IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: LILA, J.A., LEVIRA, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 390 OF 2019

SHABANI SAID KINDAMBA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania
(Corruption and Economic Crimes Division)
at Mtwara)

(Luvanda, J.)

dated 23rd day of August, 2019
in
Economic Case No. 2 of 2019

JUDGMENT OF THE COURT

26th May & 2nd June, 2021

KITUSI, J.A.:

The decision of the High Court, Corruption and Economic Crimes Division, convicting the appellant with Trafficking in Narcotic Drugs and sentencing him to 30 years imprisonment, is the subject of this appeal. The charge was drawn under section 15 (1) (a) of the Drugs Control and Enforcement Act No. 5 of 2015 (DCEA) as amended by Act No. 15 of 2017 read together with paragraph 23 of the First Schedule to and section 57 (1) of the Economic and Organized Crimes Control Act [Cap. 200 R.E. 2002] as amended by Act No. 3 of 2016, (EOCCA).

It was alleged that a search conducted by the police at the appellant's house at Chumo village, Kilwa District on 29th September, 2018 led to discovery of 92.28 kilograms of *cannabis sativa* commonly known as "bhang", stored in that house. Both during the trial and before us, there is considerable wrangle as regards the search and seizure of the alleged drugs and that forms the main area of controverse, for our determination. The star witnesses were PW2 and PW3.

The essence of the matter is that the police, including PW2, went to Chumo village acting on a tip they had received from an unmentioned source, that a person known as Shaban Said Kindamba of Chumo village, was dealing in bhang. At Chumo village the police recruited the village Chairman (PW3) who accompanied them to the house of the appellant. It was during the night. On arrival at the house, they knocked the door and the appellant opened it and got out. According to the appellant himself, he did so upon being assured that the village chairman was the one demanding the door open.

During his defence, the appellant admitted the fact that PW2 with other policemen arrived at his residence at night accompanied by PW3, the village chairman. There is therefore no dispute about that. It is what took place thereafter, specifically the search, that forms the central issue for determination, as we have already said.

According to PW2, the house in which Shaban Said Kindamba, the appellant lived, had several rooms occupied by different people. The appellant was instructed to open the door to his bedroom for the police to conduct search, and he obeyed. In that room according to PW2 and PW3, a total of eleven parcels, two of them large, were found and each contained bhang. In addition, cash amounting to Tzs. 1,300,000/= was found and seized.

After that discovery, PW2 posted the seized bags of bhang and the money into a seizure certificate special for Narcotic drugs. That Certificate or Form (Exh. P.24) was signed by PW2 and others who participated in the search. There is controversy as to whether the appellant signed it or not, and considering the undisputed fact as to his illiteracy, whether he signed it knowing what the contents of the document were.

We wish to pause and refer to the fact that this document that was admitted as Exh. P24 was introduced as being Form DCEA 003 made under section 32 of Act No. 5 of 2015 empowering a police officer to conduct search. Counsel for the appellant had taken serious objections against the document being admitted on the ground that it did not meet the conditions stipulated under section 38 (3) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (The CPA). The learned trial

Judge overruled the objection. We are going to have to revert to this issue later because it touches on the search, the central issue before us.

Back to the scene and what took place after the seizure. The appellant was put under arrest and taken to police station along with the eleven bags of the alleged contraband. A file with No. KLM/IR/657/2018 was opened and each of the items allegedly seized at the appellant's house had a label with the number.

While at Kilwa Masoko Police Station, the appellant allegedly made a cautioned statement that was recorded by PW6 on 29/8/2018 from 8:00 to 9.30 hours. According to PW6 and the said statement (Exhibit P27), the appellant confessed to committing drug trafficking. To be noted again, is that this statement was recorded under section 48 (2) (a) (iv) on form DCEA 005 of the DCEA.

As for the alleged drugs, PW2 handed them over to PW5 the Exhibit keeper at Kilwa Masoko Police Station before the same were taken to the Chief Government Chemist (CGC) by PW4. PW4 handed the suspected drugs to PW1 of the CGC's office whose analysis confirmed them to be narcotic drugs.

These samples were then handed back to the police and stored by PW5 at Kilwa Masoko Police Station and later tendered in Court during trial.

In defence, the appellant described the house in which he lives as consisting six rooms. He said when he opened for the village Chairman and got out, he saw that he had police officers with him. Then the police informed him that they intended to search his house to which he had no objection except that he demanded a warrant. The police informed him that they had no search warrant but would search anyway because the law gives them that mandate. The appellant was instructed to sit along the corridor where he and his family remained as the police entered his bedroom. A torch was flashed on his face throughout, blinding him completely.

He stated that while seated along the corridor with his face down he saw parcels being placed by his side. He said, he did not know where those parcels had been brought from. However, he stated that he heard the police telling PW3 that at least they found some money in the house. He further stated that he had kept that money in a bag and placed another bag on top of it and that he had been saving that money from his petty trade of coconut and drinks.

The appellant was then taken to police along with the parcels. He stated that he did not go to school so he could not read the contents of the documents he was made to sign, including the seizure certificate and the cautioned statement. Further that he signed the cautioned statement under torture and threat of more of it if he would not sign.

The trial court was satisfied that the parcels containing bhang were retrieved from the appellant's bedroom after he had allowed them to enter and conduct search. He rejected the defence that the appellant was illiterate so he did not sign the seizure certificate. The court noted that he signed by a thumb print.

Further that as the appellant did not suggest in his defence that the parcels could have been smuggled into his room from another outlet, the conclusion that they had been there in his bedroom before the arrival of the police, was obvious.

The learned Judge considered the argument by the defence counsel that the search was not lawful for its being conducted without a warrant, but rejected it on the ground that even if there was no search warrant, that did not in itself render the findings unauthentic. On the complaint that during the search in the room the appellant remained outside, the learned Judge held that the fact that the appellant opened

the door to his bedroom and allowed the police to get in and search, shows that he participated in that search.

Secondly, the learned Judge took the view that the cautioned statement, which in the court's finding was voluntarily made, implicated the appellant because he confessed in it that he had been in possession of the parcels in question containing bhang.

Lastly, the learned Judge concluded that the chain of custody of the alleged bhang remained unbroken from the time of seizure up until it was analysed by the CGC and then tendered in Court. He held that although there is no paper trail to establish the chain, the evidence of PW2 who arrested the appellant and seized the drugs, then that of PW5 the exhibit keeper, supported by that of PW4 the transmitting officer and that of PW1, the analyst at the CGC office, was sufficient to prove that chain.

The appellant was thus convicted and sentenced as alluded to earlier, hence this appeal.

There is a total of ten grounds of appeal; nine in the original memorandum of appeal and one in the supplementary memorandum of appeal. When those grounds are looked at closely however, they raise complaints which may be placed in two main groups. The first and major

area of complaint is, as we have already said, the search and seizure of the alleged bhang. This is the theme in grounds 2, 3, 4 and 5 of the original memorandum of appeal. In summary the said grounds of appeal are: -

2. *The trial Judge erred in relying on the seizure certificate which resulted from a search that was conducted in violation of the law.*

3. *PW2 and PW4 had no legal authority to conduct the search which was not under emergency.*

4. *The search and seizure were irregular because the appellant was not issued with a receipt acknowledging the seizure.*

5. *The Judge ought not to have relied on the seizure certificate that did not indicate that the search was at the appellant's house.*

The second group mainly relates to what took place after the alleged search and seizure. These are the 7th and 9th grounds of appeal as well as the sole ground of appeal in the supplementary memorandum of appeal, which raise a double-edged complaint because they all raise the same issue of quantity of drugs. First, that there is variance between the charge and evidence as regards the quantity of drugs. Secondly, that there was no proof of the quantity of drugs. The 6th ground of appeal complains that the trial court ignored the appellant's strong

evidence which went to show that the drugs were not found in his house. The 8th ground of appeal complains that the chain of custody was broken. Lastly, is the first ground of appeal which faults the trial court for convicting the appellant in a case that was not proved beyond reasonable doubt.

We are going to deal with the issue of search first, covering as we have said, grounds 2, 3, 4 and 5. Virtually, the appellant did not say anything in elaboration to the grounds of appeal, which we think is understandable, he being an unrepresented lay person.

On the other hand, Mr. Wilbroad Ndunguru, learned Senior State Attorney representing the respondent Republic, started by submitting that although the seizure certificate did not indicate that the search was at the appellant's house, the irregularity was inconsequential. He then proceeded to argue that there was no need of a search warrant because the police acted under section 48 (2) of the DCEA which permits officers to conduct search without warrant. He also submitted in the alternative, that even if a search warrant was needed, the appellant was not prejudiced by its absence, as the trial Judge concluded. He referred us to our decision of **Jibril Okash Ahmed v. Republic**, Criminal Appeal No. 331 of 2017 (unreported). In the learned Senior State Attorney's

view, since the appellant does not dispute being searched, and the fact that he signed the certificate of seizure by a thumb print, his complaints on the search and seizure do not hold. Let us consider these arguments in line with the law.

To begin with, there is no dispute that the search was not an emergency one and indeed it could not have been an emergency, because according to PW2 the police who conducted it had received the relevant information about the drugs being at the appellant's house as early as 14:00 hours of that day. Yet, the team of police officers from Kilwa Masoko, set out for Chumo village at 21:00 hours, and conducted the search much later at night. There is also no dispute that the police did not have a search warrant.

We recall that sometime during the trial, the defence counsel submitted that the police ought to have obtained a search warrant under section 38 (1) of the CPA and should have issued the appellant with a receipt of the seized items under section 38 (3) of the same Act. On the other hand, the prosecution maintained that they acted under section 32 (7) of the DCEA, so they did not need any search warrant. Before us, the learned Senior State Attorney submitted that search without warrant

was valid under section 48 (2) of DCEA. Our decision on the first group of complaint hangs on that thread.

We have considered the arguments placed before us but we have noted that section 48 (2) of DCEA provides for modes of arrest and interrogation of suspects. In our view, the relevant provisions in search and seizure are sections 38 (1) and (3) of the CPA and 32 (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, and sub section (3) of section 38 of the CPA provides that after the seizure a receipt must be issued. For clear appreciation of the arguments made by the learned Senior State Attorney, we shall reproduce the provisions of section 32 (7) of the DCEA, which provides: -

> *"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."

We are going to have to address two related issues here, namely whether the police acted under the DCEA as submitted by the respondent Republic or under the CPA as submitted by the appellant. The second is whether, the absence of a search warrant, be it under the DCEA or under the CPA did not affect the credibility of the search.

Reading some of the provisions of the DCEA leaves us in no doubt that it was not intended that that legislation had the effect of replacing the CPA. Rather, it is clear in some of those provisions such as section 32 (4) and (5) that the DCEA is subjected to the CPA. These subsections read: -

"(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 officers under this Act."

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.

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 SACR 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 Crime**, published on 26 January 2021 by W. Nortje, *http://dx.doi.org/10.17159/1727-3781/2021 (*page 3).

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. Whether this illegality affected the credibility of the search will be our next consideration, and in doing so, we shall link this finding with other grounds of appeal.

There are a few complaints raised by the appellant in relation to the warrantless search. For instance, in ground 4, the appellant complains that he was not issued with any receipt. This is a requirement under section 38 (3) of the CPA. In **Mbaruku Hamisi and 4 Others v. Republic**, Consolidated Criminal Appels No. 141, 143 & 145 of 2016, we reproduced the following paragraph from our earlier decision in

Selemani Abdallah and Others v. Republic, Criminal Appeal No. 354 of 2008 (unreported): -

> *"The whole purpose of issuing receipt to the seized items and obtaining signature of the witnesses is to make sure that the property seized came from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that the evidence arising from such search is fabricated will to a great extent be minimized."*

Connected with the above ground, the appellant complained that he being illiterate did not know the contents of the seizure certificate. There is also a complaint raised in ground 5 of appeal, that the seizure certificate does not show that the search was at the appellant's house. This latter complaint has been conceded to by the learned Senior State Attorney. In ground 6 of appeal the appellant complains that the trial court did not consider his defence in which he had strongly suggested that the drugs were not found at his house. When grounds 4, 5 and 6 are considered together, coupled with the unexplained choice of conducting the search at night despite the early prior knowledge by the police, they leave doubts which ought to have been resolved in favour of

the appellant. It must be pointed out that under section 40 of the CPA search may be executed between the hours of sunrise and sunset, except with leave of the court. This is the same as what is provided under Regulation 2 (b) of the P.G.O 226. Therefore, it beats us why this search, not being an emergency, was conducted at night and without permission of the court. This aspect compounds the illegality of the search in this case.

Moreover, in re-evaluating the evidence on record, we have found it tempting to also consider three other points, beginning with the appellant's conduct. Despite the fact that it was at night and illegal as we have said, and despite the fact that there were several rooms in the house occupied by the appellant, there is no suggestion that he attempted to flee. Instead, we are told by PW2 and PW3, that he readily opened the doors for the police to enter and conduct search, which we find to be inconsistent with guilt. During his defence, he tendered a business licence in exhibit to demonstrate, in our view, that he was a law-abiding person.

The other point is the fact that during the search, the appellant remained outside, meaning that he did not witness the said search. It is baffling that PW2 does not state in his testimony that he is the one who

spotted the alleged drugs and seized them. Neither does PW3. Both of these key witnesses refer to general terms, such as "*We then conducted search in the house of the accused.*" (at page 24) and "*In the search we managed to get bangi ...*" (at page 25). These statements do not specify the number of people who were in the room to conduct the said search and who actually did what. In the circumstances, and considering that it was at night, the appellant being outside, what assurance do we have, that the drugs were not planted on the appellant? In the case of **Frank Michael *alias* Msangi v. Republic,** Criminal Appeal No. 323 of 2013 (unreported), the Court allowed the appeal on the ground, among others, that the possibility that the seized items had been fraudulently planted could not be overruled because the owner of the house and the independent witnesses did not enter the house during the search.

The third point we have given consideration, is the credibility of PW3. We have picked PW3 not randomly, but for a reason. We are inclined to take it as logical that an independent witness to a search must be credible, or the whole exercise would be rendered suspect. In **Malik Hassani Suleiman v. S.M.Z** [2005] T.L.R 236 while applying the Criminal Procedure Decree Cap 14 of Zanzibar, the Court held that a

witness to a search must be a respectable person of that locality. That person's credibility is critical, in our view.

So, we ask ourselves, is PW3 beyond suspicion? We shall take a look at a few aspects in his testimony to answer this question. When he was being cross examined by counsel for the appellant during the trial, PW3 admitted to own a business stall close to the appellant's stall. He however, denied being his business rival. Yet, he went on to admit that he was not the chairman of the hamlet within which the appellant lives. He conceded that the chairman of the hamlet within which the appellant lives was not involved in the search. We are disturbed by this unexplained preference of PW3 to the relevant leader of the area. With respect, we hesitate to take PW3's word against the appellant as being unbiased, because given what we have shown above he could very likely have his own incentive to testify against him. We think in our conclusion, PW3 was not above suspicion.

In view of the position, we have taken in the above grounds, it is scarcely necessary for us to consider the remaining grounds of appeal except the first ground, which faults the learned trial Judge for convicting the appellant in a case that was not proved beyond reasonable doubt. Our conclusion is that the search that was conducted

illegally at night without permission, and without proof that it was emergency, and the same having been witnessed by a leader of a hamlet other than the one relevant in the case, raise doubt as to whether the drugs were indeed found at the appellant's house. Therefore, the prosecution failed to prove that the appellant stored those drugs, and thus failed to prove the case beyond reasonable doubt.

Consequently, we allow the appeal. We quash the conviction and set aside the sentence. We order the appellant's immediate release unless he is being held for another lawful cause.

DATED at **MTWARA** this 31st day of May, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 2nd day of June, 2021 in the presence of the Appellant in person and Mr. Abdulrahaman Mshamu, learned Senior State Attorney assisted by Ms. Caroline Matemu, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL