

IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT CHAKE CHAKE PEMBA

CRIMINAL CASE NO. 02/2023

DIRECTOR OF PUBLIC PROSECUTIONS (DPP) PROSECUTOR

VERSUS

NAHID NGWALI FAKI ACCUSED

JUDGMENT

27th February, 2024 & 26th March, 2025

BAKARI, J.

Nahid Ngwali Faki, a male, adult, aged 30, a Shirazi of Machomane Chake Chake Pemba (hereinafter to be referred to as the accused), has been charged in this Court with the offense of being found in possession of narcotic drugs contrary to Section 21 (1) (d) of the Zanzibar Drugs Control and Enforcement Authority Act, No. 8 of 2021, the Laws of Zanzibar (ZDCEA Act).

According to the information or charge sheet, on 19th January, 2023 at about 06:30 pm., at Machomane within the District of Chake Chake, South Region of Pemba, the accused was unlawfully found in possession of 70 pack lets (kete) of narcotic drugs of HEROIN with the weight of 1.043 grams, the act which is an offense under the law. The accused pleaded not guilty to the charge or information.

For the purpose of proving their case against the accused, the prosecution brought to the Court a total of five witnesses while the defense had one witness who is the accused himself.

In this case, the prosecution was represented by Senior State Attorney Juma A. Juma and Senor State Attorney Asiya I. Mohamed while the accused is self-represented.

The first prosecution witness was **Hussein Khamis Hussein** who testified as the prosecution's witness no. 1 and he will be called the PW1. He started his testimony by stating that, he works at Zanzibar Drugs Control and Enforcement Authority (herein to be referred to as ZDCEA) as a custodian of exhibits. He said, his testimony is about the exhibit which is a small khaki envelope fastened by a stapler and sealed with red stamp of the Chemist bearing identification number ZDCEA/HQ. P/IR/10/2023 and having writings which read exhibit register no. 28/2023, exhibit register no. 29/2023, and exhibit register no. 30/2023. He said, he received such exhibit from his fellow ZDCEA officer by the name of Daniel Philipo Sanare on 19th January, 2023 at about 7:10 pm, so as to preserve it.

The PW1 went on testifying that, he kept the exhibit up to 23rd January, 2023, whereby at about 9:50 am, his fellow officer by the name of Ibtisam Fadhil Khamis came to him and wanted to be supplied the said exhibit so as to send it to the Chemist for expert analysis. According to the PW1, the exhibit was later returned to him on 24th January, 2023 at about 9:50 am. He stated further that, when the exhibit returned to him, it had been a small khaki envelope fastened by a stapler and sealed with red stamp of the Chemist with the identification number ZDCEA/HQ.P/IR/10/2023 and it was handed over to him by his fellow ZDCEA officer one Ibtisam Fadhil Khamis. He said, on his side, he recorded it as exhibit register no. 30/2023 and then, he kept it in the exhibit locker which he is responsible and having the keys for it. The PW1 identified properly the said exhibit herein court.

Sarah Suleiman Saleh testified as the prosecution's witness no. 2 and she will be called the PW2. She stated that, she works at the Chief Government Chemist Laboratory Agency at Pemba as Chemical Analyst with the Degree in Medical laboratory in Micro Biology and immunology, and that she has 13 years working experience in that field. She went on to state that, on 23/01/2023, she had been on duty at the Laboratory at Madungu Chake Chake and, whilst there, the ZDCEA officer one Ibtisam Fadhil Khamis came to her while having the letter which requested for the analysis of the exhibit, the form no. 018 and the exhibit in question which is a small khaki envelope

stamped with the seal of the ZDCEA and marked as ZDCEA/HQ. P/IR/10/2023. She said, inside the envelope there had been a transparent plastic packet containing 70 pack lets (kete) enclosed with aluminum foil each one and inside them, there was powder suspected as narcotic drugs.

