IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: NDIKA, J.A., KITUSI, J.A., And RUMANYIKA, J.A.)
CRIMINAL APPEAL NO. 694 OF 2020

AYUBU MFAUME KIBOKO ..... FIRST APPELLANT

PILLY MOHAMED KIBOKO ..... SECOND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania, Corruption and Economic Crimes Division at Dar es Salaam)

(Mashaka, J.)

dated the 18th day of December, 2020
in
Economic Case No. 13 of 2019
.....

JUDGMENT OF THE COURT

7th February & 17th March, 2022

NDIKA, J.A.:

The appellants, Ayubu Mfaume Kiboko and Pilly Mohamed Kiboko, are husband and wife. They were jointly charged with and convicted of trafficking in narcotic drug in the High Court of Tanzania, Corruption and Economic Crimes Division at Dar es Salaam contrary to section 15 (1) (a) of the Drug Control and Enforcement Act, 2015 (Cap. 95 R.E. 2019) ("the DCEA") read together with Paragraph 23 of the First Schedule to the Economic and Organised Crime Control Act, Cap. 200 R.E. 2002 (R.E. 2019). They were each sentenced to twenty years' imprisonment.

Believing that justice was not served, they now appeal to this Court against both conviction and sentence.

The prosecution case was essentially that the appellants, on 23rd May, 2018 at Tegeta Nyuki Masaiti within Kinondoni District in Dar es Salaam Region, trafficked in a narcotic drug, namely, heroin hydrochloride weighing 251.25 grammes.

To prove the accusation, the prosecution mainly relied upon the testimonies of Assistant Inspector Emmanuel Patson Ambilikile (PW3), a police officer from the Drug Control and Enforcement Authority ("the Authority") who was in charge of the search at the appellants' home, and Raymond Henry Kimambo (PW6), a local leader who witnessed the search as an independent observer. Also presented were PW4 SSP Neema Andrew Mwakagenda, a police officer in charge of the Exhibits Room who took initial custody of the seized substances from PW3; and Inspector Hassan Zahoro Msangi (PW2) who took the substances to the Government Chemist Laboratory Agency ("the GCLA") for analysis. There were two further witnesses: PW5 Inspector Lubambe Kanyumbu, who tendered in evidence a statement of a witness, Frank Nicholaus Alex, who could not be produced at the trial; and finally PW1 Shimo Peter Shimo, Senior Chemist from the GCLA, who analysed the suspected substances.

According to PW3, on 23rd May, 2018 his superior officer informed him of a tip received from a confidential informant that the appellants possessed narcotic drugs at their home at Tegeta Nyuki Masaiti in Kinondoni District. Hitherto, the appellants were persistently suspected to be drug traffickers. Upon his superior officer's instruction, PW3 mobilized a contingent of police officers who included Inspector Johari, Inspector Francis Hyera and Detective Constable Optatus Kimunye. They then set upon the appellants' home arriving there in the wee hours at about 2:00 a.m. Before they got into the home, they managed to enlist two local leaders, PW6 Raymond Henry Kimambo and Christina Macha, to witness the search as independent observers.

Having entered into the appellants' gated compound, they knocked on the door to the main house, a double-storey structure. It took about a half hour for the door to be opened and the search party gaining ingress into the house. After PW3 had introduced the contingent and explained the purpose of the intended search to the appellants, the property was wholly searched until 7:00 hours. At the end of the exercise, twenty-eight items were allegedly seized from the property. These included a handgun, several rounds of ammunition, some bank cards, office files, two radio call handsets, three passports, five wrapped or tinned powdery substances

and three motor vehicles. They were recorded in a certificate of seizure (Exhibit P12) that PW3 filled out and signed. The certificate was countersigned by the appellants and the two independent observers (PW6 and the said Christina Macha). Of relevancy to the charge at hand was a black nylon bag containing a white powdery substance (Exhibit P11) as well as the three motor vehicles (Exhibits P13 to P15) suspected to be instrumentalities of drug trafficking. PW6's evidence materially supported PW3's testimony on the search, seizure of the suspected substances and the apprehension of the appellants at their property.

