of the typed proceeding shows that the weight of the exhibit is 2.82 grams which is the same provided in the charge sheet. However, he conceded that the evidence of PW5 at page 35 of the typed proceeding shows that the weight



of exhibit is 2.52 grams. He, therefore, prays the court to consider that as a typing error on the part of the trial magistrate.

Regarding the seven ground of appeal, the complaint was on failure to give advantage to the applicant for the doubts raised at the trial court. The learned State Attorney strongly denied the existence of any doubts in the trial court proceeding. He submitted that all the procedures were complied with as a result the appellant was convicted and sentence according to the law. He therefore, prays to the court to dismiss the appeal as the appellant's ground of appeal lacks merit.

The appellant being a lay man had nothing to rejoin and let the court to decide the matter according to law.

After having heard the submission from the parties, the court was confronted with the question regarding the manner the certificate of analysis and brown envelope containing 30 packets of heroin (exhibit "D1") the subject matter of the charge was tendered and admitted as exhibit by the trial court. Accordingly, I extended the invitation to the parties to address the court on the propriety or otherwise of the procedure adopted by the learned trial magistrate to admit the two exhibits in question.



Responding to the Court's disquiets, Mr. Ahmed, although reluctantly, readily conceded that the record reveals that tendering of exhibit PQ and D1 was tendered by the Public Prosecutor who was not a witness. However, he said that was human error on the part of the trial magistrate. He, therefore prays the court to consider that anomaly as a human error and it shouldn't be used to penalized the prosecution. He stressed that the court should look further interpretation on the mischief meaning of the language used at the trial court.

Being a lay man and unrepresented, the appellant commented very brief but very straight forward. He submitted that if there is a human error on the part of the trial magistrate, the state attorney had enough time to rectify the same but nothing was done. He further said that what he knows when there is doubt in the proceeding, it should benefit the appellant.

To appreciate the Court's concern and parties' argument on it, I find it wise to take the pain of reproducing the trial court's proceedings at page 10 and 12 dated 24/03/2020 subsequent to examination of PW1 by the court thus: -



PW1 Proceed: I pray the court to receive the same certificate of analysis as an exhibit before the court.

Sgd: Hamisuu S. Makanjira (RM)

24/03/2020

Pros: we pray to tender the stone certificate of analysis as a part of our evidence.

Sgd: Hamisuu S Makanjira (RM)

24/03/2020

Accused: No objection

Sgd: Hamisuu S. Makanjira (RM)

24/03/2020

Court: Certificate of analysis abdicated as a part of evidence before this court and mark as "PQ"

Sgd: Hamisuu S. Makanjira (RM)

24/03/2020

Also, at page 12 of the typed proceeding:

PW1 Proceed: I pray to your court to receive the same exhibit as part of evidence.



Sgd: Hamisuu S. Makanjira (RM)

24/03/2020

Pros: We pray to your court to receive the same exhibit as part of evidence.

Sgd: Hamisuu S. Makanjira (RM)

24/03/2020

Court: The brown envelopes which marked ANS2/IR/52/2019 there in had transparent plastic pocket inside has 30 pockets covered by transparent plastic as an exhibit before the court and marked as "D1".

Sgd: Hamisuu S. Makanjira (RM)

24/03/2020

From the above passage quoted from the trial court records, two exhibits were tendered; **First**, the exhibit "PQ" and **second**, the exhibit "D1". In tendering the exhibit PQ, it is unclear whose prayer the accused responded to. Is that of PW1 or is from Public Prosecutor? Similarly, it is unclear whose prayer the trial magistrate considered in receiving and admitting the exhibit PQ.



Furthermore, in tendering exhibit D1, the record doesn't show if the accused person was given opportunity to challenge it. But also, it is uncertain whose prayer the trial magistrate considered in receiving and admitting exhibit D1. Is that of PW1 or from Public Prosecutor? Indeed, what transpired at the trial court in respect of exhibit PQ and D1 was a fault. Exhibits forming part of the prosecution evidence should be produced and tendered by a witness and during examination in-chief so as to afford opportunity to accused person to challenge it by way of cross examination. The court of appeal and this court as well have consistently pronounced that a prosecutor is not a witness and cannot therefore be cross-examined. To mention few are; *Msanif Ramadhan Msanif Vs Director of Public Prosecutions*, Criminal Appeal No. 454 of 2019, *Amos Alexander @ Marwa vs Republic*, Criminal Appeal No. 513 of 2019, *Thomas Ernest Msungu @ Nyoka Mkenya vs Republic*, Criminal Appeal No. 78 of 2012, *Frank Massawe vs Republic*, Criminal Appeal No. 302 of 2012 (both unreported). In the case of *Amos Alexander @ Marwa* (Supra), the Court of Appeal had this to say: -



"A public prosecutor is not a witness sworn to adduce evidence and cannot assume the role of a witness; he is not competent to tender exhibits because he cannot ride two horses at the same time be a prosecutor and a witness at the same time. This course of action is fatal..."

Also, in the case of ***Rukia Ali Suleiman Vs Director of Public Prosecutions***, Criminal Appeal No. 38 of 2022, (Unreported) where my fellow brother Judge of this court (G.J.Kazi J.) faced with an identical scenario, the Court stated that:

"In the instant matter, both the witness and the Public Prosecutor, in turn, prayed to tender exhibit PE1. However, the advocate for the appellant responded to the prosecution's prayer, leading to the admission of exhibit PE1. That was improper; exhibit PE1, which is the core of the charge, was not properly admitted, it cannot form part of the prosecution evidence and I will not consider it in my determination".

In the present case, the situation is very similar as both the witness and Public Prosecutor, in turn, prayed to tender exhibit PQ and D1 and the



accused person responded to the prosecution's prayer leading to admission of exhibit PQ and D1. Also, in tendering the exhibit D1, the accused was not given opportunity to challenge it. In that accord, this court cannot avoid linking these irregularities with the last ground of appeal that the case against the appellant was not proved beyond reasonable doubt. It therefore follows that, by failure to accord an opportunity to cross-examine a witness who would have tendered exhibit PQ and D1, the appellant was denied the right to challenge them. The bottom line here is that the above explained shortcomings in the reception of exhibit PQ and D1 the subject matter of the charge was flawed and occasioned injustice to the appellant. Accordingly, as proposed by above cited court decisions, I expunge the exhibit PQ and D1 from the record of prosecution's evidence. In the absence of the subject matter of the charge (exhibit PQ and D1), the charge cannot stand.

This seriously affects the prosecution case with the effect that the prosecution was unable to prove the charge against the appellant beyond doubt as complained in ground seven of appeal.



In view of the foregoing discussions, therefore, I find the appeal with merit and allow it. Consequently, I quash the conviction and set aside the sentence. The appellant **Abdalla Suku Abdalla** should be release from prison unless he is held therein for another lawful purpose.

It is accordingly ordered.

DATED at **ZANZIBAR** this 23rd day of April, 2024.



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HAJI. S. K. TETERE
JUDGE