

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 140 of 2023**

*(Appeal from the Judgment of the Resident Magistrates' Court Kibaha at Kibaha Kibaha in Criminal Case No. 98 of 2021 dated 8<sup>th</sup> November, 2022 Hon. J. Mushi, SRM)*

**BETTY GERALD NJAU.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

**POMO, J**

The Appellant herein, BETTY GELARD NJAU, is not happy with the decision of the trial court in Criminal Case No. 98 of 2021 convicting and sentencing her to serve thirty years jail imprisonment. The trial court convicted her for the offence of Trafficking in Narcotic Drugs contrary to section 15A (1) and (2) (c) of the Drugs Control and Enforcement Act, 2015 as amended by the Drugs Control and Enforcement (Amendment) Act, 2017.

Briefly stated, on 11<sup>th</sup> March, 2021 at Picha ya Ndege area within Kibaha District in Coast Region the Appellant was found trafficking in Narcotic Drugs namely Cannabis Sativa commonly known as Bhangi

weighing 510.84 grams. The Assistant Inspector Bubinga (PW1) was on police patrol duties on the material date. He received information from the informer that the Appellant is engaged in trafficking in narcotic drugs business at her premise at Picha ya Ndege area. Following that, he contacted the street chairman of the area one Joseph Charles Zambo (PW2). Together with other police officers, went to the Appellant's premise and conducted the search. Their search resulted into finding six (6) pellets and six (6) dices of Cannabis Sativa. The found items were inside the Appellant's seating room and bedroom respectively. Those found in the seating room were on the table while in the bedroom were hidden inside the clothes bag while folded into a piece of newspaper. The search was conducted by PW1 assisted by D/C Oscar and the street chairperson (PW2). It was followed by filling DCEA Form No. 003. The Appellant signed it so is Fadhili Mkuli a person who by the time of search was met into the Appellant's house. The street chairman also signed the Form so is the police D/C Oscar. Among those conducted the search in the Appellant's premise, no police woman was involved.

Following the above, the Appellant was arrested and arraigned before the trial court. Investigation being completed, a total of eight witnesses were brought by the prosecution side to prove the charge and tendered a total of seven exhibits. These are, DCEA Form No.003 (Exhibit

P.E1); DCEA Form No. 001 (Exhibit No. PE.2); GCLA 01 sample receipt notification (Exhibit PE.3); Cautioned Statement of the Appellant (Exhibit PE.4); Exhibit Register Book (Exhibit PE.5); the Chemist Investigation Report (Exhibit PE.6) and lastly is six pallets and six dices of Cannabis Sativa (Exhibit PE.7).

The Appellant who fended for herself without calling any witness failed to convince the trial court in her defence to exonerate herself of the charged offence instead the court was satisfied that the respondent republic had proved beyond reasonable doubt against her the charge of trafficking in narcotic drugs contrary to section 15A (1) and (2)(c) of the Drugs Control and Enforcement Act, 2015 as amended by the Drugs Control and Enforcement (Amendment) Act, 2017.

Now, she has approached this court armed with five (5) grounds of appeal as follows: -

- 1. That, the learned trial magistrate erred in law for non-considering that the appellant was illegally searched by male police officers contrary to the mandatory requirement of the law which require a woman to be searched by another woman with strict regard to decency.*
- 2. That the learned trial magistrate erred in law for wrongly treating Exhibit P1 (DCEA Form No. 003) as a search*

*order or search warrant and without considering that it was not an authority of search that authorized police officers who are not staff members of the Drugs Control and Enforcement Authority in the conduct of search.*

*3. That the learned trial magistrate erred in law and facts to place reliance on invalid evidence of PW2 who was a witness with interest to serve in this case since he was the one who gave police information that the appellant was a drug dealer.*

*4. That the learned trial magistrate erred in law to pre-determine the appellant`s guilty basing on weakness of the defense before the evaluation and analysis on evidence on records to justify its decision.*

*5. That the learned trial magistrate erred in law and facts to convict the appellant without considered that two other persons namely Meshack and Fadhili were found into the House of an appellant but were not charged nor called as witness.*

When the appeal was called on for hearing, the Appellant fended herself unrepresented while the respondent republic had legal service of Mr. Clarence Mhoja, learned State Attorney. I ordered the disposal of the appeal be by way of written submission

I will begin with the second ground of appeal on complaint that Exhibit P.1 the DCEA Form No. 003 was treated as a search order or search warrant.

Responding, the respondent republic categorized it into two. Firstly, that there was no search warrant. On this, the respondent republic's submission is that section 42 of the CPA permits search to be conducted in the absence of search warrant provided it is done on an emergency situation falling within the conditions set under section 42. That, the Assistant Inspector Bubinga (PW1) who was on police patrol at Kibaha picha ya ndege received information from an informer that within that area there was an owner of the house doing Narcotic Drugs business. Following the information, he immediately communicated with Joseph Charles Zambo (PW2) the street chairman of Picha ya ndege as an independent witness who took them where the house is located. Thus, according to the Respondent republic, the search was one of emergency.

On this, the Appellant's replied as follows. That, per the evidence of PW1, search was conducted in the appellant's house with search warrant citing page 11 of the trial court proceedings where PW1 stated thus: -

*"After all that, I filled the search warrant Form No. 003, I signed such form and accused also signed the form.*

*Fadhili Mkuli and chairman of the street also signed the form. Police D/C Oscar also signed the form”.*

On the strength of the above evidence of PW1, how then the Respondent republic asserts that the search was conducted under emergence situation, the Appellant asks.

In determining the contra-verse, whether Exhibit P.1 the DCEA Form 003 is a search warrant or not, I would wish to let it speaks by itself.

**"JAMHURI YA MUUNGANO WA TANZANIA  
FORM NA. DCEA 003  
MAMLAKA YA KUDHIBITI NA KUPAMBANA NA DAW ZA  
KULEVYA  
HATI YA KUKAMATA MALI**

*(Chini ya Kifungu cha 48(2)(c) cha DCEA, 2015)*

*Mimi .....(jina) .....(cheo)*

*Nathibitisha kuwa nimefanya upekuzi tarehe .....eneo la*

*.....(mahali) ambapo vitu vifuatavyo vimekamatwa:*

- 1.....
2. ....
3. ....
4. ....
5. ....
6. ....
7. ....
8. ....
9. ....
10. ....

*Mbele ya:*

*1. Jina la shahidi .....*

*Saini.....*

2. *Jina la shahidi*.....

*Saini*.....

\*\*\*(*MASHAHIDI WATAJAZWA KULINGANA NA MAZINGIRA*)

*Jina/majina na Saini za watu waliofanyiwa upekuzi*

(a) *Jina:* .....

*Saini:* .....

(b) *Jina:*.....

*Saini:* .....

(c) *Jina:* .....

*Saini:* .....

(d) *Jina:* .....

*Saini:* .....

(e) *Jina:* .....

*Saini:* .....

(f) *Jina:* .....

*Saini:* .....

*Jina la Afisa Mtekelezaji* .....

*Saini:* .....

*Tarehe:* .....

*Jina la Mkalimani (Kama yupo)*.....

*Saini:* ..... ” End

of quote

The above is the DCEA Form No. 003 which was filled by PW1 after searching the Appellant’s premises. DCEA Form No. 003 is a prescribed form in the 3<sup>rd</sup> Schedule to the Drug Control and Enforcement (Amendment) Act,2017. It is written in both English and Kiswahili. In English version, the form carries the title “CERTIFICATE OF SEIZURE”.

This means, contrary to the evidence given by PW1 at Page 11 of the trial proceedings, exhibit P.1 is a "**certificate of seizure**" and not a "search warrant". In other words, the search was without warrant. Aware of that, that is why the respondent republic are of the submission that the circumstance of the search was one of emergence falling within section 42 of the CPA exempting search warrant.

From the evidence on record, is it true that the search was emergence one? In resolving this, I will revisit the evidence on how the incidence was reported to the police.

Assistant Inspector Bibinga (PW1) who led the search, his evidence at page 10 of the typed proceedings reads thus: -

*"I remember it was 11/03/2021 I was at the patrol activity at Kibaha Picha ya Ndege and when I was there, I received the information from my informer that there is the owner of one house doing narcotic drugs business and he mentioned the owner of the house is BETTY GELARD NJAU, the accused before the court*

***After receiving such information, I communicated with the chairman of the street at PICHA YA NDEGE one JOSEPH CHARLES ZAMBO and told him that we needed to search a house of somebody, we went to meet at the office of Street Executive Office, I went there with some police officers and I met the street***



*chairman, I asked if he knows the premise of BETTY GELARD NJAU he replied to know the house.*

*I told him to show us the house, he went at the house of the accused BETTY. We met her house door just closed partially. The chairman of the street knocked the door, and accused came outside the house, we went on to introduce ourselves to the accused and I asked accused if she know the chairman of the street, she admitted to know him”.*

On the other hand, the very street chairman of PICHA YA NDEGE KIBAHA one JOSEPH CHARLES ZAMBO (PW2) gave his evidence thus: -

*“I remember it was on 11/3/2021 I was at my office proceeding with normal duties. When I was there, I received the information from the informer that there is bhangi entered into the house of (BETTY) accused before the court, accused is my resident I know even her house. **After receiving such information, I reported the matter at the police operators commander one JOSEPH BUBINGA (PW1).** He is the police officer from KIBAHA POLICE STATION.*

***After going through report** at the police office, they came at my home. He came with other police straight up to my home; we all went up to the resident of BETTY (accused). And it was the same location KIBAHA PICHA YA NDEGE, we knocked the door of accused”.*

From the above account of testimonies by PW1 and PW2, how the information on presence of the alleged crime was conveyed and acted upon by the police is at variance and contradicts. That while PW2 the street chairman of PICHA YA NDEGE KIBAHA testified to be the one who reported the crime to police and the police having gone through the report went to him to take them to the scene of crime, PW1 the leader of the police in the search of the appellant's premises, gave a different version of story in that he was informed of the crime by an informer hence phoned PW2 the street chairman to take them to the scene. Thus, going by the evidence, there is nothing suggesting with certain that the search was one of emergence.

The provisions of the law on 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.*

Also, section 32 (4) and (5) of the DCEA require that arrests and seizures be carried out according to the law in force, specifically in this case, the CPA

In this matter, the search was conducted without search warrant. In **Shabani Said Kindamba vs. Republic**, Criminal Appeal No. 390 of 2019, CAT at Mtwara (Unreported) in which the Court of Appeal at page 14-15 enumerated the importance of search warrant to the suspect, had this to state: -

*"...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.org/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 of 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*

in **Linna Roman Muro versus Republic**, Criminal Appeal No.550 of 2021 CAT at Dar es Salaam (All unreported) the Court of Appeal, at Page 18, also had this to state: -

*"We are cognizant that the way section 48 of the Act is drafted does not impose as a requirement that an officer of the DCEA conducting search should have a search warrant. However, the Court has exhaustively pronounced itself on this in the case of Shabani Said Kindamba versus Republic, Criminal Appeal No.390 of 2019 (unreported) in which we categorically stated that the provisions of the Act relating to search and seizure **were not intended to replace the CPA but rather subject them to 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. Illegal search leads into invalid outcome of the whole process. Consequently, exhibits obtained in such illegal search are hereby expunged. These are, Exhibit PE.1 which is the DCEA Form No. 003 the seizure certificate so are the seized things therein.

Having expunged Exhibit PE1 together with the seized things thereto, the piece of evidence remaining is that which were for corroboration of exhibit PE1. In my view, the same cannot be a stand-alone evidence sufficient to ground conviction for the offence of trafficking in narcotic drugs the appellant stood charged with.

Since this ground suffices to dispose of the appeal, I find no need to dwell into determining the rest of the grounds of appeal.

In the upshot, I hereby allow the appeal by setting aside conviction meted against the appellant and order her immediate release from custody unless is held therein for other lawful cause. It is so ordered

Right of Appeal explained to an aggrieved party

DATED at **Dar es salaam** this 23<sup>rd</sup> day of **February, 2024**



**MUSA K. POMO**  
**JUDGE**  
**23/02/2024**



Judgment delivered this 23/02/2024 in presence of the Appellant and Ms. Agnes Ndazi, learned State Attorney for the Respondent

**Sgd: S. B. Fimbo**  
**Deputy Registrar**  
**23/02/2024**