The police officers took the appellants to the Authority's Offices where the suspected substances were handed over to the Exhibits Keeper (PW4) around noon on the same day. PW4 labelled and sealed the suspected substances in the presence of the appellants, PW3 and an independent observer, Frank Nicholaus Alex. She made appropriate entries in the exhibits register and stored the substances in the exhibits room. On the following day, the suspected substances were handed over to PW2 who then took them to the GCLA where PW1 extracted samples for analysis. PW2 returned the rest of the substances to PW4 for custody. PW4 retained the custody until when the substances were handed over to PW1 for exhibition at the trial.

According to PW1, both preliminary and confirmatory tests demonstrated that the white powdery substance in the black nylon bag weighing 251.25 grammes (Exhibit P11) was heroin hydrochloride, a prohibited substance. However, the rest of the seized substances contained in four separate envelopes returned negative results, meaning that they were not narcotic or psychotropic substances.

Inspector Lubambe Kanyumbu (PW5) adduced that on 29th May, 2018 he recorded the statement of Frank Nicholaus Alex in whose presence PW4 labelled, sealed and registered the seized substances on 23rd May, 2018 at the Authority's offices. Since the said person's whereabouts were unknown and that he could not be procured to appear at the trial without undue delay, his statement was tendered and admitted in evidence as Exhibit P16 in accordance with section 34B of the Evidence Act, Cap. 6 R.E. 2002 (now R.E. 2019). In the statement, the said Frank Nicholaus Alex avowed to have observed PW4 labelling, sealing and packing the suspected substances.

In their respective testimonies, the appellants interposed the defence of general denial. Despite mostly alluding to the search as adduced by the PW3 and admitting to have signed the certificate of seizure (Exhibit P12), they denied flat out that the black nylon packet (Exhibit P11)

was confiscated from their home. They were firm that the police officers did not find any narcotic drug at the scene. On his part, the first appellant resentfully moaned that he was beaten up by the police officers at his home before the search commenced and also claimed that he was not present when PW4 allegedly labelled and sealed the substances at the Authority's offices. Specifically on the certificate of seizure (Exhibit P12), both appellants admitted that the items recorded on the top page of the certificate were retrieved from their home but denied any knowledge of the items listed on page 2, which included the five suspected illegal substances one of which was Exhibit P11. However, they acknowledged that the three motor vehicles (Exhibits P13 to P15), also listed on page 2 of the certificate of seizure, were indeed seized from their home but that they were not instrumentalities of drug trafficking.

In her judgment, the learned trial judge found it established that Exhibit P11 was seized from the appellants' home on the fateful day and that it was proven to be a narcotic drug known as heroin hydrochloride. She reviewed the chain of custody of the said exhibit and held that the integrity of the said substance was beyond reproach. The appellants' common defence was considered but rejected.

Through their joint memorandum of appeal and supplementary memorandum of appeal, the appellants lodged ten grounds of appeal, which, then, they later condensed, vide their written arguments dated 26th January, 2022, into seven grounds of complaint as follows: **one**, that the search into the appellants' home was illegal; **two**, that the prosecution case was based on lies and material contradictions; **three**, that the chain of custody of the alleged illegal substance was broken raising questions over the integrity of the said substance; **four**, that PW1's testimony and report (Exhibit P1) were unreliable; **five**, that Exhibits P3, P4, P12 and P16 were improperly tendered and admitted in evidence; **six**, that the defence was not accorded due weight; and **finally**, that the prosecution case was not proved beyond peradventure.

Before us, Mr. Nehemiah Nkoko, learned counsel, argued the appeal for the appellants. Learned Senior State Attorney Cecilia Mkonongo, assisted by Mses. Batilda Mushi and Caroline Matemu, learned State Attorneys, valiantly opposed the appeal on behalf of the respondent.

We begin with the first complaint. On this, Mr. Nkoko submitted that the search was executed in contravention of sections 38 (1) and (3) and 40 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (R.E. 2019) ("the CPA"). He elaborated that whereas section 38 (1) of the CPA requires that

a search be conducted by or under the written authority of an officer in charge of a police station, the search at the scene was conducted by PW3 who was not an officer in charge of a police station nor did he have any written authority to execute the search. He added that absence of authority was aggravated by the fact that the search was carried out in the small hours of the morning in violation of express provisions of section 40 of the CPA requiring a search to be conducted only between the hours of sunrise and sunset unless requisite leave of the court is obtained. It was further contended that the search was not conducted as an emergency measure as the police had ample time to make arrangements within the dictates of the law. Referring to recent decisions of the Court in **Shabani Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019; **Director of Public Prosecutions v. Doreen John Mlemba**, Criminal Appeal No. 359 of 2019; **Joseph Charles Bundala v. Republic**, Criminal Appeal No. 15 of 2020; and **Badiru Mussa Hanogi v. Republic**, Criminal Appeal No. 118 of 2020 (all unreported) where the Court discounted the evidence obtained from illegal searches, Mr. Nkoko urged us to expunge the prohibited substance (Exhibit P11) allegedly seized from the appellants' place of abode along with the certificate of seizure (Exhibit P12) and, as a result, find the charge against the appellants unproven.

Replying, Ms. Mkonongo reviewed the evidence on record and submitted rather boldly that the search complied with the letter and spirit of section 38 (1) of the CPA. She proceeded to distinguish the instant case from the case of **Doreen John Mlemba** (*supra*) on the ground that in the latter case the police conducted the search in the absence of the suspect, which was not the case in the matter at hand. As for the case of **Shabani Said Kindamba** (*supra*), she said it was equally inapplicable because the appellant in that case stayed at the corridor and did not get into the house when the search was being carried out.

Relying on the case of **Joseph Charles Bundala** (*supra*), Ms. Mkonongo argued even if the search was illegal on the ground that it was warrantless, the evidence obtained therefrom was admissible under section 169 of the CPA particularly because it was not objected to by the appellants when it was offered for admission. She conceded that the admissibility of the certificate of seizure (Exhibit P12) was challenged at page 134 of the record of appeal but she put in a rider that the objection was not based on the alleged illegality of the search but other grounds.

In determining the issue at hand, we begin by expressing our agreement with the learned counsel that the police powers of search and

seizure are governed by section 38 of the CPA. This provision stipulates as follows:

> *"**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 piace-*
>
> *(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.***

(2) Where an authority referred to in subsection (1) is issued, the police officer concerned shall, as soon as practicable, report the issue of the authority, the grounds on which it was issued and the result of any search made under it to a magistrate.

(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, [bearing] the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any." [Emphasis added]

Section 38 (1) above expressly empowers any police officer in charge of a police station ("OCS"), if he is satisfied that there is a reasonable ground for conducting a search into a building, vessel, carriage, 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. It is striking that section 2 of the CPA defines the designation *"officer in charge of a police station"* so broadly to include any officer superior in rank to an

OCS as well as any officer above the rank of constable standing or acting in the position of OCS:

> *"'officer in charge of a police station' includes any officer superior in rank to an officer in charge of a police station and also includes, when the officer in charge of the police station is absent from the station house or unable from illness or other cause to perform his duties, the police officer present at the station house who is next in rank to that officer and is above the rank of constable or, when the Minister for the time being, responsible for home affairs so directs, any police officer so present."*

Subsection (2) of section 38 comes in force when a search is executed upon a written authority or rather search order under subsection (1). In that case, the police officer who executed the search is required to report, as soon as practicable, the issue of the authority, the grounds on which it was issued and the result of the search to a magistrate. This binding obligation is followed up by another imperious requirement under subsection (3) imposed on the officer in charge of the search, upon seizure of a thing, to issue a receipt acknowledging the seizure of that thing, bearing the signature of the owner or occupier of the premises or his near

relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any.

The letter and spirit of section 38 of the CPA appears to have been captured by paragraphs 1 (a), (b) and (c) and 2 (a) and (d) of the Police General Order ("the PGO") No. 226 made by the Inspector General of Police in exercise of his powers under section 7 (2) of the Police Force Auxiliary Services Act, Cap. 322 of the Revised Edition, 2002. For clarity, we reproduce the two paragraphs thus:

> *"1-The entry and search of premises shall only be effected, 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 enter private premises unless they either hold a warrant or are empowered to enter under specific authority contained in the various laws of Tanzania.***
>
> *2. (a) Whenever an O/C (Officer in Charge) Station, O/C. C.I.D. [Officer in Charge Criminal Investigation of the District], Unit or investigating*

officer considers it necessary to enter private premises in order to take possession of any article or thing by which, or in respect of which, an offence has been committed, or anything which is necessary to the conduct of an investigation into any offence, ***he shall make application to a Court for a warrant of search under Section 38 of the Criminal Procedure Act, Cap. 20 R.E. 2002. The person named in the warrant will conduct the search."***

We are aware that section 32 (7) of the DCEA vests the Authority's officers with powers of search and seizure. In **Shabani Said Kindamba** (*supra*), the Court dispelled the view that the DCEA gave the officers a carte blanche in executing searches. Hence, it was held that the powers under the aforesaid provision must be exercised in accordance with the law in force, specifically the provisions of the CPA.

It should be noted, at this point, that apart from section 38 of the CPA, which we have already discussed, sections 40 and 42 (1) (a) and (b) of the CPA also regulate the conduct of searches. Beginning with section 40, it provides that a search warrant may be issued and executed on any day and may be executed between the hours of sunrise and sunset. However, the court may, upon application by a police officer or other

person to whom it is addressed, permit him to execute it at any hour. As regards section 42 (1) (a) and (b), it creates an exception to the overall requirement under section 38 (1) by providing for searches and seizures in cases of emergency. Thus, a warrantless search can be carried out by a police officer in an emergency and whatever item found can be seized if the police officer concerned believes on reasonable grounds that it is necessary to do so in order to prevent the loss or destruction of anything connected with an offence. It is necessary that the search or entry is made under circumstances of such seriousness and urgency as to require and justify immediate search or entry without warrant.

We think it is worthwhile to eventually recall what we stated in **Doreen John Mlemba** (*supra*), citing our earlier decision in **Badiru Mussa Hanogi** (*supra*), stressing the rationale for the controls on powers of search and seizure thus:

> *"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' rights 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 people's private premises in fulfilling their undisclosed ill-motives."

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 mobilising 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.

We recall that Ms. Mkonongo sought to distinguish the cases of **Shabani Said Kindamba** (*supra*) and **Doreen John Mlemba** (*supra*). With respect, we do not agree with her submission. It is evident to us that the controlling feature common in the two cases as well as this case is the fact that the searches were illegal because they were executed without any order or warrant in circumstances that did not constitute an emergency. In the premises, we hold, as we did in the aforesaid cases, that the search into the appellants' home from which Exhibit P11 was allegedly confiscated, was illegal.

At this point, we would, initially, endorse Ms. Mkonongo's submission, on the authority of our recent decision in **Joseph Charles Bundala** (*supra*) that she cited, that illegally obtained evidence may be

received in evidence and acted upon by the trial court after observing the requirements of section 169 (1) and (2) of the CPA as elaborated in our unreported decision in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010. However, with respect, we do not agree with her contention that in the instant case the fruits of the illegal search were rightly admitted under section 169 of the CPA on the ground that they were not objected to by the appellants at the trial. We have painstakingly reviewed record and noted that even though the admissibility of the certificate of seizure (Exhibit P12) was assailed on narrow grounds, the question of illegality of the warrantless search executed during forbidden hours of the day was so apparent that no court of justice should have acted on such illegally obtained evidence without ensuring that the requirements of section 169 (1) and (2) of the CPA were complied with.

In view of the foregoing analysis, we find merit in the first ground of appeal, which we allow. Accordingly, we are constrained to expunge the illegally obtained evidence, which, apart from the alleged prohibited substance (Exhibit P11) and the certificate of seizure (Exhibit P12), included the other seized substances (Exhibits P4 to P10) and the three motor vehicles (Exhibits P13 to P15). The attendant outcome of discounting the evidence as aforesaid is that the remaining evidence on

record is too thin on its own to support the charge the appellants faced. That said, we think that it will only be pretentiously academic to deal with the rest of the grounds of appeal.

In the final analysis, we allow the appeal and proceed to quash the convictions and set aside the sentences against the appellants. Accordingly, we order that the appellants, Ayubu Mfaume Kiboko and Pilly Mohamed Kiboko, be released from prison unless they are held there for any other lawful cause.

DATED at **DAR ES SALAAM** this 11th day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 17th presence of Appellants in person via video link from Ukonga and Segerea prisons and Ms. Ester Kyara, Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL