IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 96 OF 2022

(Appeal from the decision in Criminal Case No. 176 of 2020 of the Resident Magistrates' Court of Coast Region at Kibaha (Mkhoi, SRM) dated 23rd of May, 2022.)

NELSON GODWIN MWAIPOPO ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

1st, & 22nd August, 2022

ISMAIL, J.

The appellant herein was arraigned in court on an offence of trafficking in narcotic drugs, contrary to the provisions of section 15A (1) and 2 (a) of the Drug Control and Enforcement Act, Cap. 95 R.E. 2019. The allegation in the charge sheet is that, on 16th April, 2021, at Mlandizi area within Kibaha District in Coast Region, the appellant was found trafficking 5.88 grams of narcotic drugs known as Heroin. The appellant's apprehension was made possible following a tip-off from a secret informer to PW4, ASP Edward Peter Gontako, a police officer. The tip was to the effect that at Mlandizi kati, the appellant was involved in dealing and selling of narcotic drugs.

A police swoop found the appellant sitting at his liquour store and was put under restraint. A search conducted on the appellant, in the presence of a hamlet Chairman, PW3, found the appellant in possession of TZS. 130,000/- and 68 dices of what was suspected to be narcotic drugs (Exhibit P1). The latter was recovered from inside the appellant's under pant. These possessions were seized and a certificate of seizure (Exhibit P3) was issued. Subsequent thereto, the seized substance was taken to the Chief Government Chemist whose findings were conveyed by Joseph Justine Ntiba, a Chemist Officer, who featured in the trial proceedings as PW1. He confirmed that the seized substance was in fact a narcotic drug known as heroin. This was confirmed by the report of the examination tendered in court as Exhibit P2.

The appellant pleaded not guilty to the charge, necessitating conducting of the trial proceedings that saw the prosecution marshal the attendance of six witnesses against the defence's sole witness. The appellant denied any wrong doing, contending, instead, that the drugs were planted onto him by police officers who raided his business premises as he was winding up business for the day. He maintained that the drugs were not recovered from him.

At the conclusion of the trial proceedings, the trial court's reasoning was that a case against the appellant had been made. Consequently, he was found guilty and convicted of trafficking in narcotic drugs. He was sentenced to imprisonment for 10 years.

Feeling aggrieved by the conviction and sentence imposed by the trial court, the appellant has instituted the instant appeal. The petition of appeal has seven grounds of appeal. These are: ***one***, that the trial Magistrate erred in fact and law in holding that the prosecution case was proven beyond doubt as against the appellant while a lot was left to be desired; ***two***, that the trial court erred in law and fact in failing to properly evaluate the evidence tendered before it; ***three***, that the trial magistrate erred in law and fact by not considering the defence of the appellant; ***four***, that the trail magistrate erred in law and fact by not holding that the search conducted on the appellant was illegal by not being conducted consistent with the law; ***five***; the seizure conducted on the appellant is a nullity as was illegally procured; ***six,*** that the chain of custody of the seized items was broken in the course of handling the recovered exhibit; ***seven***, that the whole proceedings were tainted with a number of irregularities.

Hearing of the appeal took the form of written submissions, filed consistent with a filing schedule drawn on 1st August, 2022. While the

appellant's submissions were filed by Mr. Tumaini Mgonja, his counsel, the respondent's representations were made by Ms. Rachel Mwaipyana, learned State Attorney.

Mr. Mgonja began by dropping grounds two, three, six and seven, opting to confine his arguments to grounds one, four and five. With respect to ground four, learned counsel's argument is that the search conducted by police was done in contravention of section 38 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (CPA), read together with paragraphs 1 (a), (b) and (c) and 2 (a) and (d) of Police General Order (PGO) No. 226. He submitted that these provisions guide on how search is to be conducted with a view to avoiding any possible planting of items relating to criminal acts for their own ill motives.

Referring to the testimony of PW4, Mr. Mgonja reasoned that he conducted the search while he was not an Officer Commanding the Station, and that the search carried out was not an emergency search, undertaken in terms of section 42 (1) of the CPA, and which dispenses with the requirement of having a search warrant. In the absence of the two, learned counsel argued, the search was irregular. He buttressed his position by citing a couple of the Court of Appeal decisions in ***The Director of Public Prosecutions v. Doreen John Mlemba***, CAT-Criminal Appeal No. 359 of

2019; and ***Ndima Kashinje @ Joseph v. Republic***, CAT-Criminal Appeal No. 446 of 2017 (both unreported).

Mr. Mgonja further contended that, whereas the law compels that the seized items be receipted, the record is clear that that none of the witnesses testified that the seized items were receipted. He maintained that production of the certificate of seizure is different from issuing a receipt and that both serve different purposes, though their production is imperative. The appellant's advocate cited the provisions of section 38 (3) of the CPA, section 35 (3) of the Police Forces and Auxiliary Services Act, Cap. 322 R.E. 2019; section 22 (3) (b) of the Economic and Organized Crimes Control Act, Cap. 200 R.E. 2019; PGO 226 (2) (d) and Chapter 3 Paragraph 3.8 (f) (i) of the Exhibit Management Guideline, 2020.

Mr. Mgonja's position was inspired by the decisions of the Court of Appeal in Andrea ***Augustino @ Msigara & Another v. Republic & Another v. Republic***, CAT-Criminal Appeal No. 365 of 2018; ***Mustapha Darajani v. Republic***, CAT-Criminal Appeal No. 277 of 2008; and ***Samwel Kibundali Mgaya v. Republic***, CAT-Criminal Appeal No. 180 of 2020 (all unreported).

Mr. Mgonja concluded by urging the Court to resolve the doubts surrounding the implementation of the requirements of the law should be resolved in the appellant's favour. He prayed that the appeal be allowed.

Ms. Mwaipyana was not convinced that the appeal is meritorious. With regards to ground one of the appeal, the respondent's contention is that the case for the prosecution was proved beyond reasonable doubt. She particularly singled out the testimony of PW4 and Exhibit P1 to contend that all procedural requirements in effecting a search and seizure were followed. With respect to the seized substance, Ms. Mwaipyana's view is that the chain of custody was duly observed in its handling and until it found its way to the court. Learned counsel further contended that the testimony adduced by PW2 proved that the substance received from the police was actually a narcotic drug which was recovered from the appellant.

With respect to ground two of the appeal, the argument put by Ms. Mwaipyana is that the trial magistrate's finding was not erroneous, as everything required in the carrying out of a search, including the presence of PW3 who witnessed the search that led to the impounding of Exhibit P1, the drugs. Ms. Mwaipyana was of the firm view that the position taken by the trial magistrate was unblemished.

Submitting on ground 3 of the appeal, the contention by Ms. Mwaipyana is that the entire procedure that led to the appellant's arrest was in conformity with the law. She discounted the appellant's contention that she was arrested at gun point by a person he could not apparently recall his name. The learned State Attorney argued that it is unconceivable that one would forget a person who put him under imminent threat. She maintained that the procedure leading to the appellant's arrest was quite in order.

She urged the Court to dismiss the appeal.

The rejoinder by Mr. Mgonja did not introduce anything new. It was, by and large, a reiteration of what was submitted in chief. I choose to give no space in this decision.

From the parties' rival arguments, the issue to be determined is whether the appeal is meritorious.

Deducing from the parties' submissions, the disputation by the parties has narrowed down to the regularity or otherwise of the search and seizure of the Exhibit P1. The contention by the appellant is that the process was shrouded in wanton irregularity. As submitted by Mr. Mgonja, carrying out of a search on a suspect's body or premises suspected to harbor the subject matter of a crime is governed by law, the provisions of which have been

quoted by the appellant's counsel. For ease of reference, I consider it apt to quote them as hereunder:

Section 38 (3) of the CPA:

> *"Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."*

Police General Order No. 226:

Item 17 (b)

> *"The services of a local leader or two independent witnesses who should be present throughout the search, should be obtained. This is to ensure that he or they may be in a position to give supporting evidence if anything incriminating is found and to refute allegations that the search was roughly carried out and the property damaged."*

Item 18:

> *"On completion of the search, a search report will be made out at the scene, giving details of all articles seized, a copy of which shall be handed to the occupier."*

Section 22 (3) of Cap. 200:

"Where anything is seized after a search conducted pursuant to this section, the police officer seizing it, shall-

(a) forthwith or as soon as it is practicable evaluate or cause the property to be evaluated so as to ascertain its value;

(b) issue an official receipt evidencing such seizure and on which the value of the property as ascertained and bearing in addition to his signature, the signature of the owner of the premises searched and that of at least one independent person who witnessed the search."

All of the cited provisions, which are similar in wording and spirit, emphasize on one key requirement. This is that, a search must be receipted and that absence of the receipt renders the search a complete nullity. What has become of the search in question? The appellant's contention, that has not been controverted, is that no evidence was adduced to substantiate any feeling that the law was complied with. It was expected that such testimony would be tendered through PW1, PW3 or PW4, all of whom conducted and witnessed the search. But, as it turned out, what was tendered is what I believe was available, and in this case, what is available is Exhibits P1, P2 and P3, and none of it was able to address this question. The conclusion is

that what was recovered in the course of the search was not receipted, and it cannot be said with any semblance of precision that Exhibit P1, the narcotic drug, was recovered from the search allegedly conducted against the appellant.

As I subscribe to the reasoning made by Mr. Mgonja, I feel compelled to quote an excerpt from the decision of the Court in which a matter akin to this was discussed and deliberated. This was in the case of ***Thereza Shija v. Republic***, HC-Criminal Appeal No. 198 of 2019 (MZA-unreported), in which it was held as follows:

> *"Gathering from the cautioned statement (exhibit P1), seizure of the said narcotics was not preceded by essential requirements that govern search and seizure of the subjects of criminal undertakings. ….This is a wanton disregard of the law governing searches and seizures. In this respect, section 38 of the CPA, read together with Police General Order 226 (made under section 7 (2) of the Police Force and Auxiliary Services Act, Cap.322). Both of these stipulate the requirements which ought to be observed in conducting search and seizure of property….*
>
> *Not a single one of these requirements was complied with in this case, as evidence of compliance would constitute part of the facts which were read to the appellant. This means that what was tendered in court as exhibit P2 is a substance*

whose source is not ascertained and it is not evident that such exhibit is the same as what was seized on 9th October, 2019, when police officers stormed into the appellant's house. ….. (See: ***Frank Michael @ Msangi v. Republic****, CAT-Criminal Appeal No. 323 of 2013 (Mwanza, unreported);* ***Ridhiki Buruhani v. Republic*** *[2011] TLR 303."*

Borrowing a leaf from the decisions cited above, I take the view and hold that the process that led to the impoundment of the subject matter of the trial proceedings was bungled and it infracted the law in a profound way.

Consequently, I allow the appeal, quash and set aside the conviction and sentence, respectively. I order that the appellant be released from prison forthwith, unless held for some other lawful reasons.

Order accordingly.

Rights of the parties have been duly explained.

DATED at **DAR ES SALAAM** this 22nd day of August, 2022.

M.K. ISMAIL

JUDGE

22.08.2022