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. 171 OF 2022

(Originating from the decision of the District Court of Kibaha at Kibaha in Criminal Case No. 64 of 2021 Hon. J. Mushi, RM dated 6th of July, 2021)

AMADA HAMADI TINDWA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

17th March 2023 & 31st March, 2023

POMO, J.

In the District Court of Kibaha, at Kibaha, the appellant was arraigned as hereunder: -

> *"**STATEMENT OF OFFENCE***
>
> ***TRAFFICKING IN NARCOTIC DRUGS:*** *Contrary to section 15 A (1) and (2) (c) of the Drug Control and Enforcement Act [Cap. 95 R. E. 2019]*
>
> ***PARTICULARS OF OFFENCE:***
>
> ***AMADA HAMADI TINDWA*** *on 21st day of July, 2021 at Kikobo Area within Rufiji District in Coast Region, was found trafficking an amount of 30.04 kilograms of narcotic drugs commonly known as Bhangi.*

Dated at Kibaha this 6th day of August 2021

Signed

STATE ATTORNEY."

From the statement of offence, it is beyond question that the indictment was predicated under section 15 A (1) and (2) (c) of the Drug Control and Enforcement Act [Cap. 95 R. E. 2019] (herein DCEA). It is, perhaps, pertinent to reproduce in full the said provision: -

> *15A.-**(1) Any person who traffics in narcotic drugs, psychotropic substances or illegally deals or diverts precursor chemicals or substances with drug related effects or substances used in the process of manufacturing drugs of the quantity specified under this section, commits an offence and upon conviction shall be liable to imprisonment for a term of thirty years.***
>
> *(2) For purposes of this section, a person commits an offence under subsection (1) if such person traffics in-*
>
> *(a) narcotic drugs, psychotropic substances weighing two hundred grams or below;*
>
> *(b) precursor chemicals or substance with drug related effect weighing 100 litres or below in liquid form, or 100 kilogram or below in solid form;*
>
> ***(c) cannabis or khat weighing not more than fifty kilogram.***

Upon being arraigned, the appellant is recorded to have refuted the charge, whereupon the prosecution featured six witnesses as well as six exhibits to prove their case. The appellant gave his sworn evidence in reply thereto and did not call any witness. At the close of the case on both sides, the learned trial magistrate was satisfied that the case for the prosecution was proved to the hilt and consequently, the appellant was convicted and handed down a sentence of thirty years to serve jail imprisonment.

The appellant is aggrieved by the whole decision upon lengthy memorandum of appeal which is comprised of eight (8) grounds of grievance, namely:-

1. *That, the learned trial magistrate erred in law by failure to append her signature after taking the plea of the accused person (appellant) contrary to section 210 (1) (a) of the Criminal Procedure Act [Cap 20 R.E 2019 hence rendering the trial nullity.*

2. *That, the learned trial magistrate grossly erred in by convicting the appellant relying on the seizure certificate (Exh. PE4) which resulted from a search that was conducted in violation of the law.*

3. *That, the learned trial magistrate grossly erred in law and fact by holding the appellant's conviction basis on the cautioned statement (Exh. PE6) which was illegally obtained.*

4. *That, the learned trial magistrate grossly erred in law and fact by wrongly convicting the appellant without considering that the chain of custody of exhibit PE2 was abrogated.*

5. *That, the learned trial Magistrate erred in law and fact by convicting the appellant basis on the contradictory, incredible, unreliable and uncorroborated evidence of PW3, PW5 and PW6 which rendered their story highly improbable against the appellant.*

6. *That, the learned trial magistrate erred in law and fact by wrongly holding on Exh. PE2 whose identity was not sufficiently established in court by PW2, PW3, PW4, PW5 and PW6 nor Bubenge Dushi Malecela hence rendering the same to be null and void.*

7. *That, the learned trial Magistrate erred in law and fact wrongly convicting the appellant basis on the Exh. PE.2 (Cannabis sativa) while the same was not mentioned as exhibit during the preliminary hearing contrary to the Criminal Procedure Act, [Cap 20 R.E: 2019].*

8. *That, the learned trial magistrate erred by failure to observe that the prosecution did not prove its case to the standard required in Criminal cases.*

At the hearing of the appeal, the appellant fended for himself whereas the respondent Republic had the services of Mr. Imani Mitume, learned State Attorney.

Before addressing the submissions of counsel for the parties on the merits or otherwise of this appeal, it is crucial that we give a brief account of the evidence paraded by both sides.

As can be gathered from the evidence, it was the prosecution case that, on material date the police officers from the Drugs Control and Enforcement Authority (DCEA) were in patrol within Rufiji District in Coast Region. These were SSGT Juma Hussein PW3 and NSP Hassan Msangi PW5. It was after they had received information from the informer that there was a person engaging himself with narcotic drugs issues. The said person was the appellant. They entered to the house of the appellant for searching purposes and in the process of search, two independent witnesses were involved; one being Abdallah Salum Kilimba PW6 who was a village Executive Officer of Kiboko village. Upon search, two sulphate bags containing suspected narcotic drugs were recovered (Exh. PE2). A certificate of seizure was prepared at the scene of crime. The seized items were taken to the Drugs Control and Enforcement Authority where PW3 handed them to INSP Johari Msirikale PW2 and registered them in Exhibit register book (Exh. PE. 3) and stored them in the custody.

On the following days, PW2 handed over the seized two sulphates bags to Optatus Kamunye PW4 who took them to the government chemist laboratory and met Joseph Jasckson Ntiba PW1 who examined them and confirmed to be narcotic drugs tetrahydrocannabinol. He prepared a report which was admitted as Exhibit PE1. The appellant was alleged to have been interrogated and confessed to have committed the offence. The appellant cautioned statement was admitted in Court as Exhibit PE6.

The appellant denied each and every detail of the prosecution account. He went on to raise an *alibi* defence that, on the material date he was at Kilwa Kipatimu with a friend named Said Manjacha as it was EID festival and he stayed there until 23rd July 2021 when he went back to his home. And it was on 25th July 2021 while at video hut watching a football match of Simba Sports Club versus Young African, he was arrested and taken to the police station at KIbaha and charged with the offence. When cross examined, he accepted to have not raised his defence of *alibi* after the charge sheet was read over to him.

As I have already hinted upon, on the whole of the evidence, the trial court was satisfied that the case for the prosecution was proved beyond all reasonable doubt. I have again intimated that the appellant was convicted

and sentenced to 30 years of jail imprisonment, hence this appeal. It is worth noting that, the trial magistrate found the appellant guilty as charged on the strength of the prosecution account of PW3 and PW5 who recovered the said narcotic drugs from the appellant's house, the narcotic drugs commonly known as bhangi (Exhibit PE2), the evidence of PW1 a government chemist who examined the seized items of which later confirmed to be narcotic drugs commonly known as bhangi, a certificate of seizure (Exh PE4) and the evidence of PW6 who was an independence witness contended to have witnessed search at the appellant's residence. The trial magistrate faulted the appellant for not having paraded a witness namely, Said Manjacha who he claimed to have been with him on the material date at Kilwa Kipatimu.

Embarking to the appeal at hand, in consensus the parties agreed the same be argued by way of written submissions and the Court granted their prayer.

Addressing the first ground of appeal, the appellant submitted that, the trial magistrate did not append his signature and date after he had entered a plea of not guilty. The appellant cited section 210 (1) (a) of the Criminal Procedure Act, [Cap 20 R.E 2022] (herein the CPA) and insisted that, the said provision makes mandatory to do so. To bolster his contention,

he cited the case of **Yohana Mussa Makubi and Another vs. Republic**, Criminal Appeal No. 99 of 2019, CAT at Mwanza (Unreported) of which the Court of Appeal of Tanzania held it mandatory that after evidence of every witness having been written down, it should be signed by the magistrate to form part of the record. Therefore, he argued the Court to expunge the wholly record of the trial Court.

On the 2nd ground of appeal, the appellant is contending that the search and seizure of the narcotic drugs was improperly conducted since no search warrant was tendered thus rendering a certificate of seizure a nullity. It was appellant's argument that, the search was conducted in contravention of section 38 (1) and (3) and 40 of the CPA.

It was the appellant's contention that, section 38 (1) of the CPA requires search to be conducted by or under a written authority of an officer in charge of a police station, however in our case, the search was conducted by PW3 who was not an officer incharge of the police station nor did he gave a written authority to execute search. To support his argument, he cited the decision in **Shabani Said Kindamba vs. Republic**, Criminal Appeal No. 390 of 2019, CAT at Mtwara (Unreported) approved in the case of **Samwel Kibundali Mgaya vs. Republic,** Criminal Appeal No. 180 of 2020, CAT at

Musoma (Unreported) at page 4-10, **Joseph Charles Bundala vs. Republic,** Criminal Appeal No. 15 of 2020, CAT at Dar es Salaam (Unreported), **The Director of Public Prosecution vs. Doreen John Mlemba**, Criminal Appeal No. 359 of 2019, CAT at Dar es Salaam (Unreported) quoted with approval in the case of **Ndugulile vs. Republic,** Criminal Appeal No. 58 of 2019, CAT at Mbeya (Unreported) at page 4-15 of judgement.

The appellant further articulated that, search was not conducted as an emergency measure and the police had enough time to make arrangements within the dictates of the law. It was his argument that, PW3 and his fellow officers received information of the commission earlier, they started their journey from Dar es Salaam to Rufiji within Coast Region and later went on to search the house. That, considering that, the journey started from headquarters at Dar es Salaam, therefore PW3 and his colleague had time to seek and obtain search warrant or search order and hence the issue of emergence search does not arise.

On ground 3 of Appeal, contended that the cautioned statement was wrongly admitted and acted upon as it was taken outside the prescribed time. According to the appellant, for the confession of the appellant to be

taken as the basis of conviction, it was necessary for the prosecution to establish without shadow of doubt that the statement was voluntary made. He submitted that, PW6 Abdallah Salum Kilimba who introduced himself as VEO testified that search started at 11:00 A.M to 4:45 A.M***,*** thus the appellant stayed in custody for 13 hours before his statement was taken by PW4 at 17: 35, this resulted to mental torture apart from physical torture. He also argued that, PW3 testified that they had stayed from 4:45 am mid night till 5 A.M, thus contradiction with PW'6 testimony. He then prayed the Court to be guided by the decision of the Court of Appeal in **Salim Petro Ngalawa vs. Republic,** Criminal Appeal No. 85 of 2004, CAT at Arusha (Unreported), **Janta Joseph Komba and 3 Others vs. Republic,** Criminal Appeal No. 95 of 2006, CAT at Dar es Salaam (Unreported) quoted in approval in the case of **Thomas @ Mwangamba vs. Republic,** Criminal Appeal No. 308 of 2007, CAT at Arusha (Unreported) at page 3-9 of judgment.

The 4th, 5th and 6th ground of appeal were argued together that, ***one,*** the evidence by PW3 and PW5 is inconsistent regarding the one who was assigned them to go and search the appellant. As at page 26 of the typed proceedings, PW5 INSP Hassan Msangi stated that, he appointed one officer named Juma Seleman but at page 21, PW3 Juma Hussein, stated that he was appointed by INSP Msangi. ***Two,*** PW5 had insisted at page 26 and 29

of the proceedings that, he instructed Juma Selemani to go at the house of the appellant to search and arrest him and finally the appellant was surrendered to PW5, however it is unknown from 21/7/2021 to 23/7/2021 who had the custody of the two sacks of bhangi. ***Three,*** the custodian Pw2 INSP Johari told the Court that she received the two bags from S/SGT Juma Ally Selemani but Selemani did not testify to tell the Court where he got the said two sulphates bags. For those reasons, the appellant submitted that the chain of custody has been broken. To cement on his argument, he invited the Court to read the decision of the Court of Appeal in **Paulo Maduka and Others vs. Republic,** Criminal Appeal No. 110 of 2007, CAT at Dodoma (Unreported) to which the Court of Appeal had held that: -

> *"…Chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime…"*

He then concluded that, applying the above principle, the chain of custody of the two sulphates bags (Exh. PE2) is broken due to the absence of Juma Ally Selemani as a witness. The appellant further prayed for the Court to draw an adverse inference to the prosecution as no reason was given to summon Juma Ally Selemani. In support of his argument, he cited

the decision in **Hemedi Said vs. Mohamed Mbilu** (1984) T.L.R 113 which held that the Court is entitled to draw an inference that if the witness would have called could have testified against a party, where for undisclosed reasons the party fails to call such material witness of his side.

Four, there is no direct evidence by PW3 that he gave the two sulphate bags to the custodian of exhibits PW2, INSP Johari. According to the appellant, it seems he was planted to fill the gaps in the chain of custody. He then stressed that, his name was not listed during Preliminary Hearing (PH).

In respect of ground 7 of appeal, the appellant complained that, Exhibit PE. 2 (narcotic drugs commonly known as bhangi) and Exhibit PE. 3 (Exhibit Register) were never mentioned during Preliminary Hearing (PH) that prosecution intended to tender them. Thus, they were wrongly admitted in evidence contrary to section 192 (3) of the CPA. To cement, he requested the Court to read the decisions in **Ijumaa Ramadhani vs. The D.P.P,** Criminal Appeal No. 59 of 2010, CAT at Dar es Salaam (Unreported), **Efrahim Lutambi vs. Republic** (2000) T.L.R 265 and **MT 7479 Benjamin Holela vs. Republic** (1992) T.L.R 3.

As to the 8th grounds, he relied to what he had submitted earlier and insisted the Court to declare that the search and seizure were improperly conducted.

In the rebuttal submission, the learned state attorney as to the 1st ground did submit that, the provision cited by the appellant of section 210 (1) (a) of CPA has nothing to do with plea taking. It only deals with recording of evidence of the witnesses. He went on to submit that, the relevant provision to plea taking is section 228 and 229 of the CPA which only requires that, where a charge is not admitted by the accused, the Court proceed for hearing of the case. Thus, according to him it is not a requirement of the law that a magistrate to append his signature after the accused person has entered a plea of not guilty.

The learned state attorney also cemented that, failure of the trial magistrate to put his signature after recording a plea has not occasioned any injustice to the appellant, as his plea was recorded of not guilty, witnesses were summoned to testify and he was afforded a right to defend himself. Thus, the same can be cured under section 388 of CPA. He then concluded, that not every contravention of the CPA leads to exclusion of evidence in question. He then invited the Court to read the decision in **Nyerere Nyague**

vs. Republic, Criminal Appeal No. 67 of 2010, CAT at Arusha (Unreported). It was his contention that, the ground has no merit.

Responding to ground 2 of appeal, the learned state attorney submitted that, the search conducted was an emergence because according to PW3 they were instructed to go to conduct the operation at Rufiji. That, they did not have a specific information concerning the appellant as can be seen at 18 of typed proceedings. It was respondent submission that, search was conducted at 04:45 HRS at the time of the day, there is no way they could get search warrant. He further articulated that, not every contravention of the CPA leads to the exclusion of evidence and every case must be determined depending on its circumstances. He went on to conclude that, under the circumstances of this case, search warrant could not be obtained and that does not mean the search was illegal.

As to ground 3 concerning the cautioned statement of the appellant, the learned state attorney admitted that the caution statement of the appellant was recorded beyond the four hours after arrest as required under section 50 of CPA, but it was his submission that subsection (2) of the said section provides reasons for recording the same beyond the prescribed time and one of them being reasons connected with investigation. According to him, PW5 had testified that he recorded the caution statement of the

appellant at 17 hours while the arrest was conducted at 04: 45 AM. According to the learned state attorney, the reasons for delay were clearly elaborated by PW3 and PW5 in their testimonies because investigation was still in progress given the fact that they were conducting operation. To wit, PW5 testimony that he recorded the appellant's caution statement in the car, and this shows that it was a busy day. He then insisted that, the reason is covered under section 50 (2) (a) of the CPA.

The learned state attorney also stressed that the appellant did not object the tendering of the caution statement which clearly shows that he admitted the truth. Nevertheless, the learned state attorney submitted that, the trial magistrate did not only base on the cautioned statement of the appellant to enter conviction that he also relied to the evidence by PW3, PW6 and PW1. For these reasons, he prayed for the dismissal of the ground.

In respect of the 4th, 5th and 6th grounds of appeal, the learned state attorney submitted that; *one,* Juma Selemani and Juma Hussein are one and the same. That, it was just a slip of the pen. While referring to page 26 of proceedings, the learned state attorney submitted that, PW5 ordered Juma Suleiman to conduct search in the house of the appellant. But when PW3 was introducing himself he stated that his name is Juma Hussein and he was given order to conduct search at the house of the appellant by his superior.

It was his contention that by PW3's testimony, it is prudent to believe that the JUMA mentioned by PW5 is the same as PW3 who was assigned to conduct search but also the one who handed the exhibit to PW2. He then insisted that, this was just a minor contradiction which does not go to the root of the matter, to buttress, he cited the case of **Issa Hassan Uki vs. Republic,** Criminal Appeal No. 129 of 2017, CAT at Mtwara (Unreported) at pages 17 and 18 where the Court of Appeal disregarded minor contradictions that does not go to the root of the case. To cement, he also invited the Court to make reference to the decision in **Sylivester Stephano vs. Republic**, Criminal Appeal No. 527 of 2016, CAT at Arusha (Unreported).

Two, exhibit PE 2 was seized by PW3 on 21st day of July, 2021 as observed at page 18 and 19 of the proceedings. According to him, after arrest they proceeded with investigation while the exhibit stayed in the car with PW3 until 23rd July 2021 when the same was handed over to PW2 INSP Johari who stored the exhibit. That the same was handed over from PW2 to PW4 on 26/07/2021 who took it to the government chemist (PW1) and after his analysis, PW1 handed it back to PW4 as seen at page 10 of the proceedings. And, at page 23 of the proceedings, it shows that upon PW1 returned exhibit PE2 to PW4, PW4 handed it back to PW2 where it was stored until tendered in court on 27th day of October, 2021.

Three, that he is aware that in cases involving seizing of exhibits chain of custody must be properly explained so as to ensure authenticity of the exhibit but the requirement of documenting has been relaxed in the case **Jibril Okash Ahmed vs. Republic**, Criminal Appeal No. 331 of 2017, CAT at Arusha (Unreported) as the Court of Appeal held that; despite not having a paper trail of the exhibit, if oral evidence is elaborative it suffices to show that chain of custody was not broken. The learned state attorney vehemently emphasized that, the evidence by PW3, PW2, PW4 and PW1 shows movement of the exhibit from time of arrest until tendered in Court. That, there was no room for tempering with the exhibit.

As to ground 7 of appeal, the learned state attorney submitted that, it is true that, Exhibit P2 was not mentioned during Preliminary Hearing however, it was his submission that failure to mention an exhibit is not fatal as it is not the requirement to mention the exhibit. The learned state attorney submitted that, section 192 of the CPA is there to accelerate trial for easy disposal of cases and there is nowhere under the provision it is required to name the exhibit. To support his point, he cited the case of **Joseph Nyanda vs. Republic,** Criminal Appeal No. 186 of 2017, CAT at Dar es Salaam (Unreported).

In respect to ground 8 of Appeal, the learned state attorney insisted that the offence was proved. He underscored that, for the offence of trafficking in narcotic drugs to be proven, prosecution must show that the accused was found in possession of narcotic drugs, chain of custody must be shown and the government chemist must prove that the exhibit is really narcotic drugs. According to him, all these were proved and thus the charge was proved beyond reasonable doubt. He then prayed the appeal to be dismissed for lack of merit.

After a careful consideration of the record and the rivalry submissions from both sides, I am aware of a salutary principle of law that a first appeal is in the form of a re-hearing. Therefore, the first appellate court, has a duty to re-evaluate the entire evidence on record and subjecting the same to a critical scrutiny and if warranted arrive at its own conclusions of fact. See **D. R. PANDYA v REPUBLIC** (1957) E.A 336 and **VUYO JACK vs. D.P.P,** Criminal Appeal No. 334 of 2016, CAT at Mbeya (unreported).

I am also aware that, the credibility of a witness is the monopoly of the trial court but only in so far as the demeanour is concerned. The credibility of a witness can be determined in two other ways. **One**, when assessing the coherence of the testimony of that witness, **two,** when the testimony is considered in relation to the evidence of other witnesses,

including that of the accused person. See -**Shabani Daudi vs. Republic**, Criminal Appeal No. 28 of 2001 (Unreported). On the said account, in **Goodluck Kyando vs. Republic,** [2006] T.L.R 363, the Court laid down the following principle:

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness."*

Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. (See **Mathias Bundala vs. Republic,** Criminal Appeal No. 62 of 2004, CAT at Mwanza (unreported).

Guided by the above laid down principles I will therefore dispose the appeal in seriatim by beginning in addressing the 1st to the 8th grounds of appeal.

The Appellant's complaint in the 1st ground of appeal is that the trial magistrate had failed to append his signature after entering a plea of the appellant and that violated section 210 (1) (a) of the CPA. On the other hand, the respondent has resisted arguing that the said provision is irrelevant and neither way the appellant had been prejudiced for that omission. Having

carefully considered the arguments for and against this complaint, I need not be detained much here as I am alive, from its wordings, the said provision deals with recording of witnesses' evidence. Thus, it is inconsequential to the so protest. To make it apt, the provision reads: -

> *"S.210. -(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner : –*
>
> *(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record; and*
>
> *(b) N/A"*

From the above excerpt, it is obvious that, the cited provision requires the magistrate to append his signature after recording witnesses' evidence. The provision has nothing to do with plea taking. I believe the appellant ought to have cited section 228 and 229 of the CPA as submitted by the learned state attorney since these are the relevant provisions for plea of an accused person and procedure of plea of not guilty. Nevertheless, neither of

the two provisions requires expressly or otherwise the magistrate to append his signature after recording a plea of the accused. In essence, section 228 (6) of CPA requires the Court upon recording a plea of the accused to obtain from him his permanent address, record and keep it. Again, section 229 (1) of CPA directs that where the accused person plead not guilty, the prosecutor should open the case against the accused person and should call witnesses to adduce evidence in support of the charge. From the record, all these were done by the trial Court. I thus, dismiss the 1st ground of appeal as it lacks merit.

Coming to the second ground of appeal, the appellant complains is that, the purported search and seizure were conducted in violation of the law as no search warrant was issued while there was enough time for the officers to obtain the same from Dar es Salaam as the information of commission was given to PW5 while they were still in Dar es Salaam. Again, the provision of section 38 (1) requiring an officer of a rank of OCS to conduct search while PW3 was not of the rank. On the other hand, the respondent contends that, it was an emergency search considering the time they reached at the scene which was evening of 04:45hrs, it was impossible for them to get a search warrant.

I have considered the arguments placed before me but I have noted that the relevant provisions in search and seizure are sections 38 (1) of the CPA and 32 (4), (5) (7) of DCEA. Sub section (1) of section 38 of the CPA provides that a search warrant has to be issued where it is not an emergency. As it reads: -

> *"S.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.*

Again, the provisions of section 32 (7) of the DCEA provides thus: -

"S.32(7) - Any such officer referred to under subsection (1), may at any time-

(a) enter into and search any buildings, conveyance, or place;

(b) in case of resistance, break, open any door or remove any obstacle to such entry;

(c) seize-

(i) anything with respect to which any offence has been or is suspected to have been committed;

(ii) anything with respect to which there are reasonable grounds to suspect that it will afford evidence as to the commission of any offence; or

(iii) anything in respect of which there are reasonable grounds to suspect that it is intended to be used for the purpose of committing any offence.

As well section 32 (4) and (5) of the DCEA require that arrests and seizures be conducted in accordance with the law in force, specifically in this case, the CPA.

Gathering from the evidence, it is obvious that the search was not an emergency one and indeed it could not have been an emergency because according to PW5, upon receiving the relevant information from their informer about the drugs being at the scene, that is to say at Kikobo Area within Rufiji District in Coast Region, still they were in Dar es Salaam. Yet, the team of police officers from Dar es Salaam, travelled to the scene from Dar es Salaam, and conducted the search much later in evening 4:45 AM. There is no dispute that the police did not have a search warrant. I have all reasons to believe that, PW5 and PW3 had chance to prepare a search warrant from the moment it was decided that they were to go to Rufiji for to conduct search.

Since the general rule under the CPA is that search of a suspect to be authorized by a search warrant unless it falls under the exceptions provided for under section 42 of the CPA. And, since the instant case does not fall under any of the exceptions, then the search carried out without warrant was illegally conducted. The question which come next is what is the resultant effect to the violation?

In answering the above posed issue, I will be guided by the decision in **Shabani Said Kindamba** *(supra),* in which the Court of Appeal at page 14-15 enumerated the importance of search warrant to the suspect. It had this to say: -

> *"…We think we need to appreciate the rationale for the requirement of search warrants. In some jurisdictions such as South Africa, search warrants are considered to be a safeguard to the constitutional right to dignity and privacy of a person. See, The Minister of Police v. Kunjana, 2016 SAGR 473 (CC), from an article titled Warrantless Search and Seizures by South African Police Services: Weighing up the Right to Privacy v. the Prevention of Grime, published on 26 January 2021 by W. Nortje, http://dx.doi.ora/10.17159/1727- 3781/2021 toaae 31.*
>
> *Here at home our reading of the Police General Orders (P.G.O) 226 shows the seriousness with which search warrants should be taken. Part of it reads: -*
>
> *" 1. The entry and search of premises shall only be affected either: -*
>
> *(a) on the authority of a warrant of search; or*

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

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

The tone of the provisions above cited, and the fact that under paragraph 2 (a) and (b) of the P.G.O, there is even a requirement of obtaining permission from a Magistrate before effecting search, shows that the intention was to prevent abuse of powers of search and arrest. The requirement to obtain approval of a Magistrate is echoed in section 38 (2) of the CPA…"

Since the general rule under the CPA is that search of a suspect shall be authorized by a search warrant unless it falls under the exceptions provided for under section 42 of the CPA, ***and since the instant case does not fall under any of the exceptions, the search was illegally conducted.****"* End of quote

The fact that, the search was conducted illegally, as alluded, it is obvious that even the whole process of search was illegal, henceforth as guided by the provisions of section 169 of the CPA which directs on exclusion of evidence illegally obtained, I hereby proceed to expunge the seizure certificate (Exhibit PE4) and the two sulphate bags having narcotic drugs (Exhibit PE2) which were seized during the illegal search.

Having expunged Exhibits PE4 and PE2 the sulphate bags and seizure certificate, the remaining evidence, in my view, can not sustain the conviction against the Appellant as all the evidence adduced were in support of the expunged exhibits

Before I pen off, I wish to make it vibrant that, I am alive with a position of the law that, failure of the accused to raise an objection regarding admission of his confession is presumed to have been voluntarily made. That the law is settled that if the accused person, in the course of trial, intends to object to the admissibility of say a statement/confession, he must do so before it is admitted. Thus, an objection at later stages including in appeal is considered as an afterthought. [See-**Shihoze Seni And Another vs. R** (1992) T.R.L 330**, Stephen Jason and Another vs. Republic**, Criminal Appeal No. 79 of 1999, CAT at Mwanza and **Selemani Hassan vs.**

Republic, Criminal Appeal No. 364 of 2008, CAT at Mtwara (All Unreported)].

Besides, it is the principle of law that, admissibility of a document in evidence is one thing and its probative value is quite another. In the decision of this Court in **Edward Sijaona Mwanamila vs. Abdul Idd Almas Katende,** Land case Appeal No. 59 of 2019, HCT at Bukoba (Unreported) it was held that: -

> *"But it should be noted that admitting an exhibit is one thing and an assessment of the exhibit to determine its weight/its probative value is another thing altogether. Thus, admission of the exhibit is not synonymous with its relevance. The weight and content of it can be objected.* "

In an Indian case of **P.C Purusho-tham Reddiar vs. S. Purumal, 1972 AIR 608,** the Supreme Court had this to say: -

> *"…Once a document is properly admitted, the contents of that document are also admitted in evidence though those contents may not be conclusive evidence."*

Guided by the above decisions, the appellant vide ground three of appeal has complained that, his caution statement was recorded in contrary to section 50 of CPA as it took more than 4 hours from arrest. The respondent has conceded that it took more than 4 hours to record the

appellant caution statement as the investigation was still in progress and thus, the situation falls under exceptions under subsection (2).

Principally, the period available for interrogation by the police is regulated under sections 50 and 51 of the CPA from which we extract the relevant portions : -

> *"S.50(i) - For the purpose of this Act the period available for interviewing a person who is in restraint in respect of an offence is-*
>
> *(a) subject to paragraph (6) the basic period available for interviewing the person, that is to say,* ***the period of four hours commencing at the time when he was taken under restraint in respect of the offence****;*
>
> *(b) if the basic period available for interviewing the person is extended under section 51, the basic period as extended*
>
> *S.51(1) - Where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with an offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may-*

(a) extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or

(b) either before the expiration of the original period or that of the extended period, make application to a magistrate for further extension of that period".

Upon numerous occasions, the Court of Appeal has been confronted with situations similar to the one at hand. (See **Emilian Aidan Fungo @ Alex and another v R,** Criminal Appeal No. 51 of 2010, CAT at Dar es Salaam, **Mussa Mustapha Kusa and another v R**, Criminal Appeal No. 126 of 2011, CAT at Dar es Salaam and **Hamisi Juma @ Nyambanga and others v R**, Criminal Appeal No. 261 of 2011, CAT at Mbeya (All Unreported). In all these decisions, the Court of Appeal held that the non-compliance vitiated the particular cautioned statement and to this end, the Court of Appeal had left with no other option than to expunge those cautioned statement from the record.

In this case section 50 of the CPA was not abided to clearly, the record bears out that the appellant was arrested on 21/7/2021 and he was under restraint at his residence since 4:45 AM. The caution statement indicates that it was recorded on 21/7/2021 between 17.35 and 18.40 hrs. And the

additional statement was recorded on 23/7/2021 from 15:40 and 16:02 hrs. It is apparent that the caution statement on 21/7/2021 was taken beyond the four (4) hours basic period from the time the appellant was arrested. Thus, the caution statement is not worthy to be relied to.

Basing on the above, there is no other cogent piece of evidence implicating the appellant with the offence he was charged with. The case was therefore not proved against the appellant beyond reasonable doubt to warrant his conviction.

In the circumstances, the second and third grounds are enough to faulty the findings of the trial Court and therefore, I do not see why I should do an academic exercise to delve into the rest of the grounds of appeal. I therefore allow the appeal, quash the conviction and set aside the sentence.

I further order the appellant be released from prison forthwith unless held for any other lawful cause.

It is so ordered.

Rights of appeal fully explained.

DATED at **DAR ES SALAAM** this 31st day of March, 2023.

MUSA.K. POMO

JUDGE

31/03/2023