IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

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

CRIMINAL APPEAL NO. 687 OF 2023

MWANAHAMIS MAKENZI SAID.....1ST APPELLANT

KHADIJA SHAABAN MAHONA.....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 20th day of February, 2023

in

Criminal Case No. 8 of 2022

.....

JUDGMENT OF THE COURT

3rd April & 8th May, 2024

MDEMU, J.A.:

Mwanahamis Makenzi Said and Khadija Shaban Mahona, the 1st and 2nd appellants respectively 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, in Criminal Case No. 8 of 2022. The two appellants and one Yakobo Lazaro Yakobo, the then 1st accused person (not part in this appeal) were, jointly and together, charged with

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 or the Act). According to the particulars of offence in the information; in the night of 9th March, 2022 at Kwamanda area in Micheweni District, the appellants and the then 1st accused person were found in possession of 51 bundles of cannabis weighing 10.9 kilograms. They all denied taking part. That besides, in the exercise of its original jurisdiction, the Regional Court tried, convicted and ultimately sentenced the two appellants to serve fifteen (15) years in Offenders' Education Centre (Chuo cha Mafunzo). It was held that the case against the then 1st accused person was not proved to the required standard and he was accordingly acquitted.

Before the substance of the appeal is determined, we find it necessary to provide a brief background of this appeal that; in the fateful night, police officers namely; F.7622 Cpl. Omary, F.7488 Cpl. Hamad, F. 6126 Cpl. Abdalla; PW2, PW3 and PW4 respectively and F. 7549 Cpl. Kheri all from Micheweni Police Station, were in their normal course of night patrol around the town. They parked the motor vehicle and proceeded to patrol on foot. While at Kwamanda, they saw some youths running. In the course of pursuing them, they detected a smell alike that of cannabis emanating from

a window in a certain residential house. They then surrounded it. At the veranda of that house, a woman, who later came to be the second appellant, was seen browsing in a mobile phone. PW2 then knocked thrice at the door, a knock which alerted the first appellant. The latter resisted their entry on realizing that those who knocked at the door were policemen. The policemen thus made an ambush in order to gain access. In one of the rooms, where the first appellant and the then 1st accused were, two bales were retrieved. The first bale (lumbesa) had 32 bundles and the second bale (kiloba) had 19 bundles of would-be cannabis. It is alleged according to PW2, PW3 and PW4 that, the bales were repacked in the presence of the appellants and the then 1st accused.

The appellants and the then 1st accused together with the seized cannabis were then taken to Micheweni Police Station where it was handed over to CRO incharge WP 7009 Cpl. Ramia (PW6) who thereafter handed it over to WP 11166 PC. Mwaka (PW5) for custody. On 10th March, 2022, the said illicit consignment was handed over to F. 2077 Sgt. Mohamed (PW7) who then took it to the Chief Government Chemist where one Mauwa Kombo Khamis, PW1 conducted forensic analysis. It was PW1's expert opinion as per exhibit P1 that, the two bales tendered as exhibit P2, contain narcotic

drugs, cannabis. As said, much as the appellants admitted to have been arrested at the residence of the first appellant, they denied to have been arrested in possession of the said cannabis. That notwithstanding, they were charged, tried, convicted and ultimately sentenced each to serve fifteen (15) years in Offender's Education Centre (Chuo cha Mafunzo). Aggrieved by such findings of the Regional Court, the appellants preferred the instant appeal. Initially, the first appellant alone filed a memorandum of appeal containing five grounds. However, this memorandum was abandoned at the hearing and instead, the remaining memorandum of appeal filed on 19th May, 2023 for both appellants was argued. In the latter memorandum of appeal, the counsel for the appellant abandoned the 4th and 6th grounds of appeal. We thus reproduce and rearrange chronologically the remaining grounds as hereunder:

1. *That, the Regional Magistrate Court with extended jurisdiction erred in law and in facts by convicting and sentencing the appellants based upon weak, unreliable and incredible evidence adduced by the prosecution witnesses.*
2. *That, the Regional Magistrate Court grossly erred in law by dealing with the case without jurisdiction.*

3. *That, the court's conviction and sentence to the appellants based upon weak reason of determination.*
4. *That, the Regional Magistrate Court erred in law by not considering that the procedures of arrest, search and seizure were not observed by the arresting officer.*
5. *That, the Regional Magistrate Court erred in law and in facts by holding that the prosecution side proved their case beyond reasonable doubt while in fact it was not.*
6. *That, the proceedings fall short of irregularities.*

When the appeal was before us for hearing on 24th April, 2024, the two appellants were represented by Mr. Hassan Kornely Kijogoo, learned advocate whereas Messrs. Annuwar Khamis Saadun, Mohamed Ali Juma and Nassoro Zahran Mohamed, learned Principal State Attorneys and learned State Attorney respectively, appeared for the respondent Director of Public Prosecutions (the DPP).

Mr. Kijogoo began his submission by addressing us on the ground concerning jurisdiction. In this ground, the basis of the counsel's submission was that, the Resident Judge who assigned the case to the Regional Magistrate with extended jurisdiction had no power to do so. According to the learned counsel, in terms of the provisions of the Magistrates Court Act, No.6 of 1985 as amended (the MCA), powers to assign cases to Regional

Magistrates with extended jurisdiction are in the exclusive domain of the Chief Justice of Zanzibar and there is no any legal provision for delegation. He therefore referred us to page 4 of the record of appeal insisting that, the assignment of a case made by Ibrahim, J., the Pemba Resident Judge to Faraji Juma, the Regional Magistrate with extended jurisdiction, was without authority by the Chief Justice of Zanzibar. He, in the circumstances, urged us to nullify the entire proceedings and place the matter for retrial.

Mr. Saadun did not find any substance in this ground of complaint. Citing the provisions of section 19 (1) and (2) of the MCA, it was his argument that, the assignment powers exercised by the Resident Judge was properly exercised because the law allows him to assign cases by virtue of being a Resident Judge. He thus urged us to dismiss that complaint for want of merit as there is nothing irregular or illegal which was committed in the course of that assignment.

We think this ground should not detain us long. We have two reasons for our thinking. **One**, by virtue of the Written Laws (Miscellaneous Amendment) Act No. 11 of 1986, which deleted and replaced section 20 of the MCA, Faraji Juma, a Regional Magistrate was conferred with extended

jurisdiction by the Chief Justice of Zanzibar. Let the said provision speak by itself as we quote hereunder:

> *"20 The Chief Justice may, by notice in the Gazette, confer extended jurisdiction on a Regional Magistrate or Regional Courts generally."*

Therefore, the fact that the trial Regional Magistrate was conferred with extended jurisdiction is settled, and in fact, the appellants' counsel is under concession to that effect. **Two**, having being appointed a Resident Judge by the Chief Justice, what the Resident Judge did administratively at page 4 of the record of appeal is to assign the case file to the Regional Magistrate with extended jurisdiction for him to adjudicate the case. The record of appeal at page 4 in this regard reveals that:

> ***Hon. Faraja.***
>
> *Deal with this case in the capacity of the Regional Magistrate with extended jurisdiction.*
>
> *Sgd.* ***IBRAHIM M. IBRAHIM***
> ***RESIDENT JUDGE***
> ***PEMBA***
> *06/06/2022*

In that understanding, and as argued by the learned Principal State Attorney, we find nothing harmful in the form of irregularity or miscarriage of justice or abuse of jurisdiction as complained, committed in the course of the assignment of the case. Things would have been different had the learned Regional Magistrate was without extended jurisdiction. Accordingly, this ground of appeal is thus dismissed.

Another irregularity complained of in the quoted ground 6 refers to irregularities in the proceedings. In the first place, we did not understand what was in the mind of the learned counsel for the appellants. When he took the floor, his submission hinged on one aspect that, the learned Regional Magistrate with extended jurisdiction did not inform the appellants regarding transfer of a case from the High Court to the Regional Court having extended powers. He thus opined that, the appellants were prejudiced.

Responding to this, Mr. Juma, submitted that, such a requirement is lacking in criminal procedure. To him, the requirement as contained in the provision of section 95 of the Criminal Procedure Act, No. 7 of 2018 (the CPA-ZNZ) is to have an accused person informed on changes of magistrates in the course of trial.

On our part, we associate ourselves with the understanding of the learned Principal State Attorney that, as long as the requirement in the criminal procedural laws to inform the accused person regarding transfer of a case for trial by another court is lacking, the learned Regional Magistrate with extended jurisdiction was not legally mandated to inform the appellants about transfer of a case from the High Court to the Regional Court exercising extended jurisdiction. We dismiss this ground for being unmeritorious.

Regarding the ground that the conviction was based on unproven prosecution case, Mr. Kijogoo submitted that, since the appellants were charged to have contravened the Drugs Control Act, then the competent authority to investigate the case was the Zanzibar Drugs Control and Enforcement Authority (the Authority) and not the Police Force, as was in this case. His stance was therefore that, after the arrest and the impounding of the narcotic drugs by the policemen, the Police Force should have handed over the matter to the Authority to proceed with investigation. In his argument, leaving the Police Force to proceed with investigation without involving the competent authority renders the Drugs Control Act and the Authority redundant. On that account, he urged us to quash the conviction and sentence and acquit the appellants forthwith.

Mr. Juma, in reply, conceded that the investigation in this case was spearheaded by the Police Force which, to him, was not a competent authority in terms of the Drugs Authority Act. In the latter, according to the learned PSA, the Authority is charged with the investigation mandate over matters allied to drugs control and enforcement in Zanzibar. Mr. Nassoro, learned State Attorney, joined forces by arguing that, the Police Force and Auxiliary Services Act, Cap. 322 empowers the Police Force with general function of prevention and detection of crimes. To him therefore, the test is one of justice and the question he posed to us is whether the investigation conducted by the Police Force, in this case, led to miscarriage of justice on the appellants' side. The Indian case of **Dil Prakash Meena v. C.B.I.,** Revision Petition No.217/210 was referred to us in reinforcing that position.

We have heard and considered the submission of the learned counsel for both sides. We should make it clear from the outset that, this complaint having its bases on failure of the prosecution to prove its case beyond reasonable doubt, the test we think should be whether or not the prosecution has proved its case to the required standard and not who actually conducted the investigation. We will come to it later. As to which authority between the Police Force and the Authority is a competent authority to investigate in illicit

drug offences, section 4 (1) (a) of the Drugs Control Act prescribing for the functions and powers of the Authority provides that:

> *"4 (1) The functions and powers of the Authority shall be to:*
>
> *a) Investigates drug offences and other related offences."*

In the exercise of that function, section 4 (2) of the Drugs Control Act requires the Authority to collaborate with other relevant authorities at national or internation level. Moreover, the Act under section 41 (2) permits application of the CPA-ZNZ in the exercise of powers of the Commissioner General or an authorized officer in respect of inspection, search, seizure, arrest, detention and investigation generally. Such powers, according to subsection (6) of section 41 of the said Act, where circumstance allows, may be exercised upon consultations and cooperations with other relevant authorities. It is to say, in terms of section 59 (1) of the Drugs Control Act, officers of several other authorities are duty bound to assist each other for the better performance of the functions of the Act in drugs control and enforcement. We wish to reproduce section 59(1) of the Act which we find it relevant on legal and mandatory conditions regarding the duty to assist each other in the fight against illicit drugs. It reads, thus:

"59 (1) The officers of several authorities mentioned in this Act shall, be legally bound to assist each other in carrying out the function of this Act subject to their limitation of duties."

In essence, our general understanding of the Drugs Control Act is that, much as it confers exclusive mandate to the Authority being the relevant authority to investigate offences on illicit drugs and those allied to it, it also confers obligation to collaborate with other national institutions, the Police Force inclusive. Important perhaps is the mandatory obligations coffered by law to officers of other authorities to assist in carrying out the function of the Act.

In the instant appeal, as we alluded to, the fact that policemen from the Police Force arrested and proceeded to investigate the matter is not disputed. We also stated in the foregoing that, the Drugs Control Act provides for exclusive powers and mandate to the Authority to investigate offences under the Act, it be by applying the Act itself or the provisions of the CPA-ZNZ, where circumstances allow. It is clear in the Drugs Control Act therefore that investigation of offences created in the Act is vested exclusively to the Authority. It was improper therefore for the Police Force to investigate in total ignorance of such mandatory legal requirement.

The law however, we said, compels officers from other institutions to provide assistance in the implementation of the function of the Authority coffered by the Act. In that regard therefore, PW2, PW3 and PW4 who are officers of the Police Force, in their mandatory legal obligation to assist the Authority, exercised their general powers of detection, arrest and ultimately impounding the said cannabis. After this stage, in our view, guided by the spirit of cooperation, collaboration and assistance, the Authority should have been informed of the incident so as to proceed with the investigation as required by law. The Police Force, in the said spirit of cooperation and collaboration, would have remained with the role of assisting the Authority in the conduct of that investigation in the manner the Authority prescribes in enhancement of that spirit. We think this was the intention envisaged by the House of Representatives of Zanzibar in the enactment of the Drugs Control Act.

Having resolved the foregoing regarding the function of the Authority and that of the Police Force within the meaning of the Drugs Control Act, we now make the assessment of the evidence as a whole, complained in the other grounds of appeal, to see if what was investigated by the Police Force establish the offence of possession of cannabis as charged.

This now takes us to grounds 1, 3 and 4 as reproduced above. Mr. Kijogoo submitted that, much as the search be treated as an emergency one, section 146 (2) of the CPA-ZNZ was not complied with because the result of that search was not reported to the requisite magistrate. He thus referred us to the case of **Badiru Mussa Hanogi v. Republic**, Criminal Appeal No.118 of 2020 (unreported) imploring us to declare such evidence illegal, thus liable to be expunged. His other account in persuading us to discount the prosecution evidence is in respect of absence of independent witnesses during the search and seizure. He submitted in this aspect that, having detected a smell alike that of cannabis, PW2, PW3 and PW4 should have located independent witnesses to witness that search. He thus concluded by urging us to discredit that evidence.

In reply, like Mr. Kijogoo, Mr. Juma also treated the said search as an emergency one because it was conducted at night and during normal patrol by the policemen. On that account, he said, the requirement to have a search warrant and subsequent certificate of seizure is not material. He thus cited to us the case of **Joseph Thobias & Others v. Republic**, Criminal Appeal No. 296 of 2019 (unreported) to bolster that assertion while also distinguishing the case of **Badiru Mussa Hanogi** (supra) because, in that

case, it was not known when search was conducted, unlike in the instant appeal where search was on the spot. The learned PSA could not thus comprehend the need to have independent witnesses following that emergency search and also that, the evidence suffices to establish the offence as charged. They thus trusted all the prosecution witnesses to have proven the prosecution case beyond reasonable doubt.

We begin resolving these grounds in this way. As conceded by all counsel, which we are also of the same footing, no any independent witness attended at the crime scene to witness the search conducted. The appellants, as we note in the record of appeal, conceded to have their arrest at the residence of the first appellant. However, parties parted ways in one aspect, that is, whether the alleged bales were seized in the residence of the first appellant. The team of learned State Attorneys affirm that, the appellants were arrested in the house of the first appellant where the said bales were also seized. The appellants' counsel on the other hand urged us to hold in the negative.

As it is, the circumstances where search and seizure were in the course of patrol by policemen, that, in our view, permits the said search to be conducted without search warrant. This one is settled. It is to say, does

such search without a search warrant eliminate the other requirements to have independent witnesses and the issuance of seizure certificate or receipts? Our view is in the negative. Section 146 (3) of the CPA-ZNZ in this aspect provides that:

> *"146 (3) When anything is seized in pursuance of powers conferred by subsection (1) of this section, the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing bearing the signature of the owner of the premises and those of witnesses of the search."*

This mandatory requirement to issue a receipt after search without a warrant, as quoted above, is provided for under section 146 (3) of the CPA-ZNZ which is in *parimateria* with section 38 (3) of the Criminal Procedure Act, Cap. 20. This latter was interpreted in the case of **Mustafa Darajani v. Republic**, Criminal Appeal No.277 of 2008 (unreported) in which, the Court held that:

> *"1. Under section 38 (1) of the CPA, police officers are empowered to search without search warrant, provided it is shown that there are reasonable grounds to do so and that the delay may result in the removal or*

destruction or endanger life or property. otherwise, a search warrant must always be issued.

2. *Upon completion of the search, if any property is seized, a receipt must be issued which must be signed by the occupier or owner of the premises, and the witnesses around, if any, as required under section 38 (3) of the CPA."*

We note that, in the instant case, PW2, PW3 and PW4 who conducted the search without a search warrant at the premises of the first appellant did not issue any receipt to prove that those bales were seized in no other place other than that of the first appellant. In essence, this is the purpose of issuing a receipt of the seized properties. It gives assurance that, the seized property came from no other place other than the place indicated in the said receipt. See **Mustafa Darajani** (supra).

The other requirement to be complied in a search without a search warrant, where circumstance permits, is the attendance of witnesses to witness the search. In **Mustafa Darajani** (supra), the essentials to such witnesses, after witnessing, are in the requirement to sign the receipt comprising of the seized properties. In effect, the need to have 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).

In the case at hand, besides PW2, PW3 and PW4 who are all policemen, no any independent witness who witnessed the search and seizure in the premises of the first appellant. The record shows that, there are neighboring residential houses which, in our view, the police detectives should have called inhabitants of those houses to witness the said search and seizure. Unhesitant, we say, the circumstances permitted them to do so because, the two appellants and the then 1st accused were in the house of the first appellant and had no knowledge that PW2, PW3 and PW4 were outside and would intend to conduct search or would otherwise make an ambush, as it was.

In light of the foregoing, we hold that, it was prejudicial to the appellants for the trial court to base conviction on the evidence of search and seizure of cannabis which was obtained during a search without issuing a receipt and also without the attendance of any independent witness to witness that search and seizure. There being no sufficient evidence to put that the bales were seized in the appellant, surely, the prosecution case was not proved to the required standard. We are thus constrained to allow this

appeal by quashing the conviction and set aside the sentence meted out to the appellants. We accordingly order their release from custody unless, held for some other lawful causes. We so order.

DATED at **ZANZIBAR** this 8th 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 8th day of May, 2024 in the presence of the Hassan Kornely Kijogoo, counsel for the Appellants and Shamsi Saad, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL