

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 03 OF 2021

REPUBLIC

VERSUS

1. MAARIFA ABASI NASSORO

2. NEEMA UTHUR MASUMBA

JUDGMENT

4th November & 21st December, 2022

BANZI, J.:

This case involves two lovers, Maarifa Abasi Nassoro and Neema Uthur Masumba; branded as the first and second accused person respectively. They both stand charged with the offence of trafficking in narcotic drugs contrary to section 15 (1) (a) of the Drug Control and Enforcement Act, No. 5 of 2015 as amended ("the Drugs Act"), read together with paragraph 23 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002] ("the EOCCA") as amended. It is alleged in the information that on 8th May, 2019 at Mzambarauni area, within Ubungo District in Dar es Salaam Region, the first and second accused person trafficked in narcotic drug namely Heroin

Hydrochloride weighing 330.11 grams. Both accused persons pleaded not guilty to the information.

At the trial, the prosecution side was represented by Ms. Cecilia Mkonongo and Mr. Paul Kimweri, learned Senior State Attorney assisted by Ms. Edith Mauya and Ms. Florida Wenceslaus, learned State Attorneys. On the other hand, Messrs. Josephat Mabula and Wilson Magoti, learned Advocates, represented the first and second accused person respectively. I must sincerely thank the Counsel of both sides and everyone who took part in the proceedings for their tireless efforts towards assisting this Court in the determination of this case.

In a bid to prove the case against the accused persons, the prosecution relied on testimonies of nine (9) witnesses with thirteen (13) exhibits. On the other hand, the defence side relied on testimonies of both accused person. In the main, the prosecution evidence presents a case that, on 7th May, 2019, Inspector Emmanuel Ambilikile (PW3), an officer at the Drug Control and Enforcement Authority (DCEA) received a tip from an informant that, at Mburahati area, there is a person by the name of Maarifa with his wife dealing in trafficking narcotic drugs. In a view of confirming such information and identifying the area, at 5:00 pm, he went to Mburahati area

where the informer showed him the place they were living. After identifying the area, PW3 went back to the office and reported to his superior one SSP Shelimo who later prepared the arrest team led by PW3. On 8th May, 2019 around 3:30 am, PW3 with arrest team including Inspector Brown (PW7), WP.7631 CPL Zuweni (PW5) and Ex-F.6763 Deodatus Massare (PW9) went to the house of the first accused person, where on arrival, PW3 went to look for a local leader and managed to find one Salum Abdallah Mkele (PW4) who informed him that, there is another local leader by the name of Carolina Pius Kwilanga who lives near the crime scene.

On returning to the crime scene, PW3 instructed one among the officers to go and get Carolina Pius Kwilanga who joined them before they searched the room of the first accused person. Then PW3 with PW4, PW5 PW7 and PW9 knocked the door which was opened by one lady amongst the tenants. After opening, they made introduction and asked the lady to wake up all tenants. After she complied, they asked each tenant to stand at his/her door. After introduction, they informed them about the intended search. After that, they searched themselves to satisfy them that they had nothing to plant. According to PW3, they searched one room after another and found

nothing in tenants' room. Upon searching the first accused's room, they found a backpack with red and grey colour containing child's clothes (Exhibit P10) and two nylon packets with crumps substance suspected to be narcotic drugs packed in transparent black nylon (Exhibit P7). They also found three transparent packets containing crumps substance within a left sneaker make Reebok (Exhibit P8 collectively). Under the TV stand, they found transparent packet containing powder substance wrapped within black nylon bags (Exhibit P6). Also, they found cash money Tshs.159,000/= (Exhibit P11) and two mobile phones make Samsung Galaxy (Exhibit P9). After that, PW3 seized Exhibits P6, P7, P8, P9, P10 and P11 through a certificate of seizure (Exhibit P12) which was signed by himself, PW4 and the accused persons. Upon signing they took accused persons together with exhibits and went back to the office.

On arrival, PW3 handed over all exhibits to custodian of exhibits Inspector Johari (PW2) who labelled them and stored the same in exhibits rooms after registering them in Exhibits Register. On the same day around 10:35 am, PW2 packed Exhibits P6, P7 and P8 in the presence of both accused persons, PW9 and independent witness Julius Peter Mazimu (PW6).

Around 12:00 o'clock on the same date, PW2 handed over Exhibit P6, P7 and P8 to PW9 so that he could submit the same to the Chief Government Chemist (CGC) in Dar es salaam for analysis where it was received by a government analyst one Shimo Peter Shimo (PW1). According to the testimony of PW1 and PW9, when PW1 opened Exhibit P6, he also found nine (9) aluminium foil packets containing powder substance. He weighed and conducted preliminary test which indicated that, the substances in all exhibits were narcotic drugs namely heroin hydrochloride. Then PW1 sealed Exhibits P6, P7 and P8 and handed over to PW9 who upon return to the station handed over to PW2 who stored the same until they were brought before this Court. After conducting confirmatory test which confirmed Exhibits P6, P7 and P8 to be narcotic drugs namely, heroin hydrochloride, PW2 prepared and issued a report (Exhibit P2). PW7 in his testimony claimed that, the first accused person through his cautioned statement confessed the alleged offence and the same was admitted as Exhibit P13 after conducting trial within a trial. In the course of testimony of PW2 and PW5, the defence tendered their previous recorded statements in a bid to impeach their credibility which were admitted as Exhibit D1 and D2, respectively.

In their defence, the first and second accused person testified under oath as DW1 and DW2, respectively. They categorically denied to have committed the offence of trafficking in narcotic drugs. They claimed to be lovers after being met on 5th May, 2019 in commuter bus commonly known as *Daladala* where they exchanged numbers. Thereafter, DW1 invited DW2 to his house and when she went there in a view of spending the night, they ended up being arrested on the night of 8th May, 2019. The defence evidence was to the extent that, on the fateful date around 2:00 am to 2:30 am while DW1 and DW2 were sleeping together with two children, DW1 heard Mjumbe (PW4) knocking the door and after opening, he heard PW4 saying "Ni huyu" Then DW1 was hand cuffed and taken out to the corridor and he was laid down. Then police officers went back inside and brought DW2. DW2 was laid down beside DW1. After that, a woman police went inside and returned with children. She handed them to DW2 with instruction to breastfeed the younger one who was crying. After that, two officers went back inside and after two minutes, one of them returned, took DW1 and went with him inside. Inside the room, they showed DW1 things which he didn't know. Then he was taken out and they were given a document to sign. DW1 further

stated that, the police did not show him any search warrant. He claimed that those items were planted in his house by police officers. At the end, they prayed to be acquitted.

In a nutshell, that was the evidence of the prosecution and defence sides. Learned counsel of both sides filed their final written submissions as it was ordered by this Court save for learned counsel for second accused person who did not file his submission at all. In their submission, learned counsel for the Republic cited the case of **Magendo Paul and Another v. Republic** [1993] TLR 219 which defined the term beyond reasonable doubt and argued that, this case was proved beyond reasonable doubt because; accused persons were found in the room where the narcotic drugs were found; the search was conducted in the presence of independent witness; the accused persons signed certificate of seizure and the first accused person through Exhibit P13 explained how he used to supply those narcotic drugs. Although they admitted that, the search was conducted in the absence of search order as required by law but according to them, such flaw did not prejudice the accused persons and cannot exonerate them from the offence charged. Last, it was their contention that, the chain of custody of seized

exhibits was proved through the testimonies of PW1, PW2, PW3, PW6 and PW9.

On the other hand, learned counsel for first accused person, challenged the search in question for being illegal as it was conducted at night without search order or warrant considering that the circumstances of the case do not fall under an emergence search. This is against section 40 of the Criminal Procedure Act [Cap. 20 R.E. 2022] ("the CPA"). In that regard, Exhibits P6, P7 and P8 are illegal exhibits obtaining from illegal search and so as the certificate of seizure (Exhibit P12). He cited the cases of **Shabani Said Kindamba v. Republic** (Criminal Appeal No. 390 of 2019) [2021] TZCA 221 and **Ayubu Mfaume Kiboko and Another v. Republic** (Criminal Appeal No. 694 of 2020) [2022] TZCA 121 to support his submission. On the issue of chain of custody, he contended that, the same was broken from the moment the exhibits were seized from the crime scene because the same were transported in the different car from the one boarded the accused persons as admitted by PW4 during cross-examination. According to him, by doing so, the possibility of such exhibits being polluted or tempered with cannot be excluded because one of the exhibits ended up with foreign substance i.e., 9 aluminium foil packets that were not seized at the crime scene. In that regard, the first accused person should be entitled

to benefit of doubt as it was held in the case of **Boniface Mathew Malyango @ Shetani Hana Huruma and Another v. Republic** (Criminal Appeal No. 358 of 2018) [2020] TZCA 314. He also attacked the chain of custody for want of exhibit label, PF 145 as claimed to be attached by PW3 at the crime scene.

Having considered the evidence on record and the submission from learned counsel of both sides, the main issue is whether the prosecution has proved the case beyond reasonable doubt. However, determination of this issue depends on two specific issues that; *whether the search was legally conducted* and *whether the chain of custody was maintained*.

It is prudent to underscore that, search and seizure in drug related cases where it is not an emergence one is governed by section 38 of the CPA as well as section 32 of the Drugs Act. Section 38 (1) of the CPA empowers the police officer in-charge of the station (OCS) if he is satisfied that there is a reasonable ground for conducting a search into a building, vessel, carriage or box, receptacle or place without delay, either to search or to issue a written authority to any police officer under him to carry out the search. Before it was repealed in October, 2022 via section 13 of the Written Laws

(Miscellaneous Amendments) (No. 2) Act, 2022, section 32 (7) of the Drugs Act empowered the officer of the Authority at any time to enter into and search any buildings, conveyance, or place. When it comes to the requirement of search warrant before executing search and seizure under the Drugs Act, the said section 32 (7) had already been interpreted by the Court of Appeal of Tanzania through the case of **Shabani Said Kindamba v. Republic** (*supra*) where it was held that:

*"In our conclusion on the two related issues, **there is no justification for the learned Senior State Attorney arguing that the search and seizure was under the DCEA and therefore a search warrant was not required. This is because sub sections (4) and (5) of section 32 of the DCEA cited above, require that arrests and seizures be conducted in accordance with the law in force, specifically in this case, the CPA.**"*(Emphasis supplied).

This position has also been discussed in the cases of **Remina Omary Abdul v. Republic** (Criminal Appeal No. 189 of 2020) [2022] TZCA 118 and

Ayubu Mfaume Kiboko and Another v. Republic (supra). The position on requirement of search warrant has not been changed after the amendment of Drugs Act in October, 2022. With the introduction of section 32A in the Drugs Act, search other than emergence search still requires search warrant issued either by the Commissioner General of the Drug Control and Enforcement Authority or the OCS. Thus, the law as it stands, it requires the search warrant or order for officer of DCEA or police officer to execute search either under section 38 of the CPA or section 32A (3) of the Drugs Act as amended in October, 2022.

Reverting to the matter at hand, it is undisputed that, the search that was conducted in the house of the first accused person was not an emergence one and it could not be an emergence by any means whatsoever, because according to the evidence of PW3 who was the team leader in the search in question, he received the relevant information about the accused persons on 7th May, 2019. Around 5:00 pm, he left with the informant and headed to the area where the first accused person was living in order to identify it. After identifying the area, he went back to his office and informed his superior about the information. It is when SSP Shelimo prepared a team

for arrest and on 8th May, 2019 around 3:30 am they went to Maarifa's house at Mburahati and conducted search. From his testimony, it is clear that, the search was not an emergence one. In that regard, the search in question was supposed to be preceded by search warrant as required by law.

However, as correctly submitted by learned Advocate for the first accused person and admitted by learned State Attorney, the search in question was conducted without search warrant. In that regard, whatever was recovered from the crime scene was a result of search that was conducted without any search warrant. In other words, Exhibit P6, P7 and P8 alleged to be retrieved from the house of the first accused person was a result of an illegal search. Although PW8 (the investigator) in his testimony tried to introduce presence of oral search order but, that fact was not stated by PW3 himself. Besides, the law requires a written search order or warrant and not oral order or warrant. The importance of search warrant was explained in the case of **Director of Public Prosecutions v. Doreen John Mlemba** (Criminal Appeal No. 359 of 2019) [2021] TZCA 482 where at page 14 it was stated that:

"In our view, the meticulous controls provided for under

the CPA and a clear prohibition of search without warrant in the PGO is to provide safeguards against unchecked abuse by investigatory agencies seeking to protect individual citizens' right to privacy and dignity enshrined in Article 16 of the Constitution of the United Republic of Tanzania. It is also an attempt to ensure that unscrupulous officers charged with the mandate to investigate crimes do not plant items relating to criminal acts in peoples' private premises in fulfilling their undisclosed ill motives."

(Emphasis supplied).

In the particular circumstances where there were preparations including visiting the crime scene prior to the search, reporting to PW3's superior and mobilization of human resources, it would not have been difficult to procure a search warrant from any in-charge of the station or the court in order to comply with the law. What happened was complete breach of the law. Since the search in question was conducted without search warrant, I am constrained to agree with learned counsel for the first accused

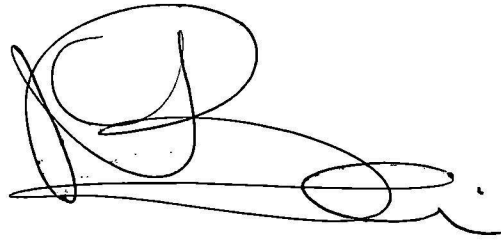
person that, the said search was nothing but illegal.

From that finding, no weight can be accorded to Exhibits P6, P7 and P8 which were retrieved following the illegal search. In other words, they are the fruits of illegal search with no evidential value. Likewise, the certificate of seizure (Exhibit P12) which was a result of illegal search lost its evidential value and cannot accorded any weight. Thus, the first issue specific issue is negatively answered.

The remaining evidence which could be useful for the prosecution side is the confession of the first accused person (Exhibit P13). It is obvious that, the first accused person under Exhibit P13, confessed by explaining how he was dealing with narcotic drugs. I must admit that, confession if properly and lawfully obtained is the best evidence in criminal cases. However, the said confession was admitted after being retracted; and hence, it requires corroboration before acting on. With the finding of the first issue which concluded that the search in question was illegal, I find nothing to corroborate the said retracted confession. Nevertheless, such confession cannot cure the illegal search which was conducted without warrant. Since the first specific issue is negatively answered, the second one dies automatically.

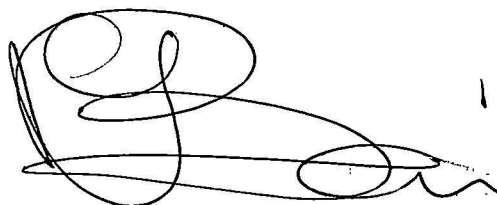
That being said, it is the findings of this Court that, the prosecution side has failed to prove the case against the accused persons beyond reasonable doubt. Thus, the main issue is also negatively answered. Consequently, Maarifa Abasi Nassoro and Neema Uthur Masumba, the first and second accused person, respectively are accordingly acquitted of the charged offence of trafficking in narcotic drugs and are hereby set free.

It is so ordered.



I. K. BANZI
JUDGE
21/12/2022

Delivered in open court in the presence of Ms. Fidesta Uisso, learned State Attorney, Mr. Wilson Magoti, learned Advocate who is also holding brief of Mr. Josephat Mabula, learned Advocate and both accused persons. Right of Appeal duly explained.

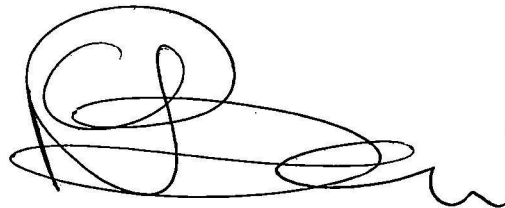


I. K. BANZI
JUDGE
21/12/2022

ORDER

Exhibit P6, P7 and P8 together with its packages Exhibit P3, P4 and P5 are hereby ordered to be destroyed in accordance with the provisions of Drugs Control and Enforcement Act [Cap. 95 R.E. 2019] with its Regulations.

Exhibits P9, P10 and P11 be restored to accused persons.

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a horizontal line and a small flourish.

I. K. BANZI
JUDGE
21/12/2022