

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 359 OF 2019

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

DOREEN JOHN MLEMBA..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania (at Dar es Salaam)

(Mrango, J.)

Dated the 14th day of August, 2019

in

Criminal Sessions Case No. 12 of 2018

.....

JUDGMENT OF THE COURT

17th August & 14th September 2021

GALEBA, J.A.:

Doreen John Mlemba, the respondent in this appeal, was charged with the offence of trafficking in narcotic drugs contrary to section 16(1)(b) of the Drugs and Prevention of Illicit Trafficking in Drugs Act, [Cap 95 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, No. 6 of 2012, now repealed. The narcotic drugs subject of the proceedings in the High Court, according to the information, were *Heroin Hydrochloride* or *Diacetylmorphine Hydrochloride* weighing 35,205.66 grams valued at TZS. 1,408,346,400/=. The respondent was prosecuted before the High Court

of Tanzania at Dar es Salaam and at the end of the trial, she was acquitted of the charge, for the case against her, according to the trial court, was not proved beyond reasonable doubt. That decision aggrieved the appellant hence the instant appeal.

The brief facts relevant to this appeal may be stated that, by a lease dated 22nd October 2014 (exhibit P5), Professor Feetham Philipo Banyikwa (PW6) leased to the respondent his house located at Plot No. 346 Block 'F' Tegeta in Dar es salaam (the house) for a term of six (6) months lapsing on 21st April 2015. As consideration for enjoyment of the tenancy, the respondent paid the full rent of Tanzania Shillings Three Million Nine Hundred Thousand (TZS. 3,900,000.00) for the whole term of the lease, whereupon PW6 handed over the keys to the respondent.

About a week later, on 31st October 2014, Assistant Inspector Brown Mdeme (PW2) a police officer attached to the Anti-Drug Unit (ADU) in Dar es salaam was informed by his supervisor SSP Salimini Salimo (PW9) that there was a house in Tegeta occupied by foreigners from Nigeria and Pakistan in collaboration with a Tanzanian lady, who were dealing in narcotic drugs. PW9 further ordered PW2, Sgt Wamba and PC Emmanuel in company of the informer to go to the suspected destination, Tegeta, a peri urban suburb of Dar es salaam city, in order to arrest the suspects and impound any narcotic drugs, if found. In the

process of planning the exercise, PW9 requested for extra police personnel from Kinondoni and started off to Tegeta. When they got to the targeted house they knocked at gate of the outer fencing wall, but it seemed like there was no one inside. PW2 who was instrumental in the operation, went to the neighbouring house and got hold of a neighbour, called George Mbeyela who informed PW2 and others around that a few days previous, he had spotted a person at the premises who identified himself as a foreigner from West Africa and that he was residing in the house with his Tanzanian wife. George Mbeyela told PW2 further that the owner of the house was PW6 who was instantly called and made appearance shortly in company of Ibrahim Juma Issa (PW7), a broker who found PW6 a tenant (the respondent) for the house.

Before the search could start, they looked for a local street authority leader called Morice Mluge Katemba, who, too joined the team. PW6 called the respondent on her mobile phone, but she told him that she was at Iringa and would be in Dar es salaam after two days, at the earliest. Until this time, there still did not seem to be anybody on the other side of the fence, in the compound. A decision was made and one of the police officers jumped over the fence and opened the rear gate of the fence from inside to make way for the rest to get in the compound. In the compound still there was nobody. A knock on the door of the house

returned no signs indicating a likelihood of there being any person in the house. Further efforts were to be made in order to achieve entry in the house. They looked for a carpenter from the neighbourhood called Hassani who removed one piece of wood from the door joining the garage to the main house to create space for passage by the police. After the hole was made in the door, PW2 jumped through it and got in the main house. He was then able to open the main door leading to the living room from inside. PW6, PW7, PW9, Morice Mluge Katemba and Hassani, all entered through the main door.

Then the search started. It was being physically carried out by PW2. He started from the kitchen, the store and then the sitting room but they found nothing suspicious from the three places. As the doors to two of the rooms were not locked, they proceeded to the first bed room where, like in the previous places, they did not get anything suspected to be narcotic drugs. In the second bedroom they found a new mattress and two pillows but still no drugs. In the two rooms searched thus far, keys would be found in the door lock, loose and not locked.

PW2 headed to the third bedroom but the door to it was tight locked and there were no keys in the door unlike for the other rooms. To be able to enter the room, the carpenter had to be called to aid. He removed one wood compartment at the upper part of the door and PW2

jumped into the third bed room, just like he had done when he was getting into the house from the car park.

In this room, the third room, there was a wardrobe with two large bags, one was black and another, greyish. He then saw a lighter, a weighing scale, two lazer blades, one candle, many nylon bags and a sealing machine. When PW2 was carrying out a search he was alone in the room, but PW9 and a few other witnesses were in the corridors in the house, whereas others were outside watching what PW2 was doing through aluminium fitted glass windows. All the items that were recovered from the third room were delivered and handed over to and were received by PW9 through the opening in the door that was created by the carpenter and through which PW2 had got into the room. It was also alleged that at the time they were getting in, no one had any item in the nature of anything that was recovered from the house.

After receiving the items recovered from the closed bedroom, PW9 took them to the sitting room where he unzipped the black bag and found within it twenty-two (22) packets of powdery substances and fourteen (14) similar packets in the grey bag the total of which was thirty-six (36) packets (Exhibit P2). The packets were suspected to be narcotic drugs. PW9 issued a certificate of seizure (Exhibit P6) which was signed by

himself, PW6, PW7 and one Morice Mluge Katemba, the local street leader.

PW9 took all items that were recovered including the substances suspected to be narcotic drugs and handed them over to SP Neema Andrew Mwakagenda (PW5), an exhibits keeper and police officer at ADU Kilwa Road in Dar es Salaam. She entered the suspicious substances in the exhibits register and opened case file No. CD/IR/4130/2014. Thereafter she locked the bags containing the thirty-six (36) packets in the exhibits room.

On 2nd November 2014, in the presence of Zainabu Dua Maulana (PW4), SACP Godfrey Nzowa, Chuks Sylvester Agbazuo, Walayat Khan, Emeka Merit Nwachukwu and Eko Tony Okafor, PW5 sealed the suspected narcotic drugs into two boxes, "A" with twenty-two (22) packets and "A1" with fourteen (14) packets and recorded case No. CD/IR/4130/2014 on each of the boxes.

On 3rd November 2014, in the presence of PW9, Inspector Makole and DC Emmanuel, PW5 took the above boxes containing all the packets of substances suspected to be narcotic drugs to the Chief Government Chemist Office and handed them over to Elias Zakaria Mulima, (PW1) who tested them and found out that indeed the substances contained in the packets were *heroin hydrochloride*. He prepared a report which was

tendered as exhibit P1. Thereafter PW1 delivered back the boxes to PW5 together with P1, who kept the two boxes containing the confirmed narcotic drugs in the exhibits room and informed SACP Nzowa of the results of the tests. On 14th September 2015, Kenneth James Kasseke (PW3) weighed the drugs and found them with 35,205.66 grams in weight with a financial value of TZS 1,408,346,400/=. He then prepared a certificate of value and tendered it as exhibit P4. The drugs were later tendered in court by PW1 and were marked as exhibit P2 as indicated above.

Based on the fact that the respondent had, a few days previous, taken possession of the house from which the drugs were recovered, she was charged with trafficking in the narcotic drugs as earlier indicated. In defence, she stated that although the lease was in her name, the actual occupier of the house was her boyfriend's brother called Chuks Sylvester Agbazuo who could not sign the lease on account of being a foreigner. She therefore denied not only knowledge of the drugs, but also the control of the leased premises from which the drugs were retrieved.

As indicated above, at the end of the trial, the High Court made a finding that the prosecution failed to prove the case beyond reasonable doubt and acquitted the respondent. The appellant was aggrieved by the acquittal hence this appeal in which she is seeking to impeach the

decision of the High Court. To that end, the appellant predicated this appeal on four (4) grounds.

At the hearing of the appeal, the appellant had joint services of Mr. Candid Nasua assisted by Ms. Tully Helela both learned State Attorneys, whereas the respondent was represented by Mr. Nehemiah Nkoko in company of Mr. Abdul Azizi, both learned advocates. In trying to narrow down the complaint of the appellant in this appeal, Mr. Nasua abandoned the first and second grounds of appeal such that he retained only the third and fourth grounds of appeal whose substance was that:

"3. That Honourable Judge erred in law and fact by holding that the prosecution case was not proved beyond reasonable doubt.

4. The trial Judge erred in law and fact by holding that the house in which the drugs were retrieved was a free entry while the contract was entered by the accused Doreen John Mlemba."

Arguing the two grounds, which he did at the same time, Mr. Nasua contended that the High Court erred in finding the respondent not guilty of the charge because at the time the drugs were retrieved from the house, she was the only person known to have been in control of the house. He added that when the search was about to be mounted, she was called by PW6 and said that she was at Iringa but she did not

disclose the fact that she was not in control or in occupancy of the house. He insisted that when she was called while at Iringa, her first reaction to the caller was supposed to be that she was not the one occupying the house. Mr. Nasua dismissed allegations of the house being in control of a third party, but the respondent herself. Citing the cases of **Yanga Omari Yanga v. R**, Criminal Appeal No. 132 of 2021 and **Song Lei v. DPP** and **DPP v. Xiao Shaodan, Cheng Jianlin and Hu Liang**, Consolidated Criminal Appeal No. 16A of 2016 and 16 of 2017 (both unreported) and **Nurdin Akasha alias Habab v. R**, [1995] TLR 227, Mr. Nasua moved the Court to hold that the respondent was in constructive possession of the house. As for the search having been carried out without having a search warrant in place, Mr. Nasua admitted that indeed there was no such warrant although the search was not an emergency search, as there were plans carried out before the police team could be despatched to the scene of the crime.

To conclude his submission, Mr. Nasua prayed that the High Court decision be set aside, the respondent be found guilty and convicted of trafficking in narcotic drugs as charged at the High Court and an appropriate sentence provided by law be imposed on her.

In reply, Mr. Nkoko submitted that although the appellant executed the lease, the person who was in control of the house was Chuks

Sylvester Agbazuo for whom the respondent had procured the lease. To justify that position he argued that, **firstly**, one of the neighbours, George Mbeyela, told PW2 that a few days before the search, he had seen a male person carrying a new mattress to the house. **Secondly**, on the day that rent was paid, the person who gave the respondent money to pay it was a certain man although the lease was in the name of the respondent. **Thirdly**, there were two houses which were searched on 31st October 2014 and nothing was found in the respondent's house at Tegeta Nyaishozi and the house which was found with the narcotic drugs is located at Tegeta Ununio. **Fourthly**, that some witnesses like a policeman called Wamba, Morice Mluge Katemba who was an independent witness and George Mbeyela, a neighbour, were not called to testify. He argued that exhibits P1 and P5 were not read in court so they need to be expunged from the record.

Mr. Nkoko further contended that, the search was unlawful as the respondent did not sign the seizure certificate and that what was found in the house could have been planted in there.

The final point Mr. Nkoko made, which in our view was a serious point of law, was that the search which was conducted by PW2 was illegal because there was no search warrant issued to give him mandate to carry out the search as required by law citing the case of **Shabani**

Said Kindamba v. R, Criminal Appeal No. 390 of 2019 (unreported). He submitted that because of that anomaly, at the High Court the case was not proved beyond reasonable doubt. Coupled with other anomalies cited, he moved the Court to dismiss the appeal.

In rejoinder, Mr. Nasua admitted that exhibits P1 and P5 need to be expunged as submitted by Mr. Nkoko, although he was quick to add that even if the same were to be expunged, the remaining substance of the evidence would still be sufficient to ground a valid conviction. As for the search, he admitted that the same was carried out without a search warrant.

With the advantage of the above background and commendable submissions of counsel as summarized above, we are now in position to approach resolution of this appeal. The two issues for determination in the context of the submissions by learned counsel are, **one** whether the prosecution proved beyond reasonable doubt that the house from which the narcotic drugs were recovered was under control or possession of the respondent, actual or constructive. **Two**, whether the case was proved beyond reasonable doubt against the respondent at the High Court, although the search was carried out without a search warrant.

As the second point, questions the legality of the due process of law in recovery of the alleged narcotic drugs, we must start with that one.

Messrs Nasua and Nkoko were in agreement that the search was carried out without warrant. Whereas Mr. Nasua provided no way forward following the omission, Mr. Nkoko submitted that, that omission constituted a serious breach of law and when appropriately considered, the resultant conclusion in law, is that the prosecution in the High Court, failed to prove the case beyond reasonable doubt.

It is our proposal that we review the law relating to search and seizure with particular interest on the requirement of a search warrant. The law, in our view, is, for the purposes of this appeal, section 38(1) of the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA) read together with paragraphs 1(a), (b) and (c) and 2(a) and (d) of Police General Order (PGO) No. 226. Section 38(1) of the CPA provides as follows:

"38 -(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place-

(a) anything with respect to which an offence has been committed;

(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the

purpose of committing an offence, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property,

*he **may search or issue a written authority to any police officer** under him to search the building, vessel, carriage, box, receptacle or place as the case may be."*

[Emphasis added].

On the other hand, PGO No. 226 paragraphs 1(a), (b) and (c) and 2(a) provide to the following effect:

"1-The entry and search of premises shall only be effected, either: -

*(a) **on the authority of a warrant of search; or***

(b) in exercise of specific powers conferred by law on certain Police Officers to enter and search without warrant.

*(c) **Under no circumstances may police enter private premises unless they either hold a warrant or are empowered to enter under specific authority contained in the various laws of Tanzania.***

2. (a) Whenever an O/C (Officer Incharge) Station, O/C. C.I.D. [Officer In Charge Criminal Investigation of the District], Unit or investigating officer considers it

*necessary to enter private premises in order to take possession of any article or thing by which, or in respect of which, an offence has been committed, or anything which is necessary to the conduct of an investigation into any offence, **he shall make application to a Court for a warrant of search under Section 38 of the Criminal Procedure Act, Cap. 20 R.E. 2002. The person named in the warrant will conduct the search.***

[Emphasis added]

In other words, all things being equal, for a search into private premises to be a lawful search, it must be conducted by either an officer in charge of a police station or another police officer with a search warrant as per the provisions of section 38(1) of the CPA and PGO No. 226 paragraphs 2(a) quoted above.

In our view, the meticulous controls provided for under the CPA and a clear prohibition of search without warrant in the PGO is to provide safeguards against unchecked abuse by investigatory agencies seeking to protect individual citizens' rights to privacy and dignity enshrined in Article 16 of the Constitution of the United Republic of Tanzania. It is also an attempt to ensure that unscrupulous officers charged with the mandate to investigate crimes do not plant items relating to criminal acts in peoples'

private premises in fulfilling their undisclosed ill motives- see **Badiru Musa Hanogi v. R**, Criminal Appeal No. 118 of 2020 (unreported).

Nonetheless, that is not to say that on each occasion that a search needs to be conducted, it must be preceded by issuance of a search warrant. There are exceptions, which are not the subject of this appeal, but one of such exceptions is where an intended search is to be conducted on emergency basis under section 42 of the CPA or under circumstances envisaged under paragraph 1(b) of the PGO quoted above. We will then turn to consider whether there is any evidence that suggests that there were circumstances which necessitated the search to be carried without warrant.

According to the evidence on record, PW9 while in his ADU office at Temeke received information from a confidential source that at Tegeta Ununio there were some foreigners and a Tanzanian lady by the name of Doreen John who were engaging in trafficking in narcotic drugs. He then reported the information to his officer in charge Senior Assistant Commissioner Godfrey Nzowa. It appears he procured a go ahead from Commissioner Nzowa because from then PW9 mobilized several police officers including Inspector Makole, PW2, PC Emmanuel and others, ready for a strategic trip to Tegeta. According to PW2, they got other police officers from Kinondoni then proceeded to the targeted destination where

a search was conducted and as stated the alleged narcotic drugs were recovered.

We have painstakingly studied the record of appeal, particularly the prosecution evidence and we can confirm that there is nowhere in the record where it is shown that PW2 had a search warrant procured either under the CPA or the PGO or that he was himself in charge of any police station in terms of section 38(1) of the CPA. The fact that the search at whose end there was recovered the narcotic drugs was conducted without any search warrant, was confirmed by Mr. Nasua for the appellant at the hearing of the appeal. The other important aspect missing in the entire evidence from all witnesses especially the police officers, is the evidence as to why they were to carry out a search of private premises without a search warrant as required by law, more so, in a house whose occupier was absent. There were no reasons advanced for that unusual and unauthorized move.

The conclusion we are likely to inevitably make is that the search in this case was not a search in an emergency. There were preparations including reporting within the ADU hierarchy and mobilization of human resources. In any event, it would not have been difficult to procure a search warrant from any in charge of a police station or the court in order to comply with the law. In other words what happened was sheer breach

of the law. The search of the house in question was conducted with no lawful mandate or authority and we have no doubt in our mind in holding that, the search of the house from which the narcotic drugs were recovered, was an illegal search. We now turn to consider briefly, the fate of an exhibit or evidence procured illegally.

Although evidence illegally obtained may be received in evidence, it must be so received after observing the requirements provided at section 169(1) and (2) of the CPA – see **Nyerere Nyague v. R**, Criminal Appeal No. 67 of 2010 (unreported). In this appeal, the trial court did not take into account the considerations detailed at the above section 169 of the CPA. That is to say, admission of the narcotic drugs, exhibit P2 was unlawful because it was evidence illegally obtained within the context of section 169(1) of the CPA.

Further, in **Badiru Musa Hanogi** (supra), 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 to this Court, it was observed:

"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. Since the appellant has challenged its admissibility again in this appeal and having found that its admissibility was flawed, we have no option but to expunge such evidence from the record as we did in **Mbaruku Hamisi and Four Others v. R**, Consolidated Criminal Appeals No. 141, 143 and 145 of 2016 and 391 of 2018 (unreported) where the Court found the procedure of obtaining exhibit P1 (a mobile phone make techno) and P3 (two blankets) which were seized during a search contravened the provisions of section 38 of the CPA and expunged them from the record.”*

In other words, in **Badiru Musa Hanogi** case (supra) and **Mbaruku Hamisi and Four Others** (supra) referred to in the former case, exhibits impounded without a search warrant were treated as evidence illegally obtained and this Court expunged the said exhibits from the record. We are afraid, in the circumstances obtaining in this appeal, it is beyond certainty that we will be constrained to follow suit. However, before we ultimately get to that inevitable landing, let us consider another recent decision of this Court, the decision in **Shabani Said Kindamba v. R**, Criminal Appeal No. 390 of 2019 (unreported). In that case, on 29th September 2018 at Chumo Village in Kilwa District, a search of the house of Shabani Kindamba was conducted during the night and the police officers recovered therefrom 92.28 kilograms of *cannabis sativa* also

called *marijuana*. The officers did not have any search warrant authorizing them to enter upon the house of Shabani Kindamba and conduct the search therein. Underscoring the rationale and significance of the searching officers to be in possession of search warrants being protection of the citizens' Constitutional right to dignity and privacy, the Court declare the search illegal, and allowed the appeal on that basis.

In this appeal by retracing our own footsteps in **Badiru Musa Hanogi's** case (supra) and **Mbaruku Hamisi and Four Others** (supra), we hereby expunge exhibit P2, the narcotic drugs, which we have amply demonstrated that it constituted evidence illegally obtained by the police in clear breach and disobedience of the provisions of the CPA and the guidelines provided by the PGO for them to follow. Not only that the evidence was unlawfully procured, but also the same was admitted illegally in complete disregard of section 169 of the CPA.

Consequent 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 substances were narcotic drugs), exhibit P6, (the 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 having nothing to support.

Subsequent to the above finding, we dismiss the third ground of appeal for want of merit, and hold that the High Court was right in holding that the case was not proved beyond reasonable doubt against the respondent, albeit for different reasons. Having so held, we find no use value in addressing the fourth ground of appeal.

In view of the above, this appeal is hereby dismissed for want of merit.

DATED at DAR ES SALAAM, the 7th day of September, 2021

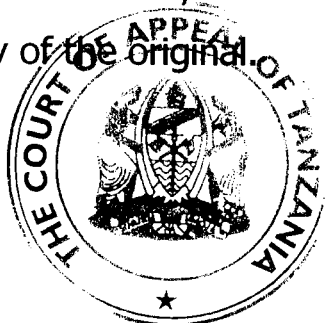
G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 14th day of September, 2021 in the presence of Ms. Edith Mauya, State Attorney for the Appellant/DPP and Mr. Abdul Azizi, counsel for the Respondent is hereby certified as a true

copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL