IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: KOROSSO, J.A., MDEMU, J.A And MLACHA, J.A.)

CRIMINAL APPEAL NO. 686 OF 2023

FUMU ALI MAKAME.....1ST APPELLANT

KHERI MAKAME KOMBO.....2ND APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

(Appeal from the Judgment of the Regional Court of Zanzibar with Extended Jurisdiction at Chake Chake)

(Juma, RM Ext. Jur.)

dated the 21st day of November, 2022

in

Criminal Case No. 7 of 2022

.....

JUDGMENT OF THE COURT

24th April & 6th May, 2024

MDEMU, J.A.:

The appellants herein are challenging the conviction and sentence of the Regional Court of Zanzibar in the exercise of its Extended Jurisdiction (the Regional Court) sitting at Chake Chake, Pemba in Criminal Case No. 7 of 2022. Exercising its original extended jurisdiction, the Regional Court tried, convicted and ultimately sentenced the two appellants to forty (40) years in Offenders' Education Centre (Chuo cha Mafunzo) each for possession of cannabis contrary to section 21 (1) (d)

of the Zanzibar Drugs Control and Enforcement Authority Act No. 8 of 2021 (the Drugs Control Act).

It was alleged in the particulars of offence that, on the 23rd April, 2022 at about 2.30 pm at Mahuduthi Kengeja area, Mkoani District in Pemba, the appellants were found in possession of narcotic drugs to wit; four bundles of cannabis and one hundred cannabis twists weighing 992 grams.

The background of this appeal as we appraise from the record is that; during the fateful day, PW3 Salum Ali Khalid, an officer from Zanzibar Drugs Control and Enforcement Authority (the ZADCEA) received intelligence information from an informer that the appellants are trafficking in cannabis at Kengeja Mahuduthi area. They thus had to lay a trap. Lailat Mshamu Said (PW5) and other officers of ZADCEA went earlier to the scene or crime in order to apprehend the appellants. It was then the turn of the appellants and at about 8.30 pm the same day, they also showed up there. The 1st appellant carried with him a mixed colored bag (commonly referred to as "kipolo") in his right hand whereas the second appellant had a-lightened cellular phone torch which then aided PW3 and his companion to identify the appellants. They thereafter apprehended them and in the course of search, four bundles of cannabis and one

hundred cannabis twists all weighing 992 grams packed in plastic materials and wrapped using newspapers were retrieved. Dry cannabis leaves were also found in that mixed coloured bag.

The appellants together with the seized cannabis were taken to ZAEDCA offices. In the latter, PW3 sealed the said cannabis in a khaki envelope and labelled it ZDCEA/HQ. P/1R/15/2022 and handed it over to Ibrahim Khamis Juma (PW2) for custody. The said envelope which was tendered as exhibit PE2, was thereafter handed over to PW1 one Seif Ali Hamad by Mohamed Khalfan Omar (PW4) for forensic examination in which, it was confirmed that the content thereof in exhibit PE2 was cannabis weighing 992 grams. That besides, the appellants denied taking part in the incident and also each fronted the defence of *alibi* in total resistance towards the incident, as such, denied to have been arrested in the manner stated by the prosecution witnesses. Nonetheless, as said, they were convicted and accordingly each sentenced to serve forty (40) years in Offender's Education centre (Chuo cha Mafunzo).

Aggrieved by such findings of the Regional Court, the appellants preferred the instant appeal each fronting six (6) grounds of complaint, thus making a total of twelve (12) grounds. Our scrutiny in their totality, the said grounds of appeal are condensed to the following points of

grievances: **One**, the prosecution case was not proved. In this one, we will also direct our focus on the complained contradiction in the prosecution witnesses. **Two**, want of independent witnesses in the prosecution case and **three**, the appellants' defence of *alibi* was not considered.

The appeal came before us for hearing on 24th April, 2024 in which the two appellants appeared in person, unrepresented, whereas Messrs. Mohamed Salehe Iddi and Ali Amour Makame both learned Principal State Attorneys and Ilhan Sultan Malik and Raghida Said Abdalla, both learned Senior State Attorneys teamed up for the respondent Director of Public Prosecutions (the DPP).

At the commencement, the appellants opted first to hear from the respondent DPP and would follow thereafter to argue their grounds of appeal. The respondent DPP resisted the appeal. Beginning with the fronted defence of *alibi* by both appellants, Ms. Malik, learned Senior State Attorney submitted by making reference to page 98 of the record of appeal that, generally, the defence case was considered. Specific to the *alibi* of the appellants, she argued that, the trial court did not take into account that defence.

On their part, the appellants reiterated what is in their defence case that they were not arrested at the crime scene. The first appellant in particular stated to have been arrested on 19th May, 2022 while at home where he was nursing his sick father. On his part, the second appellant elected to have his arrest on 17th April, 2022 along the road while driving "chombo" (in Zanzibar "chombo" have the meaning of a car or motorcycle).

Having heard the appellants and the learned counsel in this ground of complaint, we are in all fours with the appellants and the team of learned State Attorneys that the appellants' *alibi* was not considered by the trial court. Reasons for not doing so features at page 98 through 99 of the record of appeal in the following version:

> *"Hivyo kwa utetezi huu washitakiwa wanajaribu kuonyesha kwamba siku ya tarehe 23/04/2022 wao hawakuwepo huko mahudhuthi Kengeja kwani kwa tarehe hiyo wao walikuwepo kituo cha polisi Chake Chake. Katika hiii,* ***washtakiwa hawakufuata utaratibu wa kisheria kwa kushindwa kutoa notice ya kutokuwepo eneo la tukio siku hiyo*** *(notice of* ***alibi****). Na kwa hii ni kwa mujibu wa kifungu cha 190 (1) cha Sheria Na. 7 ya mwaka 2018 ambacho kinawataka washtakiwa kutoa indhari ya kwamba siku hiyo*

*washtakiwa hawakuwepo na watatoa utetezi wa kutokuwepo...kwa mujibu wa kifungu hicho....washtakiwa walitakiwa kutoa taarifa mapema kabla ya kesi kuanza kusikilizwa...**Mahakama, utetezi huu haiwezi kuzingatia** na hii ni kwa mujibu wa kesi mbalimbali kama vile kesi ya **Kubezya John v. the Republic, Criminal Appeal No. 488 of 2015** (unreported) ambayo imeeleza kwamba, ikiwa mshatakiwa/washtakiwa watatoa ushahidi bila ya kutoa notisi ya **alibi,** basi Mahakama ushahidi huo haitauzingatia."* [emphasis supplied]

We have translated the above extract from Swahili to English language as hereunder:

*In that defence, the appellants are trying to indicate that on 23rd April, 2022 they were at Chake Chake Police Station and not at Mahudhuthi Kengeja. **However, they have failed to file the notice of alibi** as required under section 190 (1) of Act No.7 of 2018 such that, they will rely on that defence. According to that section, the notice was to be furnished before their trial commenced. On that note, **the court may not take into account the defence of alibi** as stated in various decisions, for instance in **Kubenzya John v. the Republic,** Criminal Appeal No.488 of 2015*

(unreported) which states that, where evidence of alibi is staged by the accused without having first issued the notice of alibi, the court will not base on that evidence.

The question which follows on our part is whether, the learned trial Resident Magistrate with extended jurisdiction properly took the letters of section 190 (1) of the Criminal Procedure Act No.7 of 2018 of the Laws of Zanzibar (the CPA-ZNZ). Actually, what we entirely share with in the thinking of the trial court regarding the defence of *alibi* is on the requirement of filing the notice of *alibi* prior to the commencement of the case or furnishing the particulars of the *alibi* before closure of the prosecution case. Where this remain the trite law, it was odd in this case for the appellants to front their *alibi* during their defence ignoring that mandatory legal requirement. However, that notwithstanding, we are alive that, the trial court may not casually dismiss that defence of *alibi*, as was in this case. In our considered view, the duty of the trial court under the circumstances where neither prior notice of *aiibi* was given nor particulars thereof furnished to the prosecution before closure of their case was stated in **Mwita Mhere & Ibrahim Mhere v. Republic** [2005] TLR 107 that:

*"Where the defence of **alibi** is given after the prosecution has closed its case, and without any*

prior notice that such a defence would be relied upon, at least three things are important under the provisions of s. 194 (6) of the CPA: (a) the trial court is not authorized by the provision to treat the defence of ***alibi*** *like it was never made; (b) the trial court has to take cognizance of that defence, and (c) the court may exercise its discretion to accord no weight to the defence."*

Section 194 (6) of the Criminal Procedure Act, Cap. 20 RE 2022 interpreted by the Court in **Mwita Mhere & Ibrahim Mhere** (supra) is in *parimatiria* with section 190 of the CPA-ZNZ, being the subject under discussion. We are confident therefore that, the trial court abdicated its responsibility in dealing with the defence of *alibi*. We thus find merit in this ground of complaint to the extent that the trial court erred in not dealing with the defence of *alibi* fronted by the appellants simply because the provisions of section 190 (1) of CPA-ZNZ stood under violation by the appellants. His duty was to take into account that defence and use his discretion to accord no wait to it. See also in **Lusanbanya Siyantemi v. Republic** [1980] TLR 275 and **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39.

We now turn to the ground of complaint relating to want of independent witnesses in the prosecution case. The main complaints of

the appellant are in twofold. **One**, that the informer was not called in evidence and **two** is in respect of the act of the prosecution to parade in evidence witnesses from authoritative departments, that is, from the Chief Government Chemists and also officers from ZADCEA. In their grounds of complaint, witnesses such as "sheha" or others, besides ZADCEA officials should have been called to testify.

Responding to this ground of complaint, Mr. Makame, learned Principal State Attorney argued that under section 141 of the Evidence Act, No. 9 of 2016, an informer may not be called in evidence save where he took part in arrest or was at the crime scene. In the instant appeal, Mr. Makame submitted, the informer never participated in the arrest of the appellants as his duty ended in availing intelligence information that led to the arrest of the appellants. He cited to us the case of **George Lazaro Ogur v. Republic,** Criminal Appeal No.69 of 2020 (unreported) to bolster his assertion.

Elaborating on the second component of the complaint regarding independent witnesses, the learned Principal State Attorney conceded that in the instant appeal, no any independent witness was called in evidence besides those from the Chief Government Chemists and ZADCEA officials. In this one, we note to be undisputed that none out of the five

prosecution witnesses assembled in the prosecution case was independent of the Government machinery. PW1 as we said, is from the Chief Government Chemist and took part in investigation by certifying that what was impounded was cannabis. PW2, PW3, PW4 and PW5 on the other hand, are officials of ZADCEA. To the learned Principal State Attorney, this is not a problem as he thought the question would be whether the appellants were prejudiced, which, in his argument, they were not. He continued to submit that, in the planned trap, first, the appellants were arrested, searched at night in a place inhabitable by anyone such that, it was unrealistic to have any independent witness to witness the incident.

The second reason submitted was associated with section 42(1) of the Drugs Enforcement Act which permits the Commissioner General, in exercise of his powers of arrest and seizure to effect search without warrant. In this one, the learned Principal State Attorney referred us to the case of **Jason Pascal & Another v. Republic,** Criminal Appeal No. 615 of 2020 (unreported) in which wildlife officers, acting on information regarding persons dealing in government trophies at night and in the forest, arrested and searched without the presence of any independent witness. The Court blessed that move, Mr. Makame added.

In resolving the issue of independent witnesses in matters relating to search and seizure, we note that, the need for having an independent witness in conducting search and seizure is important because such a witness is able to provide independent evidence. See in **Jibril Okash Ahmed v Republic**, Criminal Appeal No. 331 of 2017 (unreported). The Court in **Jibril's** (supra) case went on to state that, for that requirement to be absolute, it must be backed by law. In the instant appeal, as conceded by the respondent DPP, there is neither a search warrant nor a seizure certificate tendered by the prosecution side concerning the impounded cannabis. We will resume to this later more so because, the appellants' complaint is not pegged on either search warrant or seizure certificate. Their complaint hinges mainly on want of independent witnesses during search and seizure.

To this end, we are unable to associate with the respondent's team of State Attorneys regarding what prevented them to secure independent witnesses in the course of organizing a trap and subsequent to the search and seizure. We have the following observation: **One**, since what led to the arrest and ultimately impounding the alleged cannabis was intelligence information from undisclosed informer, reasons provided for not having independent witness founded on section 42(1) of the Drugs

Enforcement Act are unfounded. We are saying so because the seizure was only known to an undisclosed informer and PW3. In our view, there would be nothing to conceal, or to be destroyed in respect of the arrest of the appellant or the impounded cannabis within the meaning of section 42 (1). **Two**, the search was not an emergence one. **Three,** there was ample time to organize and arrange availability of independent witnesses from when the informer delivered information to PW3 in the evening of 23rd April, 2022 to the arrest of the appellant at almost about 8.30 pm. **Four**, the evidence that the appellants were arrested in a place where there are no residential houses is wanting. The evidence on record suggest to the contrary. At page 28 of the record of appeal, what PW3 testified is that the appellants were apprehended in a place where there was a road, cloves, banana plant and *kibanda cha maji* (a water hut). As it is, the witness never testified that there were no residential houses. In our view, mentioning a road, cloves, banana plant and *kibanda cha maji* (a water hut) cannot be interpreted that the area had no residential houses. We stand to hold such allegation as an afterthought.

Finally, regarding independent witnesses, the respondent DPP argued and urged us to hold that the appellants were not prejudiced. With respect, the circumstances of this case do not permit the invitation in the

affirmative. We said in **Jibril Okash Ahmed** (supra) that independent witnesses in conducting search are important because such witnesses are able to provide independent evidence. It was important under the circumstances to have independent witnesses in the search conducted to the appellants in this case because the appellants not only denied taking part in the commission of the offence but also controverted to have been arrested at the crime scene as alleged by the prosecution. In essence, this was the gist and the import of their *alibi* fronted and they had no duty whatsoever to prove that *alibi*. See in **Sijali Juma Kocha v. Republic** [1994] TLR 206. The prosecution thus had an obligation in the course of conducting search to the appellants herein to have independent witnesses.

As to the complaint relating to summoning the informer in the trial of the appellants, we have two concerns. **First**, as observed by the team of State Attorneys appeared before us, there is no evidence regarding involvement of that informer in the arrest of the appellants nor is there any evidence of his presence at the crime scene as to require him to possess any material fact in proving the prosecution case at trial. See also in **George Lazaro Ogur** (supra).

Second, by and large, in terms of section 141 (1) of the Evidence Act No. 9 of 2016 of the Laws of Zanzibar, the prosecution is not compelled to state where certain information in respect of the commission of the offence may be obtained. For clarity, it is stated this way:

> *"141 (1) A magistrate, prosecutor, investigator or police officer shall not be compelled to say whence he got any information as to the commission of any offence and revenue officer shall not be compelled to say whence, he got any information as to the commission of any offence against the public revenue."*

We thus find no merit in the entire complaint to have the informer in evidence, and accordingly, dismiss it.

Last is whether the prosecution case was proved beyond reasonable doubt. In the foregoing analysis, particularly on the complained *alibi* and the need to have independent witnesses, we specifically pointed out that the evidence of the prosecution in circumstances where the appellants raised the defence of *alibi*, as in this case, demands presence of independent witnesses to corroborate the story of the five prosecution witnesses.

This being an offence of possession of cannabis in the circumstances where dealers and their whereabout was known, the next

question is whether it may be proved without evidence of search as required by law. As conceded by Mr. Iddi, learned Principal State Attorney, search conducted to the appellants was not witnessed by any independent witnesses. In **Malik Hassani Suleiman v. S.M.Z.** [2005] TLR 236 it was held that:

> *"In executing a search warrant under s. 114 (1) & (2) of the Criminal Procedure Decree, Chapter 14 of the Laws of Zanzibar, the following conditions are mandatory: one,* ***the search must be witnessed by two or more respectable inhabitants of the locality; and two, a list of things seized in the search must be prepared and signed by the witness.*** *In the instant case, the search was irregular for being witnessed, and the list signed by only one witness."* [emphasis ours]

In the above case, the search was declared irregular because only one inhabitant witness of the locality where the thing searched who witnessed. In the instant appeal where even documentation regarding what was searched is lacking and no any independent witness who witnessed the said search, we find it doubtful if at all there was any search conducted. The end of all these conclude to one legal point that, the prosecution case was not proved beyond reasonable doubt.

Its consequence follows that, we allow the appeal forthwith. The conviction and sentence meted out to the appellants is thus quashed and set aside. We accordingly order their release, else held for some other lawful causes.

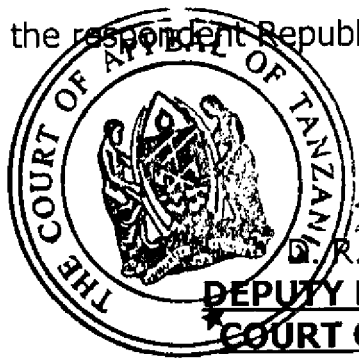
DATED at **ZANZIBAR** this 4th day of May, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of May, 2024 in the presence of the appellants in person and Mr. Ali Yussuf Ali learned Principal State Attorney for the respondent Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL