IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 120 OF 2021

SHABANI RAMADHANI ABDALA @ KINDAMBA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of a Resident Magistrate's Court of Dar es Salaam at Kisutu)

(Magutu, SRM-Ext. Jur.)

dated the 2nd day of December, 2020
in
(DC) Criminal Appeal No. 45 of 2020

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JUDGMENT OF THE COURT

23rd September, 2022 & 22nd June, 2023

MWARIJA, J.A.:

The appellant, Shabani Ramadhani Abdala @ Kindamba was charged in the Resident Magistrate's Court of Dar es Salaam at Kisutu with the offence of trafficking in narcotic drugs contrary to section 15 A (1) and (2) (a) of the Drugs Control and Enforcement Act, No. 5 of 2015 as amended by the Drugs Control and Enforcement Act, No. 15 of 2017

(the Act). It was alleged that, on 01/05/2018, at Mjimwema - Kibaoni area within the District of Kigamboni in Dar es Salaam Region, the appellant was found in possession of narcotic drugs, namely, heroin hydrochloride weighing 50.83 grams. The appellant denied the charge and as a result, the case had to proceed to a full trial.

Having heard the evidence of seven prosecution witnesses and the appellant, who was the only defence witness, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. It thus convicted and sentenced him to thirty (30) years imprisonment. Aggrieved by the decision of the trial court, he unsuccessfully appealed against that decision hence this second appeal.

The facts which led to the appellant's arraignment, conviction and consequently, the decision giving rise to this appeal, are not complicated. The appellant was until the date of his arrest, staying in one of the rooms of a house situated at Mjimwema - Kibaoni area in Kigamboni District. On 01/05/2018, a team comprising of officials of the Drugs Control and Enforcement Authority (the Authority), including Titolas Edward (PW3), D/Sgt. Juma Suleiman (PW4), A/Insp. Violeth and

A/Insp. Beatus, were conducting an operation against illegal drug dealers. At about 1:00 a.m, the team arrived at the house in which the appellant was residing. His room was searched and a black plastic bag which contained a substance believed to be narcotic drugs was allegedly found. After the search, the appellant was arrested and taken to police station. The Authority proceeded to conduct further investigation through A/Insp. Emmanuel (PW6). It involved interrogation of the appellant and ascertainment from the Chief Government Chemist, on whether or not the substance which was allegedly found in possession of the appellant was narcotic drug. Having completed investigation, the appellant was charged as shown above.

According to PW3's evidence, on 01/05/2018, while in office, he received information that there was one person who was operating illegal business of dealing in narcotic drugs from a certain house at Mjimwema in Kigamboni area. Thus, in that operation the team arrived at that house and among other rooms, the room which was occupied by the appellant was searched. The search was conducted in the presence of the Area's ten-cell leader, Hudi Bagambi (PW5). The evidence of PW3

was also to the effect that in the course of the search, a black plastic bag was found and in it, was another transparent plastic bag containing the suspected substance. The witness prepared a seizure certificate which according to him, was signed by him, PW5 and the appellant. The same was admitted in evidence as exhibit P3.

The evidence of PW3 was supported by PW4 and PW5. The former stated that, before they entered into the appellant's room to conduct the search, they pulled out their trousers' pockets to assure the appellant that they did not carry with them anything offensive. He said further that, in the course of the search, apart from the plastic bag containing the suspected substance, which according to him was found under the bed, they also found cash, TZS 370,000.00, two mobile phones and five sim cards. On his part, PW5 added that, the search was conducted with the aid of torchlight. As to the outcome of the search, it was his evidence that, as the appellant's bed was being searched, the black plastic bag which was under the matress dropped down and when it was unfolded, a salt like substance was found in it. He also confirmed that he signed exhibit P3.

Evidence was also led to the effect that, after its seizure, the suspicious substance was handed over by PW3 to SP Neema (PW2) who sealed it in the presence of the appellant, other officers of the Authority and an independent person, one Nicholaus Alex. Thereafter, she sent it to the Chief Government Chemist for examination. The examination was conducted by Fidelis Segumba (PW1), a chemist who testified that, after having examined the substance, the test results were that the same was heroin hydrochloride weighing 50.83 grams. The substance was admitted in evidence as exhibit P1.

The appellant's defence was that, on 01/05/2018 at night, he was arrested at his residence by two persons, Violeth Onesmo and Amin Amour. He said that, his arrest followed a suspicion that he had been carrying out illegal fishing; that he was using explosives to do so. After his arrest, his room and the other rooms which were occupied by other tenants were searched. The search, he said, was conducted with the aid of torchlight and in the course, his mobile phones, five sim cards, a wallet containing cash, TZS 350,000.00 and various documents were taken. He was then taken to the Ferry area where he spent the night

under the custody of one person of Masai origin. Later in the morning, he was taken to police station where he was incarcerated until on 17/01/2018. He denied the contention that he recorded a cautioned statement on 17/01/2018 as testified by PW4. According to the appellant, on that date, he was called by PW4 who required him to sign a document which PW4 described to be a bail bond and thus signed the said document on that belief.

In convicting the appellant, the trial court acted on the evidence to the effect that, the substance which was confirmed by the Government Chemist (PW1) to be heroin hydrochloride, was found in the appellant's room. It believed the evidence of PW3 and PW5 that exhibit P1 was found in the appellant's room as evidenced by the certificate of seizure (exhibit P3) which was admitted in evidence without any objection from the appellant.

As stated above, the appellant unsuccessfully appealed against the trial court's judgment. In her judgment, the learned Senior Resident Magistrate (Ext. Jur.), agreed with the findings of the trial court, **first** that the appellant was found with exhibit P1. Like the trial court, she

was of the view that, the evidence of PW3 and PW5 was credible and that the appellant's defence did not raise any reasonable doubt against the prosecution case. **Secondly**, that the search and seizure of exhibit P1 was done in accordance with the law because the search was conducted under emergency situation thus permissible without a search warrant by virtue of the provisions of s. 42 (1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA). She found further that, given the circumstances under which the search was made, it was not necessary to issue a receipt for exhibit P1 and other items which were seized from the appellant as required under s. 38 (3) of the CPA. The learned first appellate Magistrate cited the case of **Linus Uzo Chime Ajana v. Republic**, Criminal Appeal No. 13 of 2018 (unreported) to support her findings.

Coming to the appeal before us, the same was initially predicated on eight grounds raised by the appellant. Four grounds were raised in the memorandum of appeal lodged on 31/05/2021 and the other four grounds were contained in the supplementary memorandum of appeal which was filed on 02/09/2021. However, on the date of the hearing of

the appeal, Mr. Nehemiah Nkoko, learned counsel who appeared for the appellant, consolidated those grounds into two main complaints as follows:

> *"1. That, the learned Senior Resident Magistrate (Ext. Jur.) erred in law and fact in upholding the appellant's conviction and sentence while the search was illegally conducted in a comprising environment.*
>
> *2. That, the learned Senior Resident Magistrate (Ext. Jur.) erred in law and fact in failing to re-evaluate the evidence, especially by failing to consider the defence evidence thus occasioning a failure of justice and prejudice to the appellant".*

Submitting in support of the 1st ground of the consolidated grounds of appeal, Mr. Nkoko argued that, the search of the appellant's room was illegally conducted because PW3 and those who were involved in the search, did so in the night and without a search warrant in breach of ss. 40 and 39 of the CPA. Elaborating, the learned counsel contended that, the search was not conducted under emergency situation because, according to the evidence of PW3 and PW4, the Authority had prior information of the suspicion that the appellant was involved in illicit drug

trafficking. Submitting further, Mr. Nkoko argued that, during the trial, the prosecution did not contend that it acted under emergency, instead that factor was raised at the hearing of the first appeal. Citing the cases of **Shabani Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019 and **Samwel Kibundali Mgaya v. Republic,** Criminal Appeal No. 180 of 2020 (both unreported), he urged the Court to find that the search which was conducted at night without a search warrant and permit contrary to ss. 38 (1) and 40 of the CPA respectively was illegal.

With regard to the 2nd ground of appeal, Mr. Nkoko submitted first, that from the record at page 89, the trial court gave the substance of the appellant's defence including the contention that, his arrest was based on the suspicion that he had been conducting illegal fishing. However, in its judgment, the first appellate court erred in failing to find that, apart from evaluating the prosecution evidence, the trial court did not say anything about the appellant's defence.

Secondly, Mr. Nkoko argued that, the learned first appellate Magistrate erred in failing to find that, the trial court did not properly evaluate the prosecution evidence. Had she done so, he said, she would

not have found as proved, the allegation that the appellant was found in possession of illicit drugs. The reason advanced by the appellant's counsel is that PW1, PW2, PW3 and PW5 differed in their description of the substance which was allegedly found in the appellant's room. Whereas in his evidence, PW5 said that the substance was in the form of particles resembling salt, PW1 said it was flower like while PW2 and PW3 said that it was in the form of flour.

On those arguments, Mr. Nkoko urged the Court to find that the prosecution did not prove the case against the appellant beyond reasonable doubt. He implored us to allow the appeal, quash the appellant's conviction and set aside the sentence.

Mr. Hezron Mwasimba, learned Senior State Attorney appeared for the respondent Republic. He was being assisted by Ms. Anitha Sinare, also learned Senior State Attorney and Mr. Chesensi Gavyole, learned State Attorney. Ms. Sinare replied to the submissions made by the learned counsel for the appellant. She argued that the two grounds of appeal are devoid of merit. She submitted that, the search was conducted under emergency situation and was thus permissible without

a search warrant in accordance with the provisions of s. 42 (1) of the CPA. She cited the case of **Wallestein Alvares Santillan v. Republic**, Criminal Appeal No. 68 of 2019 (unreported) to bolster her argument.

Even though the learned Senior State Attorney admitted that the Authority had prior information about the suspicion against the appellant that he was involved in selling illicit drugs, it was her argument that, whereas that information was received on 01/05/2018, the search was conducted at 1:00 a.m which means that it took place at a later date on 02/05/2018. For that reason, she argued, the search was conducted in an emergency situation. Secondly, it was Ms. Sinare's submission that the nature of the offence made it necessary that the search be done without a search warrant in terms of s. 42 (1) (b) (ii) of the CPA.

As for the 2nd ground, the learned Senior State Attorney conceded that the appellant's defence was not considered. That notwithstanding, she argued, this Court has the power of considering that evidence and come to its own finding on whether or not it raises any reasonable doubt in the prosecution case. On the weight of the prosecution evidence, she submitted that, the evidence is credible because the search was done

after the members of the team who conducted it in the presence of PW5, had assured the appellant that they did not carry anything suspicious in their trousers' pockets.

Furthermore, she said, the appellant signed exhibit P3 which was later admitted in evidence without any objection from him. On the variance of the evidence between PW2 and PW3 on one hand and PW1 on the other as regards description of the appearance of the substance in question, Ms. Sinare submitted that the variance is minor and thus immaterial because the witnesses were describing the same substance which was the only one found in the appellant's room at the time of the search. The learned Senior State Attorney concluded her reply submissions by urging the Court to disallow the raised grounds and consequently, dismiss the appeal.

We have duly considered the rival submissions of the learned counsel for the parties. To begin with the 1st ground of appeal, it is not disputed that the search of the appellant's house was conducted without a search warrant. The search was done by, among others, PW3 and PW4 who were until the material time, the officials of the Authority. The

purpose was to seize illicit drugs suspected to have been in possession of the appellant. Although the said witnesses were exercising their powers under the Act, in terms of s. 32 (4) of the said Act, they were required to act in accordance with the provisions of the CPA. Sections 32 (1) and (4) states as follows:

> *"32 (1) The officers of the authority shall have powers of arrest, search, seizure and investigation in relation to offences under this Act and other related offences.*
>
> *(2) ... N/A*
>
> *(3) ... N/A*
>
> *(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 dlscharging 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".*

The relevant section of the CPA which provides the conditions for conducting a search is s. 38 (1) (a) - (c) and (2) which state that:

> *"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.*

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".

As pointed out above, the learned Senior State Attorney did not dispute the fact that the search of the appellant's room was conducted without a search warrant. It was her submission however, that, despite having acted without a search warrant, the officers of the Authority did not breach s. 32 (1) and (3) of the Act read together with s. 38 (1) of the CPA. The basis of her submission, which was contested by the learned counsel for the appellant, is that the search was conducted in an emergency situation and therefore, under the particular circumstances of this case, a search warrant was not necessary. She relied on s. 42 (1) (b) (i) and (ii) of the CPA which provides as follows:

"42-(1) A police officer may-

a) ... N/A

b) enter upon any land, or into any premises, vessel or vehicle, on or in which he believes on reasonable grounds that anything connected with an offence is situated, and may seize any such thing that he finds in the course of that search, or upon the land or in the premises, vessel or vehicle as the case may be-

(i) if the police officer 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; and

(i) the search or entry is made under circumstances of such seriousness and urgency as to require and justify immediate search or entry without the authority of an order of a court or of a warrant issued under this Part".

The issue for our determination in this ground is whether or not the entry into the appellant's room and the search was made under circumstances of such seriousness and urgency such that, even though PW3 and PW4 were exercising their powers as if they were police offfcers, it was not necessary to obtain a search warrant from the

relevant authority, in this case, the responsible officer of the Authority discharging the duties similar to those of an officer incharge of a police station as stipulated under s. 38 (1) of the CPA.

It is plain from the evidence of PW3 that the operation team left the office of the Authority while having information that the house in which the appellant was residing was specifically targeted to be searched. In the circumstances, a search warrant ought to have been obtained before the team went to search that house. It is true that the offence which the appellant was suspected of having committed is a serious one. We are, however, unable to agree with Ms. Sinare that, such factor alone justified the act of the officers of the Authority of conducting the search without a search warrant. Section 42 (1) (b) (ii) of the CPA exempts the requirement of a search warrant where, apart from the seriousness of the offence, the search is done under emergency situation.

In the case of **Shabani Said Kindamba** (supra) cited by the appellant's counsel, like in the case at hand, a search was conducted without a warrant while the police had prior information about the

suspicion that the appellant was dealing in bhang in the house in which the search was conducted. Having considered that fact, the Court had this to say:

> *"...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".*

In another case of **The Director of Public Prosecutions v. Doreen John Mlemba**, Criminal Appeal No. 359 of 2019 (unreported), also cited by the appellant, the police had prior information that certain persons were allegedly engaging in trafficking in narcotic drugs. Preparations were made and a team of police officers went to search the house in which the suspects were alleged to be committing the offence. The Court considered whether or not there were circumstances which

necessitated the search to be carried without a warrant and held as follows:

> *"In conclusion we are likely to inevitably make is that the search in this case was not a search in an emergency. There were preparations including reporting within the ADU hierarchy and mobilization of human resources. In any event, it would not have been difficult to procure a search warrant ... In other words what happened was sheer breach of law. The search of the house in question was conducted with no lawful mandate or authority and we have no doubt in our mind in holding that, the search of the house from which the narcotic drugs were recovered was an illegal search".*

See also the case of **Samwel Kibundali Mgaya v. Republic**, Criminal Appeal No. 180 of 2020 (unreported).

In a similar vein, we find that, in this case, since PW3 had prior information about the allegations that in the house in which the appellant was residing, the said illegal business was being conducted, the search, which was carried out without warrant, was illegal. The

contention by Ms. Sinare that since the search was made at 1:00 a.m, the next day after the information, is not in our view, a sound argument because that did not change the fact that the Authority had prior information before its officers conducted the search. As to the case of **Wallestein Alvares Santillan** (supra) cited by the learned Senior State Attorney, the same is distinguishable in that the search was not conducted in a building, vessel, carriage, box receptacle or a place but on a person, which is permissible without a search warrant under emergency situations as provided for under s. 42 (2) of the CPA.

Having found that the search was illegal, it follows that the evidence obtained from that search, that to say, the substance in question (exhibit P1) and seizure certificate (exhibit P3) were also illegally obtained. We are, for this reason, constrained to expunge that evidence, as we hereby do. Since the finding on the 1st ground of appeal suffices to dispose of the appeal, we find no need to consider the 2nd ground of appeal.

On the basis of the foregoing findings, we hereby allow the appeal, quash the appellant's conviction and set aside the sentence. The appellant should be released from prison forthwith unless he is otherwise lawfully held.

DATED at **DAR ES SALAAM** this 21st day of June, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of June, 2023 in the presence of Appellant in person through Video Link from Ukonga Prison and Ms. Gladness Senya, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL