

IN THE HIGH COURT OF ZANZIBAR

HELD AT TUNGUU

CRIMINAL CASE NO. 15 OF 2023

DIRECTOR OF PUBLIC PROSECUTION DPP

V.

YUSSUF MUHAMAD IBRAHIM ACCUSED

JUDGMENT

Date: 27th February, 2024

S. HASSAN (J)

The accused person **YUSSUF MUHAMAD IBRAHIM**, was arraigned on the 21/2/2023 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. The accused person pleaded not guilty to the charge upon arraignment.

The particulars of the offence alleged that, the accused person on the 9th October, 2022 at around 9:40am at Donge Mtambile in the Northern District B, of the Northern Region, unlawfully was found with **43 pellets** of drugs of the heroine type weigh **1.2207grams** which is contrary to the law.

On the 21st March, 2023 the Prosecution submitted the completed records of evidence and the accused was given 15 days for his defence preparation as prayed.

During the hearing of the case, the prosecution presented 5 witnesses and tendered **Khaki envelope marked as exhibit P1** and **Form A.ZDCEA 009 Analysisi report marked as exhibit P2**

During the course of hearing the Prosecution was represented by SSA Mr Shamsi Saad, while the accused person was unrepresented.

JUMA MWADINI KHATIBU (PW1), was the first witness called by prosecution to give his evidence and he stated that, he is works at ZDCEA as investigation and arrest officers and that he is a police officer who had his training at police academy and at ZDCEA offices. He went on to testify that, on the 9/10/2022 at around 9:00am they were in their normal patrol and received a tip from their informer that there is a youth dealing with drugs in Donge. At around 9:40am they arrived at Donge and manage to see the youth. They arrest the youth and identified themselves as officers from ZDCEA, the suspect was also asked to introduce himself by the name of **Yussuf Muhamad Ibrahim**. After the introduction, the accused was ask to hand over a transparent plastic which he was holding in his hand and thereafter the discovery of 43 pallets of aluminum foiled was discovered, after the pallets were open the substance alleged to be drugs was found. The suspect was caution for his offence and they left the scene of crime with the suspect and the exhibit and went back to their offices at Migombani. He further stated that during the arrest, search and discovery of 43 pallets of alleged drugs his **fellow officer Mussa Fadhil Mzee** was witnessing. Upon arriving at the office the exhibit was re counted again and received the same total number of 43 pallets while witnessed by his fellow officer and the suspect.

PW1 further stated that, he opened the case file which he gave reference no. **ZDCEA/HQ/ IR/187/2022** thereafter he put the exhibit on the khaki envelope and sealed with lakiri and the khaki envelope was given identification no. ZDCEA/HQ/IR/187/2022. At around 11:17am he handed over the exhibit to the exhibit keeper **Saada Mohamed Fum** while witnessed by his fellow officer **Mussa Fadhil Mzee** and the suspect. **PW1** went on to tender in court after identification on the marks the **exhibit P1**.

In cross examination **PW1** stated that, they do there patrols anywhere and on that particular patrol they were 3 persons who were himself, his fellow officer and driver. He further stated that, during the arrest he did not call any Sheha no any other independent witness, and that the accused was arrested at Maskani and there were

other people but ran away after they approached the maskani but managed to arrest the accused. He further stated that, he did not search the suspect but ask him to hand over what he was holding in his hand. In re examination PW1 stated that, after they arrest the suspect other people ran away.

Saada Mohamed Fum (PW2), an exhibit keeper at ZDCEA also gave her evidence and stated that on the 9/10/2022 at around 11:17am while in her office, she received from officer **Juma Mwadini** khaki envelope sealed with lakiri and had identification no. **ZDCEA/HQ/IR/187/2022**. She kept the exhibit in the cupboard which she uses alone and her have the key. On the 10/10/2022 while in her office went officer **Stefano Khamis** at around 13:00pm and gave to him a letter of request of exhibit analysis, form 018 and khaki envelope sealed with lakiri for the purpose of sending the exhibit to the government chemist laboratory for chemical analysis.

She further stated that, on the 24/10/2022 at around 14:00pm while she was in her office, officer **Stefano Khamis Meza** returned the khaki envelope which was sealed by the lakiri of government chemist with identification ZDCEA/HQ/IR/187/2022 which had the signature of the analyst. She kept the exhibit until the day it was needed in court as evidence.

In Cross examination **PW2** testified that, she performed her duties in accordance with the law and that she did not have in court any document which prove that she had kept the exhibit under her custody she stressed that, while the exhibit was under her custody she only gave it to officer Stefano for taking the same to the lab for chemical analysis.

Mussa Fadhil Mzee (PW3), was also in court to give his evidence and testified that, he is working at ZDCEA as arresting officer and that on the 9/10/2022 at around 9:00am he was in the office with his fellow officer Juma Mwadini Khatibu and he witnessed his follow officer receiving a tip through a mobile phone from the informer that there is a youth in Donge Mtambile dealing with drugs. They immediately left their office and went to Donge and arrived there at around 9:40am and manage to locate the youth standing in the road of Mahonda to Donge. He further stated that, he witnessed

his fellow officer arresting the youth and after the introduction, he witnessed his fellow officer asking the accused to hand over the bag he was holding, the bag was opened and 43 foiled plastic pallets of alleged drugs were found, the suspect was cautioned and they left the scene of crime and went back to their office, while the exhibit and the suspect were under the custody of officer Juma Mwadini. At the office, he witnessed his fellow officer re counting the pallets and got the same number as before, he further witnessed his fellow officer opened the case file against the suspect for illegal possession of alleged drugs. The rest of his testimony was as narrated by **PW1**.

In cross examination **PW3** stated that, he stated that they managed to identify the suspect by the descriptions given to them by the informer, and that they went at the scene of crime in ambush and therefore they did not have time to call any witness of Sheha. He further stated that they had a seizure certificate as required by law and at the scene of crime they were 4 officers and the suspect.

Stefano Khamis Meza (PW4) also was called to give his evidence and testified that, he works at ZDCEA as an Investigation officer and that on the 10/10/2022 at around 8:10am he received a file from his In charge concerning a case no **ZDCEA/HQ/IR/187/2022** the suspect was *Yussuf Muhamad Ibrahim* and the complainant was officer *Juma Mwadini Khatibu*. On the same day at around 1:00pm he received from officer *Saada Mohamed Fum* an exhibit keeper, a letter of analysis request, *form 018* and the exhibit which was khaki envelope sealed with lakiri and had identification *no ZDCEA/HQ/IR/187/2022* after that he went to the government chemist laboratory and arrived there at around 1:30pm and met with analyst *Mohamed Hamduni Khamis* and handed over to him a form, a letter and the exhibit. He further witnessed the analyst unsealed the exhibit and removed the transparent plastic bag containing **43 pallets** of alleged drugs. After the handing over he went back to the office and called for interview officer *Juma Mwadini Khatibu* and officer *Mussa Fadhil Mzee*. He further stated that he also interrogated the suspect who confessed to him that he was arrested with the alleged drugs.

In cross examination, **PW4** stated that during his investigation at the scene of crime he did not go with the suspect and during his investigation at the scene of crime he did not discover anything he further stated that the scene of crime was in the push.

Mohamed Hamdunu Khamis (PW5), government analyst gave his evidence and explained the manner he received the exhibit and the analysis test he conducted he went on to tender analysis report and was marked as **exhibit P2**.

In cross examination he stated that he performs his duties in accordance to the law, and went on to state that the form 018 is evidence that he received the exhibit from ZDCEA, his test confirmed the exhibit as drugs of heroine type which had color brown.

After the evidence of **PW5**, the prosecution closed its case and the court after analyzing the evidence adduced by prosecution witnesses found the prima facie case was made and the accused person was required to enter his defence in accordance with **section 216 (1) (a) (b) of the Criminal Procedure Act No. 7 of 2018**.

The accused person opted to be the sole witness for defence and gave his evidence under oath.

Yussuf Muhamad Ibrahim (DW1), gave his evidence and stated that, on the 21/2/2022 he appeared in this court charged with the offence which he denied, he stated that the evidence from prosecution witnesses is contradictory and stated that **PW1** testified that he was arrested in the street while his fellow officer **PW3** who witnessed the arrest testified that the accused was arrested near the road, **DW1** continued to testify that **PW5** who is the investigation officer testified that the scene of crime was in the bush, he went on to deny the charge and prayed to be set free.

In cross examination, he stated that it is true that he was arrested at Donge and he was alone during the arrest. He further stated that, the place where he was arrested is not far from other houses. He further stated that in Donge most people are engaged in farming and during morning most people go to their farms. He further stated that during his arrest people gathered to witness but they were told to go away because the matter did not involve them.

After cross examination of **DW1**, the accused closed his case and the matter was left in the hands of the court to decide whether based on the evidence presented, the prosecution has managed to prove its case against the accused person beyond the standard required which is beyond reasonable doubt or otherwise.

Bearing in mind the duty of prosecution to prove the charge against the accused person beyond reasonable doubt and that, an accused ought to be convicted on the strength of the prosecution case, I shall start by determine the evidence of **PW5**, a Government Analyst who discharged his duties to testify on how he conducted chemical analysis on the **exhibit P1** and arrived to the conclusion that, the alleged substance is narcotic drugs known as heroine with brown color based on the **exhibit P2**

In this case the defence side did not analytically rebutted the evidence of **PW5** nor it cast any doubt on the findings of exhibit P2. In that respect, I shall conclude this matter by making reference to **section 64 (2) of the Zanzibar Drugs Control and Enforcement Authority Act, No. 8 of 2021**, which provides as follows:

“ 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.

Furthermore, in the case of **Charo Said Kimilu v. R, Criminal Appeal No. 1 of 2015** (unreported) the Court of Appeal had this to say:

“ 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”

It is the evidence of **PW4** that, on the 10/10/2022 at around 1:30pm he took the exhibit to the Government Chemist Laboratory where he met with **PW5** and handed over to him the exhibit for chemical analysis, therefore based on the evidence on record

this court has no doubt that, the findings made by **PW5** supported by **exhibit P2** are conclusive evidence that the alleged drugs contained in the **exhibit P1** were narcotic drugs namely heroine **weighed 1.2207grams** and that evidence was not rebutted by the defence side.

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 and conclude this matter by determine the following:

1. *Whether the accused has raised any doubt on the prosecution case,*
2. *Whether the prosecution has managed to prove this case beyond reasonable doubt.*

Starting with the first issue, in his defence the accused person casted doubt in the evidence of **PW1**, **PW3** and **PW4**, the accused person raised a point that the evidence from the prosecution witnesses is contradictory and inconsistency, the witnesses are not clear on the place of his arrest each witness naming a different place.

I have gone through the evidence of **PW1** who is the arresting officer and the one who received a tip from the informer, to start with he testified that, he was with his fellow officer **PW3**, doing their normal patrol when they received a tip that there is a youth in Donge dealing with drugs. On the other side, **PW3** in his testimony stated that he was in his office at Migombani when he witnessed **PW1** receiving a mobile phone from the informer that there is a youth in Donge dealing with drugs and immediately they started a journey to Donge. Here we can establish the first contradiction between **PW1** and **PW3**, where each witness gave a different scenario on where about they were when they received a tip, *is it in the office or during a patrol?*

Another contradiction is on the area of arrest, in his testimony **PW1** during cross examination testified that he arrested the accused person in "**maskani**" while **PW3** testified that the accused was found standing in the Mahonda to Donge road where they arrested him.

Another contradiction is when **PW1** testified that during the arrest they were only 3 people, himself, **PW3** and driver, while **PW3** testified that during the arrest they were 4 officers.

At this early stage it is vividly clear that, the arresting officer **PW1** and his fellow officer **PW3** who witnessed the whole episode contradict themselves and the accused person was right to point those contradictions, having established the contradictions this court is required by law to determine whether such contradictions and discrepancy are normal or material and do not go to the root of the prosecution case or can they flop the prosecution case.

It is the view of this court before it make findings on the discrepancy and contradictions raised, the purpose of calling as witness **PW3** was to corroborate and confirm or support the evidence of **PW1** which is sufficient satisfactory and credible, and not to give validity or credence to evidence which is deficient, suspect or incredible. See the case of **Aziz Abdalla v. R, [1991] TLR 71**.

Furthermore, in the case of **DPP v. Kilbourne [1973] AC 729, 745 D** Lord Hailsham stated the following:

" If a witness testimony fails of its own inanities the question of his needing or being capable of giving corroboration does not arise"

With respect to contradictions raised by the accused person, this court has a duty to examine those contradictions and establish whether they are minor or material and whether they go to the root of the case as stated so in the case of **Mohamed Said Matula v. R, [1995] TRL 3** where the Court of Appeal held the following:

" Where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and

contradictions are only minor or whether they go to the root of the matter"

Furthermore, to determine whether the discrepancy testimony of **PW1** and that of **PW3** is material or not and whether its goes to the root of the matter, I shall make reference to the case of **Mohamed Haji v. DPP, Criminal Appeal No. 225 of 2018** (unreported) where the Court of Appeal cited the case of **Dikson Elia Nsamba Sapwata and Another v. R, in Criminal Appeal No. 92 of 2007** (unreported) at page 7 while quoting with approval the author of Sakar, the **Law of Evidence, 16th Edition, 2007** had this to say:

"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties case, material discrepancies do."

Having analyzed the evidence in record, I am of the view that the discrepancy statement between that of **PW1** and **PW3** are not normal, the discrepancies are such material and goes to the root of the matter and therefore corrode the credibility of the prosecution witnesses.

Furthermore, **PW1** and **PW3** in their evidence stated that they were tipped of by the informer about the accused, but neither of the witness has given evidence on how they managed to recognized the accused person, the witness did not inform the court that the informer was present at Donge and pointed the accused to them, the issue of recognition of the suspect in criminal cases has be discussed in numeral cases for instance, in the Kenyan case of **Kenga Chea Thoye v. R, Criminal Appeal No. 375**

of 2006 (unreported) the Court of Appeal of Kenya had this to say in respect of recognition of the suspect:

" Recognition is more satisfactory, more assuring and more reliable than identification of a stranger"

In the present case in hand, the accused person was a stranger to **PW1** and **PW3** so it was very important to lay a good foundation on how they manage to recognized the accused person who was not well described to them by their informer. Failure to lay a foundation on how the witnesses have managed to identify and recognized the accused before the arrest cast doubt on whether they arrested a right person.

Having highlighted the pot holes in prosecution evidence which cast doubts and flopped the prosecution case, it is obvious that the prosecution has failed to prove the case against the accused person beyond reasonable doubt and therefore there is no need to dwell much and try make findings on the issue of chain of custody of the exhibit, independent witness and on certificate of seizure. 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".

Therefore, since the prosecution has failed to prove the charge against the accused person **Yussuf Muhamad Ibrahim**, beyond the required standard which is beyond reasonable doubt, the only option available for this court is to do the right thing which is 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 2018**.

The accused person is immediately ordered to be released from custody unless otherwise he is held there for other lawful purposes. Furthermore, I also order **exhibit**

P1 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) 27/2/24

Dated: **27th February, 2024**

Court:

Right of Appeal is explained.