IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 146 OF 2023

(Original Criminal Case No. 04/2021, District Court of Kinondoni (Hon. H.S. Msongo, PRM)

ZUHURA SHABANI MBAGA.....1ST APPELLANT
KASSIM IDDI ABDALLAH.....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

Date of Last Order: 01/11/2023

Date of Judgment: 14/11/2023

JUDGMENT OF THE COURT

KAFANABO, J.:

This is an appeal that emanates from the decision of the district court of Kinondoni at Kinondoni, (*Hon. H.S. Msongo, PRM*) dated 10th May, 2023.

The appellants herein were charged with the offence of trafficking narcotic drugs contrary to section 15A(1) and (2)(c) of, the Drugs Control and Enforcement Act, Cap. 95 R.E. 2019. The particulars of the offence being straightforward that the appellants on 21/02/2021 at Mloganzila, Kibamba Area, within Ubungo District in Dar es Salaam Region, jointly and together were found trafficking narcotic drugs, namely 'Khat' weighing 4.86 kilograms.

The appellants were prosecuted, convicted, and sentenced to 30 years' imprisonment.

The appellants being aggrieved by the decision of the district court of Kinondoni approached this court with seven grounds of appeal. Four grounds are contained in the petition of appeal filed in this court on 19th July 2023 and three grounds are contained in the additional grounds of appeal filed on 21st September 2021 which were added with leave of the court.

On 1st November, parties appeared before this court for a hearing and both were represented by learned counsels. The appellants were represented by Mr. Patrick Masenge, learned Advocate and the respondent was represented by Mr. Cuthbert Mbilinyi, learned State Attorney.

First of all, Mr. Masenge prayed to renumber additional grounds of appeal as 5th, 6th, and 7th for ease of reference, and with a view to avoid confusion as they were filed starting with serial numbers 1 to 3, numbering which would be easily confused with the initial grounds of appeal. The prayer was not objected to by the respondent and thus granted by the court. Therefore, the grounds for appeal before the court are as follows:

1. *The trial magistrate erred in law and in fact to convict and sentence both appellants based on inconsistent/contradictory evidence and testimonies of prosecution witnesses which differ from one another, and this goes to the root of the case.*
2. *The trial magistrate erred in law and in fact to convict and sentence the appellants without credible testimonies of prosecution witnesses.*
3. *The trial magistrate erred in law and in fact to convict both appellants without considering the breach of the chain of custody of the exhibit which led to the tendering of a different exhibit from the one which was seized at the time of the search.*
4. *The trial court erred in law and in fact to convict both appellants while the prosecution failed to prove their case beyond a reasonable doubt.*
5. *The trial magistrate erred in law and in fact to convict and sentence both appellants while the search was illegally conducted contrary to section 38 of the Criminal Procedure Act, Cap. 20 R.E.2019.*
6. *The trial magistrate erred in law and in fact to convict both appellants while evidence brought before the trial court does not support the conviction and sentence.*

7. *The trial magistrate erred in law and in fact to convict both appellants while the caution statement was illegally recorded and without following the procedure and that made it not to be used in the conviction(sic) of the appellants.*

At the hearing, which proceeded orally, counsel for the appellants dropped grounds number two and three of the appeal and argued grounds number one, four, five, six, and seven of the appeal.

Counsel for the appellants started with the 5th ground of appeal. He submitted that the search conducted in the premises of the 1st appellant where she was found with the 2nd appellant is contrary to the law on how a search is conducted. According to section 38(1)(c) of the Criminal Procedure Act, Cap. 20. R.E. 2019(hereinafter referred to as 'the CPA'), requires the police officer to obtain a search warrant to be issued by the OCS of the police station. In searching the 1st appellant's premises the law was not complied with, taking into account they planned to search the said premises well in advance. No good reasons were advanced by the respondent. Hence the police officers had no mandate to search the said premises. Reference was made to the testimony PW2 in pages 11, 12, and 13 of the trial court proceedings.

The court was referred to the case of **Shabani Ramadhani Abdala @ Kindamba vs Republic (Criminal Appeal No.120 of 2021) [2023] TZCA 17352** (22 June 2023) where on page 17 the court held that no search shall be conducted without a warrant unless there is an emergency. It was further submitted that the unlawful search makes all items and exhibits allegedly seized at the 1st appellant's premises to be illegal and the seizure certificate to be illegal. This was the position in the case of Kindamba (supra) where the court directed that the exhibits seized illegally should be expunged from the record of the court. The case of **Sophia Joseph Kimaro vs Republic (Criminal Appeal No.152 of 2019) [2023] TZCA 17589** (1 September 2023) was also cited in that aspect.

It was added that the police officers who conducted the search did not follow the procedure prescribed under section 32(4) of the Drugs Control and Enforcement Act, Cap. 95 [R.E. 2019] (hereinafter referred to as 'the DCEA') referring to section 38 of the CPA.

In respect of this ground, the respondent submitted that this is a baseless ground because the law applicable was not the CPA but the DCEA. It is clear from the record that, as a certificate of seizure (exhibit P3) indicates the law

applicable is the DCEA under section 48(2)(c), and the same was admitted without objection and both appellants signed the certificate.

The respondent further submitted that, as regards search warrant and authority to search the DCEA reduced the conditions of searching and seizing drug-related substances compared to CPA. The officers who went to search were governed by section 48(2)(c)(ii) of the DCEA. The law does not require a search warrant to search and seize narcotic drugs. The respondent objected to the argument that the respondent failed to observe the requirements of section 38(1) of the CPA because section 48(6) of the DCEA provides that in case of conflict between provisions of CPA and DCEA the provisions of DCEA prevails, therefore search and seizure was correct. The case of **Islem Shebe Islem vs Republic (Criminal Appeal No.187 of 2020) [2023] TZCA 17625** (18 September 2023) (pages 20-23) was cited in support of the submission.

As regards**,** ground six of the appeal, counsel for the appellants argued that the evidence before the trial court did not support the conviction and sentence of the appellants. It was argued that the appellants were charged for trafficking 68 bundles amounting to 4.86 kilograms of khat. The same

was in bags/luggage containing 35 bundles marked as Exhibit 'A', 12 bundles as Exhibit 'B', and 21 bundles as Exhibit 'C'.

However, in the trial court proceedings, only 52 bundles were tendered. among those, 51 bundles were the bundles tendered to prove the case against the appellants and were relied upon by the court to convict the appellants. The respondent did not explain where 17 bundles were taken or their whereabouts. The decision of the trial court on page 3, last paragraph indicates the number of bundles. This raises doubts that the bundles sent to the government chemist for examination are different from those tendered as exhibits in court. The report of the government chemist (PW1), admitted as exhibit P1 indicates examined bundles as 69. There is inconsistency/variance between the charge sheet and evidence tendered before the court. The respondent did not explain the discrepancy. It was the appellant's submission that the respondent failed to prove their case. The case of **Godfrey Elisalia & Others vs Republic (Criminal Appeal No.39 of 2022) [2023] TZCA 17325 (12 June 2023)** was cited in support of the submission.

Regarding ground no 7 of the appeal**,** the appellants are challenging the use of caution statement to convict them. Section 48(2)(v) of the DCEA, requires

a statement of the accused to be taken within 24 hours from the time of arrest. The caution statement of the 1st appellant admitted as exhibit 'P4', was taken on 21/02/2021.

The appellants' counsel submitted that the said exhibit indicates a time of commencing taking the statement as 18:57 hours, however, the statement does not show when the exercise of taking the statement ended. Further, an additional statement of the 1st appellant was taken on 25/02/2021, and commencement time being 09:32 hours and the completion time being 10:01 hours. It was submitted that the main statement was never closed according to law and thus be expunged from the record. Also, it is not indicated why an additional statement was taken and under whose directive, this contravenes the requirement of section 48(2)(vi) of the DCEA. Therefore, exhibit P4, was taken contrary to law and thus could not be used to convict the appellants, and thus deserves to be expunged from record.

The respondent, opposing this ground of appeal, submitted that this was a baseless ground since exhibit P4 was tendered without objection, except on its voluntariness, but was cleared by the court and hence legally obtained. The objection was supposed to be made during clearance and admission of the document, not during cross-examination or appeal. The cases of

Emmanuel Lohay & Another vs Republic (Criminal Appeal 278 of 2010) [2013] TZCA 292 (4 March 2013), **Jileka Machiya vs Republic (Criminal Appeal No. 193 of 2021) [2023] TZCA 17700 (3 October 2023)** were cited in support of the submission.

In respect of the 1st ground of appeal, the appellants submitted that the evidence upon which they were convicted was full of inconsistencies and contradictions. The first one was evidence of PW2, Inspector Msoke, on page 12 of the trial court proceedings. It was testified that one person was arrested outside the house (before entering), his name was Yusuph Kerefu and then they entered the house. Evidence of PW3 (a ten-cell leader and independent witness), on page 27 of the trial court proceedings, contradicts that of PW2. The concern is when was the ten-cell leader called to the 1st appellant's premises.

Also, the bundles found in the premises of the 1st appellant have different explanations from PW2 and PW3. PW3 also did not explain about the police officer who went to call her. Also, evidence of PW5 (on page 33 of the trial court proceedings) shows that PW3 was not at the 1st appellant's premises when police arrived. She arrived after the police officers had arrived and made arrests. The evidence of PW5 makes it clear that appellants were

arrested before the arrival of the ten-cell leader. PW3 was not present before and during the arrest, and thus could not testify as to who was arrested with how many bundles. The contradiction is also on PW1, the government chemist, and other witnesses, he tendered 52 bundles of Khat, but other prosecution witnesses testified to have seen 68 bundles. The case of **Matera Simango @ Masana vs Republic (Criminal Appeal 517 of 2019) [2021] TZCA 621 (29 October 2021)** was cited as regards inconsistencies in evidence. It was submitted that the inconsistencies in this case go to the root of the matter.

Moreover, it was submitted that sections 15A (1) and 2(c) of DCEA, require proof that drugs were in possession of the accused. The inconsistencies raise doubts that the drugs were planted.

The respondent in this ground of appeal submitted that it is also baseless because the contradictions and inconsistencies were minor especially that of PW1 on the number of bundles. PW1 said that the 3rd luggage had four bundles but the same was cured by PW5 (see page 10 of the trial court proceedings on the identification of drugs during seizure). The same was cured by PW2 and PW4 and the appellants did not dispute that drugs were found in their possession in the house of the 1st appellant.

It was further submitted by the respondent that in proving the charge leveled against the appellants, the number of bundles was not necessary, but weight matters. Moreover, exhibits were not objected and no cross-examination was done on those facts which means the appellants agreed to the facts. It was the respondent's submission that inconsistencies did not go to the root of the case. The court was referred to the book by Sarkar, the Law of Evidence, 16th edition in justifying normal discrepancies in evidence. It was the respondent's submission that the discrepancies are normal, not material.

The fourth ground of appeal challenges the conviction of the appellant whilst the respondent failed to prove his case beyond reasonable doubt. It was submitted by the counsel for the appellants that it is unlawful to convict the accused based on the weakness of the defense case.

The respondent argued grounds four and six combined. The learned State Attorney submitted that the grounds of appeal have no merit. Both appellants were charged with trafficking 4.86 kilograms of narcotic drugs named 'khat'. It is not about 68 bundles as submitted by the appellants. The charge only contained weight. The respondent paraded six witnesses and four exhibits to prove the offence. It was submitted that in order to prove the offence of trafficking narcotic drugs, four elements must be proved.

One, the substance seized must be proved to be drug-related. This was proved by PW1, a government chemist, that leaves seized are drug-related (khat) as they contained cathinone and cathine. Exhibit P1, a report, was tendered which was not challenged at all. Failure to cross-examine is taken to have admitted the facts. The case of **Nyerere Nyague vs Republic (Criminal Appeal Case 67 of 2010) [2012] TZCA** was cited in support of the submission. Two, the accused must be found with drugs. From the evidence on record PW2, PW3, PW5, DW1, and DW2 all agreed that the appellants were found with drugs. Also in exhibit P4, the caution statement of DW1, she confessed to having been found with the drugs.

Three, the chain of events from the day of arrest to the day they were arraigned in court was not broken. The evidence was seized by PW2 and passed to PW5, who took them to PW1 government chemist. They were given to PW5 who passed them to PW6 who was the custodian and later brought to court. Thus the chain was intact. Fourth, the weight of the element must be proved. The same was proved by PW1, and exhibit P1 was not contested by the appellants which is deemed to have been accepted. The case of **Nyerere nyague** (supra) was cited in support of the submission.

After hearing the parties this court turns its focus on determining grounds of appeal as expounded by submissions of the parties and evidence on record. The major issue, as common in criminal cases is whether the case against the appellants was proved beyond reasonable doubt.

The starting point of this court will be grounds One, Four, and Six of the appeal as they all challenge the credibility of the evidence relied upon by the trial court to convict the appellants.

As regards inconsistencies and contradictions of the evidence of the respondent's witnesses, this touches on two major concerns as highlighted by the appellant's counsel.

One was when PW3, a ten-cell leader and an independent witness, arrived at the premises where appellants were allegedly found with drugs and arrested. Two, how many bundles of the alleged Khat were found with the appellants in the 1st appellant's house?

The appellants' counsel made it clear that the testimonies of PW1, PW2, PW3, and PW5 are inconsistent as to who arrived first at the premises subject matter of the search.

Reading page 12 of the trial court proceedings, it is clear that PW2, Inspector Msoke, testified that after being shown the house, they found three people outside, two ran away, and one person remained and was arrested. The person was identified as Yusuph Ally Kerefu. He also testified that they entered the house, where they found two persons a man and a woman. They arrested both and then they called a ten cell leader by the name of Mwajuma (PW3). During the search they found 35 bundles and other 11 bundles, they also found 12 bundles which were in a plastic bag. Other 21 bundles were found in a plastic bag, in the store outside. They also found one bundle with Yusuph Kerefu. This makes a total of 80 bundles as per PW2 testimony.

The testimony of PW5, available on page 33 of the trial court proceedings, shows that they (PW2, PW5, and Cpl. Gwasha) knocked on the door of the 1st appellant's premises. The same was opened and inside the house, there were two adults (the appellants herein) and two children. They arrested the appellants and went to find a ten-cell leader called Mwajuma. During the search they found 35 bundles on the bed, 12 on the floor, and 21 bundles were found in the chicken hut. This makes a total of 68 bundles as PW5's testimony.

Moreover, according to the testimony of PW3, a ten-cell leader at Mloganzila, Kibamba area, two police officers arrived at her home and asked her to go and witness a search of narcotic drugs at her community. She testified that they went to the house of the 1st appellant, but the door was closed. The police officers knocked on the door and when the door was opened they found 35 bundles on the bed, 12 in the red bag, 21 in the chicken yard, one on the pillow, and one bundle was found with a person she did not remember. This makes a total of 70 bundles as per PW3's testimony.

It was the submission of the appellants that PW3 was not present before and during the arrest, and thus could not testify as to who was arrested with how many bundles of drugs or any of the drugs. Evidence of PW3, on page 27 of the trial court proceedings contradicts with that of PW2 (on page 12 of the trial court proceedings) and PW5 (on pages 33-34 of the trial court proceedings).

Moreover, the Respondent did not specifically address the issue of the time of arrival of PW3 as an independent witness in the premises of the 1st appellant where both appellants were allegedly found with the said narcotic drugs.

This court finds that from the testimony of PW2 and PW5, it is apparent that PW3 arrived at the 1st appellant's house after the police officers had arrived and made arrests of the appellants. The evidence of PW2 and PW5 makes it clear that the appellants were arrested before the arrival of the ten-cell leader. This court, therefore, finds the testimony of PW3 unreliable and the trial court should not have relied on the same to convict the appellants herein.

Besides, testimonies of PW2, PW4, and P5 are to the effect that bundles allegedly seized on 21/02/2021 at the 1st appellant's premises in Mloganzila, Kibamba area were later taken to Police Ufundi Kurasini, at the Drugs Abuse and Trafficking Department. Upon arrival, the seized bundles of narcotic drugs were properly packed in front of the appellants, Yusuph Kerefu, and the ten-cell leader of Keko Machungwa, one Mashaka Abdi Hamadi (PW4). They were packed as follows: 35 bundles in one luggage/bag marked 'A', 12 bundles in another luggage/bag marked 'B', 21 bundles in another luggage/bag marked 'C,' and one bundle separately marked 'D'. The items of luggage A, B, and C were written names of the appellants who signed them and also counter-signed by PW5 and PW4 (the ten-cell leader), and a thumbprint was put on the same. Luggage D was written the name of one

suspect, Yusuph Kerefu, signed by PW5, and PW4 and countersigned by Yusuph Kerefu.

PW5 also testified that she filled out form No. DCEA 0.01 and sent the specimen to the government chemist Laboratory for investigation. PW5 and PW2 went to the government chemist and met by laboratory chemist by the name of Derick. The specimens, that is A, B, C, and D above, were measured and weighed 3.04 kilograms, 676.22 grams, 1.14 kilograms, and 45.95 respectively. Thereafter, they were properly sealed and handed back to PW5. When the items of luggage/bags were shown to PW5 in court, as exhibit P2, she recognized them according to the way she marked them in her office before the same were taken to the government chemist as luggage A (35 bundles), luggage B (12 bundles), and luggage C (21 bundles). This makes a total of 68 bundles.

A government chemist, Derick Masako, testified that on 22/02/2021 he received four sulphate bags from PW5 which were given laboratory reference number 498/2021, and then measured their weight. After investigation, it turned out that the sample was Mirungi (Khat) as it reacted with cathinone and cathine. He prepared a report dated 8/03/2021. In the trial court, the

report was admitted as exhibit P1, and the items of luggage A, B, C, and D were admitted as exhibit P2 collectively.

However, when items of luggage A, B, C, and D were opened in court, luggage A had 35 bundles, luggage B had 12 bundles, luggage C had 4 bundles, and luggage D had 1 bundle. This makes a total of 52 bundles admitted by the court out of which 51 bundles were connected with the appellants. This means that out of 68 bundles connected with the appellants, 17 bundles were not tendered in court and there was no explanation from any of the prosecution witnesses. Exhibit P1, the government chemist report, indicated that 69 bundles as allegedly found with the appellants, but only 52 were tendered in court.

The appellant's counsel submission was that the discrepancy in the bundles raises serious doubt as to whether the accused were found with drugs, or the same were planted. The respondent submitted that the inconsistency is minor and was cured by other prosecution witnesses. Further, he submitted that the charge was based on the weight of the narcotic drugs not the number of bundles.

This court, with respect, disagrees with the learned state attorney. The total weight of the drugs depended wholly on the number of bundles each luggage contained. Examining exhibit P1, the report from the government chemist, makes it clear that the greater the number of bundles in each luggage the heavier the weight. For the avoidance of doubt, the report shows that luggage A of 35 bundles weighed 3.04 kilograms, luggage B of 12 bundles weighed 676.22 grams, luggage C of 21 bundles weighed 1.14 kilograms, and luggage D with 1 bundle weighed 45.95 respectively.

The weight indicated in the charge sheet was derived from the weights indicated in the Exhibit P1 and not otherwise. It is this court's view that since there was no explanation as to the whereabouts of the 17 bundles, Exhibit P1 does not represent the alleged drugs admitted as Exhibit P2 in court. Further, the evidence tendered in court is different from the evidence allegedly found in the 1st Appellant's premises as testified by PW2, PW3, and PW5.

Also, the evidence tendered in court is not which was submitted to the government chemist for examination. Simply stated, the Exhibit P1 is not connected with Exhibit P2. Also exhibit P3, seizure certificates, differs from exhibit P2 and the respondent offered no explanation or clarification to the

court. With respect, the trial court also did not do its duty of analyzing evidence before it with a view to avoid miscarriage of justice. The inconsistencies and contradictions in this case are not minor, as the respondent would want this court to believe, they are major and shake the foundation of the case. In the case of **Matera Simango @ Masana vs Republic (Criminal Appeal 517 of 2019) [2021] TZCA 621 (29 October 2021)** it was observed by the court that:

> *'Similarly, we entertain no doubt that the descriptive inconsistencies and contradictions in the testimonies of the prosecution witnesses as reflected in the evidence reproduced above, is material and went to the root of the prosecution case. It is indeed, unfortunate that the two courts below did not thoroughly address those 10 inconsistencies and contradictions which are apparent in the prosecution witnesses' evidence and resolve it as required by law. By way of emphasis on the importance of resolving contradictions and inconsistencies, we wish to reiterate what the Court stated in* ***Mohamed Said Matula v. Republic [1995] T.L.R. 3*** *that:-*
>
> > *"Where the testimony of witnesses contains inconsistences and contradictions, the court has a duty to address the inconsistences*

and try to resolve them where possible, else the court has to decide whether the inconsistences and contradictions are only minor or whether they go to the root of the matter. "

It was further held that:

'In the final analysis, considering the variance between the allegation in the charge and the evidence; the material inconsistencies and contradictions in the prosecution evidence and the unreliability of the exhibits as we have alluded to above, it cannot be concluded that the case against the appellant was proved beyond reasonable doubt as found by the trial court and confirmed by the first appellate court.

It follows that the trial court was wrong in convicting the appellants based on Exhibits P1, P2, and P3 as they contained serious inconsistencies which, in the view of this court, as observed above, go into the root of the matter. Choosing not to cross-examine a witness on a particular fact or exhibit does not amount to accepting the same. See **Zakaria Jackson Magayo vs Republic (Criminal Appeal 411 of 2018) [2021] TZCA 207 (19 May 2021**). Thus, the case of **Nyerere Nyague vs Republic (Criminal**

Appeal Case 67 of 2010) [2012] TZCA 103 (21 May 2012) is distinguishable.

Further, no evidence was tendered to prove the accounts or testimonies of PW2, PW3, and PW5 on the alleged 80, 68, or 69 bundles of narcotic drugs.

The inconsistencies and failure by the prosecution to tender the alleged narcotic drugs, as allegedly found with the appellants, suggest that the chain of custody was broken and that is why the respondent could not explain the missing 17 bundles of the alleged khat. In the case of **Paulo Maduka & Others vs Republic (Criminal Appeal 110 of 2007) [2009] TZHC 69 (28 October 2009),** the Court of Appeal held that:

> *'By* ***"chain of custody" we have in mind the 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, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime - rather than, for instance, having been planted fraudulently to make someone appear guilty****. Indeed, that was the contention*

of the appellants in this appeal. The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.

In the case at hand, unfortunately, this salutary guiding principle in criminal investigations, was not observed and enforced. As a result, there was no linkage between the money seized from the appellants and the one sent to the Chief Government Chemist, and therefore the money robbed from the hospital. Without this linkage, the entire prosecution case was bound to crumble.'

The above observation of the Court of Appeal reflects the situation in the present case. The prosecution did not tender, as an exhibit, the alleged narcotic drugs found with the appellants. This means that the respondent failed to prove that the appellants were trafficking narcotic drugs contrary to section 15A(1) and 2(c) of the DCEA.

This court, therefore, finds that grounds one, four, and six of the appeal have merits and are therefore upheld.

As regards the 5th ground of appeal, the appellants submitted that the search conducted in the premises of the 1st appellant where she was found with the 2nd appellant is contrary to the law on how the search is conducted. It was added that the police officers who conducted the search did not follow the procedure prescribed under section 32 (4) of the DCEA referring to section 38 of the CPA. In respect of this ground, the respondent submitted that this is a baseless ground because the law applicable was not the CPA but the DCEA. It is clear from the record that, as a certificate of seizure (exhibit P3) indicates the law applicable is the DCEA under section 48(2)(c). The respondent cited the case of **Islem Shebe Islem vs Republic (Criminal Appeal No.187 of 2020) [2023] TZCA 17625** (18 September 2023).

The rivalry of the parties herein may be resolved by a critical construction of the relevant provisions of the law. Section 32 (3)(4)(5) of the DCEA provides as follows:

> *(3)The provision of any law in force in the United Republic in relation to the general powers and duties* ***of investigation, arrest, search and seizure by officers of the police****, customs officer or any other person having powers of arrest,* ***shall apply to this Act.***

(4)The ***officer of the Authority shall have powers to arrest, search, seize, investigate*** *and record statements in relation to any matter under this Act as* ***if he is a police officer discharging duties and exercising powers under the Criminal Procedure Act*** *or customs officer under the Customs (Management and Tariff) Act or any other law conferring powers of arrest and seizure*

(5) The provisions of any law in force in the United Republic in relation to the general powers and duties of the investigation, arrest, search, seizure and record statements by the police officer, customs officers or any other person having powers of the arrest, ***shall apply to officer under this Act.***

The above provisions of section 32 of the DCEA are crystal clear that provisions of other, laws including the CPA, are not excluded by the DCEA. The officers of the authority under the DCEA are required to adhere to provisions of other laws when discharging their duties.

In addition, section 48(2)(c) of the DCEA, as referred to by the learned state attorney is not exhaustive as matters of investigation, arrest, search, and seizure are concerned. Filling the gap are provisions of section 32 (3)(4)(5)

of the DCEA which requires application of the DCEA together with other laws. Section 32(4) in particular requires officers of the authority to discharge their duties as police officers discharging their duties under the CPA.

This court therefore agrees with the appellant's counsel that section 38 of the CPA, under the circumstances of this case where the officers of the authority had prior notice from the informer that they were going to search a house, should have procured a search warrant for that purpose. The cases of **Shabani Ramadhani Abdala @ Kindamba vs Republic (Criminal Appeal No.120 of 2021) [2023] TZCA 17352 (22 June 2023) and Ayubu Mfaume Kiboko & Another vs Republic (Criminal Appeal 694 of 2020) [2022] TZCA 121** (17 March 2022) followed. In the case of **Kiboko** (supra) the court of appeal observed that:

> *'Adverting to the instant case, it is in the evidence that PW3 led the police team that searched at the appellants' home after he was instructed to do so by his unnamed superior officer. It is certain that PW3 was not an OCS and that it was not suggested that he was, in terms of section 2 of the CPA, an OCS by virtue of his rank or that he was standing or acting in the position of OCS. It is also on record that he had no requisite written authority (search order) from an OCS to*

carry out the search. Furthermore, the evidence does not suggest that the impugned search was executed as an emergency undertaking in terms of section 42 (1) of the CPA dispensing the requirement for a search order or warrant. We have arrived at that conclusion based on the following: first, that PW3 indicated that the police had repeatedly received intelligence on the appellants' alleged wrongdoing, which would have allowed them to deploy appropriate surveillance measures that would have led to apprehension of the suspects. Secondly, before the search party attended the scene on the material day, PW3 had ample time to prepare for the pursuit by mobilizing a contingent of police officers. We wonder why he did not seek and obtain the requisite search order for the anticipated search before he and his team set for the scene. We think that this is a classic case where police officers, believing that they were unshackled by the law and that they had a free hand, went ahead, entered into and searched suspects' home brazenly violating the law. As rightly argued by Mr. Nkoko, this unsettling situation is further compounded by the fact that the questioned search was executed in the small hours of the morning

before sunrise clearly in contravention of the prohibition under section 40 of the CPA.'

The case of **Islem Shebe Islem** (supra) is, therefore, distinguishable because it did not say that the CPA is not applicable and section 32(4) was not under consideration in the above case.

In addition to that, the police officers or officers of the authority entered the premises of the 1st appellant and arrested both appellants herein. There was no independent witness. The ten-cell leader, as intimated above came later, purportedly, to witness search and seizure. It is, therefore, not safe, to conclude that the seized substances were from the 1st appellant's premises. Further, it is not safe to conclude that both appellants were found with the alleged narcotic drugs in the absence of an independent witness during entry into the 1st appellant's premises and during arrests.

Therefore, this court finds that the search and seizure was conducted unlawfully and thus the certificate of seizure prepared under such search is not valid.

In the above-referred cases of **Kindamba (supra)** and **Kiboko (supra),** the Court of Appeal having found that the search was unlawful proceeded to rule that the evidence obtained through unlawful search was illegally obtained and proceeded to expunge the same from the record. This court is bound to follow in the same veins, and hereby expunges from the record exhibit P1 (government chemist report, as procured from illegally obtained evidence), exhibit P2 (substance in question), and exhibit P3 (seizure certificates).

Turning to ground number 7 of the appeal, this court agrees with the appellants that section 48(2)(a)(v) of the DCEA, requires a statement of the accused to be taken within 24 hours from the time of arrest. The caution statement of the 1st appellant admitted by the trial court as exhibit P4 was taken on 21/02/2022 from 18:57 hours. The statement does not show when the exercise of taking the statement ended. It follows that the additional statement of the 1st appellant was taken on 25/02/2021 and commencement time was 09:32 hours the ending time being 10:01 hours. This shows that the initial statement also should have indicated the time of completion, but none was indicated.

Also, it is not indicated why an additional statement was taken and under whose directive. The whole exercise of taking exhibit P4 is marred by irregularities including contravention of section 48(2)(vi)(vii)(x) of the DCEA.

Further, the respondent's argument that the caution statement was admitted without objection, is with respect misleading. This is due to the fact that the 1st appellant objected to the admissibility of the same and the court admitted the same after conducting a trial within a trial. Therefore, the cases of **Nyerere Nyague vs Republic (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 (21 May 2012) Emmanuel Lohay & Another vs Republic (Criminal Appeal 278 of 2010) [2013] TZCA 292 (4 March 2013**), **Jileka Machiya vs Republic (Criminal Appeal No. 193 of 2021) [2023] TZCA 17700 (3 October 2023)** which were cited by the respondent in support of their submission are, in this case, distinguishable.

Therefore, the caution statement of the 1st appellant was taken unlawfully and should not have been admitted by the trial court. The same is hereby expunged from the record.

Under the circumstances, and for the reasons stated herein above, this appeal is allowed. The conviction of the appellants is hereby quashed and the sentence of 30 years' imprisonment is set aside. This court orders immediate release of both appellants, unless held for another lawful cause.

It is so ordered.

K. I. KAFANABO

JUDGE

14/11/2023

Judgment delivered in the presence of Mr. Patrick Masenge for the Appellants, and the appellants also present in court, and in the presence of Mr. Adolf Kisima, State Attorney, for the Respondent.

K. I. KAFANABO

JUDGE

14/11/2023