The PW2 has further told the Court that, she filled the form no. 018 with her name, her post, and work number together with the date which is 23rd January, 2023. Then she said, she took the letter and the exhibit in question and headed to the Laboratory for conducting the analysis. According to the PW2, the said analysis has two stages which are physical and chemical analysis. She said, the physical analysis which involved the process of weighing the exhibit had shown that, the exhibit or the powder sample had the weight of 1.043 grams. She added that, as to the chemical analysis, it involved color test and confirmatory test. She has told the Court that, the color test indicated that, the powder sample is heroin while the confirmatory test proved that, the sample is heroin as well.

The PW2 had gone on telling the Court that, she filled her findings in the certificate of analysis and later, she handed over the said certificate, the exhibit in question and the form 018 to the ZDCEA officer Ibtisam Fadhil Khamis. The PW2 identified the certificate of analysis herein Court and also, she has tendered the said certificate in Court where the same has been received as the prosecution's exhibit no. 1 and marked "PE1". She has also identified the form no. 018 and tendered it in court where it has been received by the Court as the prosecution's exhibit no. 2 and marked PE2. The PW2 had also identified herein Court 70 pack lets containing heroin in question and tendered them in Court where the same have been received as the prosecution's exhibit no. 3 and marked PE3. She added that, she does not know the person responsible for the heroin in question.

Daniel philipo Sanare has given his evidence as the prosecution's witness no. 3 and he will be called the PW3. He said he is the officer of the ZDCEA working in the operation center charged with the duty of arresting those persons involving themselves

with either drugs business or drugs use and that, he has two years working experience. The PW3 has told the Court that, on 19th January, 2023 at about 5:00 pm, he together with his fellow ZDCEA officer Othman Mahmoud Haji had been on patrol around Machomane areas Chake Chake Pemba. He said, in the course of the patrol, he received information from his secret informant to the effect that, in "Machomane - kwa Kamanda," behind the house of Mrs. Asha Aboud, there was a youth called Nahid Ngwali Faki who was involving himself with narcotic drug business. He said, the said informant has also informed him about the physical appearance of that youth.

After that, the PW3 stated that, they headed to Machomande kwa Kamanda and on arrival at the scene to wit behind the house of Mrs. Asha Aboud at about 6:00 pm, he the PW3 together with his fellow officer Othman Mahmoud Haji, saw the youth in question standing behind the said house. He said, they approached and then, arrested him. After that, he said, they introduced themselves to him that, they are the officers of the ZDCEA where, the youth introduced himself as Nahid Ngwali Faki. He said, they requested the youth to give cooperation in the search to be conducted for him and he responded.

The PW3 has told the Court that, when he searched the youth on his body especially on his right trousers' pocket, he found a small transparent plastic packet, and when he opened it, he saw 70 pack lets (kete) enclosed with aluminum foil each one which contained powder which they suspected as narcotic drugs. The PW3 said, after that, they cautioned the suspect about his offense of being found in possession of narcotic drugs as well as the reasons of his arrest. Then, he said, they took the suspect up to their ZDCEA office at Chake Chake. He added that, he searched the suspect at about 6:30 pm and finished it at about 6:50 pm. He said, the said search, witnessed by his fellow ZDCEA officer Mahmoud Haji.

The PW3 has informed the Court that, he is the one who took the drug exhibit in question from the scene up to to their ZDCEA office where they arrived in the office at about 7:00 pm. He said, whilst in office, he re-calculated the drugs and gotten the

same amount of 70 pack lets and he did all that things in front of the suspect and his fellow officer Mahmoud Haji. He elaborated that, in their office, there is enough light to count the exhibit. He has told the Court that, he recorded the amount of exhibit in the special form which he mentioned as form number 024. In addition to that, he said, he wrote his name and did put his signature in that form while at the same time, he wrote the name of the suspect in the form and then, the suspect did put his signature in it. Moreover, the PW3 has told the Court that, he wrote in that form the name of the witness who is the ZDCEA Officer Mahmoud Haji and he did put his signature in it as well.

The PW3 stated that, after all that processes, he opened the charge against the accused which is about the offense of being found in possession of narcotic drugs and he had given the case file, the number which is ZDCEA/HQ. P/IR/10/23. Then, he said, he took the said exhibit and did put it in the small khaki envelope and stamped it with the red seal and wrote on the envelope, an identification number which is ZDCEA/HQ. P/IR 10/2023 before handed over it to the custodian of exhibits by the name of Hussein Khamis Hussein. He said, he has handed over the said exhibit to the exhibit's keeper Hussein on the same day at about 7:10 pm, and after that, he said, he detained the suspect in the lockup. The PW3 identified herein court the following exhibits:

- i) The 70 pack lets (kete) containing heroin; and,
- ii) The form no. 024.

He has also identified the accused. The PW3 insisted saying that, he arrested the accused with 70 pack lets of heroin. Also, he said, he did not know the accused prior to the material day.

During cross examination by the accused, the PW3 stated that, the scene of the incident is residential area but when they arrested the accused, such area had no civilian witnesses. He said, even the area Sheha was not present at that area. He has also stated that, while at the scene, the accused did not sign any exhibit's form.

When re-examined by the prosecution, the PW3 stated that, they have failed to secure the attendance of the area Sheha at the scene because, his phone was not available. He added that, the accused signed the exhibit form while in ZDCEA office.

Othman Mahmoud Haji testified as the prosecution's witness no. 4 and he will be called the PW4. He said, he is the ZDCEA officer and that, on 19th January, 2023 at about 6:00 pm, he had been on patrol in the areas around Chake Chake where his fellow ZDCEA officer by the name of Daniel Philipo Sanare came to him and informed him that, on that moment, he has received a call from his secret informant, informing him that, there was a youth at "Machomane kwa Kamanda" behind the house of Mrs. Asha Aboud who is known as Nahid Ngwali who involves himself in the drug business. He said, his fellow officer went to the extent of informing him the physical appearance of that youth.

The PW4 has said, thus, they left for Machomane and reached there at the scene behind the house of Asha Aboud at about 6:30. He said, upon reaching there, they saw the said youth and at the same time, he (the PW4) witnessed his fellow officer Daniel Philipo Sanare approached the youth and then arrested him. He said, they introduced themselves to him as the officers from the ZDCEA and the youth introduced himself as Nahid Ngwali Faki. After that, he said, his fellow officer Daniel Philipo Sanare asked him to provide cooperation so as to conduct a search for him some thing which he agreed.

According to the PW4, before his fellow officer Daniel Philipo Sanare/PW3 conducted a search for the accused, he called civilians witnesses but they refused. He said, then, Mr. Daniel Sanare switched on his mobile phone's torch and searched himself first, before searching the accused where he has found with no narcotic drugs on his body.

Further, the PW4 said, in the course of the search on the accused's body, he witnessed his fellow witness Daniel Philipo Sanare fished out a transparent plastic packet from the accused's right pocket of his trouser. According to the PW4, when the PW3 Sanare opened the packet he saw the 70 pack lets (kete) enclosed with aluminum foil each one, and when the PW3 Sanare opened some of the pack lets, he saw a powder

suspected as narcotic drugs. After that, the PW4 said, the PW3 cautioned the suspect about his offense of being found in possession of narcotic drugs and then, the PW3 Sanare took the drugs exhibit together with the accused up to their ZDCEA office and reached there at about 7:00 pm.

The PW4 has told the Court that, while in office, he witnessed the PW3 verifying the exhibit and he had gotten the same amount of 70 pack lets. After that, the PW4 said, the PW3 did put the drugs exhibit in the small khaki envelope and then sealed it with the red stamp, and then marked it with the writings which reads, ZDCEA/HQ.P/IR/10/2023. Later on, the PW4 said, he witnessed the PW3 opening a case relating to the suspicion of being found in possession of narcotic drugs. The PW4 has told the Court that, at about 7:10 pm, he witnessed the PW3 handing over the drugs exhibit to the ZDCEA exhibit keeper by the name of Hussein Khamis Hussein and then detained the accused in the lockup. The PW4 has identified herein Court the drugs exhibit which are 70 pack lets of heroin and he has also, identified the accused. The PW4 has said, while at the scene, the civilian witnesses refused to attest the search because of their ignorance of the dangerous effect of narcotic drugs. He stated further that, they gave a ring to the area Sheha but he didn't pick up the call.

Cross examined by the accused, the PW4 stated that, he is not sure if the accused signed any form relating to the exhibits found with him while at the scene. He insisted that, they called the area Sheha but he didn't respond to the calls and they hadn't the phone number of the Deputy Sheha. He said, on the day of the incident, they were on patrol and in the course of the same; they got information relating to the accused's involvement in the drugs business. He said, due to the fact that, they arrested the accused in night time, then, it was not safe for them to go around the whole areas of Machomane looking for independent witnesses.

The last prosecution's witness has been **Ibtisam Fadhil Khamis** who testified as the prosecutions' witness no. 5 and she will be called the PW5. She stated that, she is the ZDCEA officer working as the investigator. She said, on 23rd January, 2023 at about

9:50 am, she had been on duty at their ZDCEA office at Kichungwani Chake. She went on to state that, whilst there, the case file having the registration number ZDCEA/HQ. P/IR 10/2023 with the suspect Nahid Ngwali Faki was assigned to her by her commanding officer so as to conduct investigation. The PW5 has told the Court that, the case was about the suspicion of being found in possession of narcotic drugs against the accused.

She proceeded to testify that, she started investigation by going to the ZDCEA exhibits keeper at about 10:50 am, where she was handed over the small khaki envelope sealed with the red stamp and marked with identification number ZDCEA/HQ. P/IR/2023 and she took the same to the Chief Government Chemist Laboratory Agency Zanzibar for expert analysis. She said, she arrived at the Laboratory at about 10:00 pm and handed over the exhibit together with the request letter for analysis to the Chemist/analyst one Sara Suleiman Saleh/PW2.

The PW5 has further told the Court that, he witnessed the Chemist/PW2 Sara opening the said envelope which contained a white transparent plastic packet and then, she opened the packet and pulled out the pack lets enclosed with aluminum foil. He said, when the Chemist opened some of the pack lets, she saw powder inside them suspected as narcotic drugs. Then he said, the Chemist closed the pack lets and returned them to its normal condition. The PW5 has gone on telling the Court that, he signed the form and the PW2 or Chemist signed the form as well and after that, he returned to his office.

The PW5 has told the Court that, whilst in office, he met the accused Nahid Faki Ngwali and made an interrogation with him about his offense where he admitted to have committed the offense in question. The PW5 said, she proceeded with the investigation by interrogating the arresting officers or witnesses namely Daniel Philipo Sanare/PW3 and Othman Mahmoud Haji/PW4. She added that, on 23rd January, 2023 at about 8:00 am, she inspected the scene of the incident which is Machomane behind the house of Mrs. Asha Aboud while being together with the arresting officer Daniel Philipo Sanare

and the accused Nahid Ngwali Faki. He said, the circumstances of the scene are that, there is a jackfruit tree and "Maskani" (people's conversation center). After that, she said, they returned to their office.

Moreover, the PW5 has told the Court that, on 24th January, 2023 at about 9:40 am, she arrived at the Chemist Laboratory to take the exhibit which is a small khaki envelope enclosed with red seal and fastened with the stapler and having the identification number ZDCEA/HQ. P/IR/10/2023 together with the certificate of analysis indicating that, the exhibit in question is narcotic drugs of heroin with the weight of 1.043 grams. She said, she arrived in the office at about 10:50 am, and handed over such exhibit to the custodian of exhibits one Hussein Khamis Hussein. The PW5 has identified herein Court the following exhibits:

- i) The form no. 018, and,
- ii) 70 pack lets of heroin.

He has also identified properly the accused.

Cross examined by the accused, the PW5 stated that, all witnesses testified for the prosecution are trustworthy. She said, when she interrogated the accused, he admitted to have committed the offense but she is not sure if he has signed his statement.

After the closure of the prosecution's case, the Court found the accused to have a case to answer in respect of the offence of being found in possession of narcotic drugs and asked him to give his defense.

When giving his defense evidence on oath as the defense witness number 1 or DW1, the DW1 in the first place denied to have committed the offense in question and denied also, to have been caught with narcotic drugs of heroin by PW3 and PW4. He said, this case is nothing but cooked and fabricated by the ZDCEA officers who are PW3 and PW4 against him.

During cross examination by the prosecution (SSA Asiya), the DW1 stated that, the prosecution's witnesses to wit PW3 Daniel Philipo Sanare and PW4 Othman Mahmoud Haji testified that, they found him with narcotic drugs of heroin some thing which is not true. He admitted that, on the material date and time on the evening time, he was present at the scene as by that time, he had been passing there to the market. He said, he was arrested while on his way to the market. The DW1 admitted in Court that, he had no quarrel with the said arresting officers to wit PW3 and PW4.

Having gone through the evidence of the prosecution and after considering in depth the accused's defense, the Court is of the opinion that, there is no dispute in this case as to whether the drugs allegedly to have been found in possession of the accused are narcotic drugs of heroin. This is because, the evidence of the Chemical Analyst Sara or PW2 together with the certificate of analysis or exhibit PE1 are evident to that effect. Apart from that, even the accused himself, did not object to the said testimony of the Analyst/PW2 who proved in Court that, the drugs are narcotic drugs of heroin with the weight of 1.043 grams. If that is the situation, then, the central points for determination in this case are:

- 1) Whether, the accused was found in possession of the narcotic drugs of heroin.
- 2) Whether, the chain of custody was proper.
- 3) Whether, the prosecution has managed to establish their case against the accused beyond reasonable doubt.

Starting with the first point as to **whether, the accused was found in possession of the narcotic drugs of heroin**, the PW3 Daniel Philipo Sanare and the PW4 Othman Mahmoud Haji have told the Court that, they have arrested the accused with narcotic drugs of heroin while the latter had been in the area of Machomane behind the house of Mrs. Asha Aboud. On this issue, the accused's argument is that, it is not true that he was not caught with heroin except that, the arresting officers PW3 and PW4 fabricated the case against him. To speak the truth, the question arises here is, how

should the PW3 and PW4 cooked the case against the accused while the accused admitted in his defense that, he had not been knowing them before the case and also, he had no prior hostility mood with them. For that reasons, one will agree with me that, PW3 and PW4 had no reasons to lie or fabricate the case against the accused. Thus, my take is that, this argument raised by the accused holds no water at all.

The argument which I can see as the valid and solid argument is that, when the accused had been in the process of cross examining the PW3 and PW4 who are the arresting officers he touched over the issue of documentation of the exhibit and independent witnesses at the scene, whereby both PW3 and PW4 admitted that, they lacked independent witnesses to witness the accused's search and seizure as well as the documentation. As to the independent witnesses, they said, they dialed the area Sheha and his Deputy but they phones were not reachable and also, other witnesses refused to attest the search and seizure.

It must be understood that, the issue of independent witnesses during search and seizure is a statutory one provided for under Section 42 (2) of the ZDCEA Act (supra) which 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."

To speak the truth, the reasons given by the PW3 and PW4 are too general and do not show the efforts they have taken to get those witnesses. The Court takes judicial notice that, Machomane is a busy town with so many houses and many people. Thus, the PW3 and PW4 were supposed to tell the Court how many houses they passed through to find the witnesses and miss or if the Sheha and his Deputy were not available, how about other members of the Sheha's Committee, did they (PW3 and PW4) communicate with

them?. In addition to that, the prosecution evidence have shown that, although, the arresting officers were on patrol on the material day and time, but they had sufficient time to find such witnesses.

Therefore, based on the reasons that, the accused search and seizure were conducted in the absence of independent witnesses and bearing in mind that, no solid or valid reasons were given for their absence, thus, it is the stand of this court that, it is doubtful as to whether the accused was caught with narcotic drugs of heroin.

Coming to the second point which relates to the **chain of custody**, I'm saying that, it is not in dispute that, there was no any documentation of the drugs exhibit at the scene of which, even the arresting officers to wit PW3 and PW4 admitted. On this issue, I'm saying that, it is a trite law that, chain of custody is established where there is a proper documentation of the chronology of events in the handling of exhibit from seizure, custody, control, transfer till tendering in Court at the trial so as to prove that, nobody else could have accessed the exhibit in question, [see the cases a of **Paulo Maduka and Four Others v. R, Cr. Appeal No. 110 of 2007 (CAT at Dodoma)**, **Jackson John v. Republic, Cr. Appeal No. 515, of 2015 (CAT at Tabora)**, **Abas Kondo Gede v, R, Cr. Appeal No. 472 of 2017, Makoye Samwel@ Kashinje and Kashindye Bundala v. R, Criminal Appeal No. 32 of 2014** (all unreported)].

All the same, documentation of the exhibit has also been emphasized in Section 48(g) of the ZDCEA Act (supra) which provides:

"48: In exercising of powers conferred under section 41(1) of this Act, the Commissioner General or an authorized officer shall:

*(g) **record and issue a receipt** for an article or thing seized."*[emphasis added].

In the same vein, it must be understood that, although documentation of exhibits is a creature of both case laws and statutes, but in other hand, I admit that, the law allows the chain of custody to be proved by oral evidence of witnesses. For instance, in **DPP**

v. Mussa Khatib Sembe, Criminal Appeal No. 130 of 2021 (CAT) at Tanga (Tanzlii), it was held that:

"Chain of custody can be established by oral account of witnesses as we have held in our previous decisions". [Emphasis added].

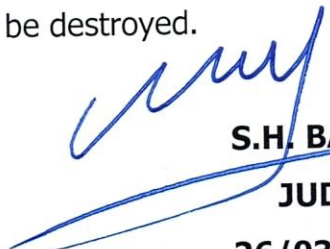
Thus, from the basis of the above cited case of **DPP v. Mussa Khatib Sembe** (supra), the question which we are supposed to ask ourselves is whether the oral evidences of the prosecution witnesses establish the chain of custody in this case. When this matter of chain of custody was discussed in the case of **Mussa Khatib Sembe's case** (supra), the Court had this to say:

*"...in the instant case, the chain of custody was broken in the very beginning when the respondent was searched and alleged items seized **in the absence of an independent witness**. It is initial stage of the process which would have set in motion the chain of custody if it was done to the dictates of the law. Therefore, even if the exhibit was properly handled when it left to the hands of PW4, the exercise lacked credibility because it was doubtful that exhibits P4 (a) and (b) was searched and seized from the appellant."*

On the basis of the foregoing cases and provisions of the law, since in the instant case, there is no dispute that, there was no any documentation of the drug exhibit at the scene coupled with the fact that, the accused was searched and seized in the absence of independent witnesses, then, it is the opinion of this Court that, the chain of custody was broken and it was not proper.

In relation to the last point which is to the effect that, **whether, the prosecution has managed to establish their case against the accused beyond reasonable**

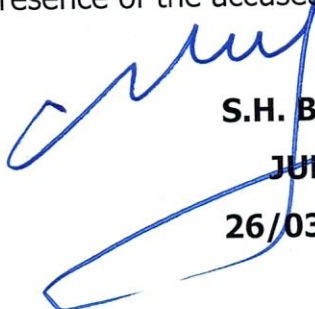
doubt, the Court is of the opinion that, the cumulative effect of all that shortcomings to wit the absence of independent witnesses and documentation of the exhibit in the scene, have tempted the Court to decide that, the prosecution has failed to prove their case against the accused beyond reasonable doubt. Thus, on that basis, I have no choice than to say that, the accused Nahid Ngwali Faki is found not guilty of the offense of possession of narcotic drugs of heroin contrary to Section 21(1)(d) of the ZDCEA Act No. 8/2021 as charged, and is he is hereby acquitted and be set at liberty forthwith as per Section 290(3) of the Act No. 7/2018. The drug exhibit (70 pack lets/kete of heroin) is ordered to be destroyed.



S.H. BAKARI
JUDGE
26/03/2025



The judgment delivered this 26/03/2025 in the presence of SSA Juma A. Juma for the DPP and also in the presence of the accused. The right of appeal explained.



S.H. BAKARI
JUDGE
26/03/2025

