

IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: KOROSSO, J.A., GALEBA, J.A., And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 207 OF 2021

NDILA LUGATAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the judgment of the Resident Magistrates' Court of Shinyanga
(Extended Jurisdiction) at Shinyanga)**

(Mbuya, PRM (Ext. Jur.))

dated 25th day of January, 2021

in

Criminal Appeal No. 74 of 2020

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JUDGMENT OF THE COURT

5th & 12th December, 2023

ISMAIL, J.A.:

Ndila Lugata, the appellant herein, was charged with the offence of being in an unlawful possession of narcotic drugs in contravention of section 11 (1) (d) of the Drugs Control and Enforcement Act No. 5 of 2015. The subject matter of the charge is cannabis sativa, commonly known as *bhang* that weighed 683.6 grams. The offence was allegedly committed at about 12.00 hours, on 12th April, 2017, at Ihale village, within Busega District in Simiyu Region. The appellant pleaded not guilty to the charges, necessitating conducting of trial that saw the prosecution marshal the attendance of six witnesses against one for the defence. The

prosecution witnesses' testimony was supported by four exhibits against none for the defence.

At the conclusion of the trial, the District Court of Bariadi District at Bariadi, in which the appellant was arraigned found him guilty. Consequently, it convicted and imposed on him to a twenty-year custodial sentence.

Facts of this case as gleaned from the record are summarized hereunder. It was alleged that, following a tip-off from an anonymous source that the appellant was involved in selling narcotic drugs, namely cannabis sativa, PW4, F5153 D/CPL Maulid, along with his colleagues, on instruction of the Officer Commanding Criminal Investigation Department (OC-CID) went to Ihale Village. They stormed into the appellant's house and carried out a search. At that point, the appellant was in the house with a woman. The search, which was allegedly witnessed by a certain Mr. Ng'angu Tano, a hamlet chairman, and Abeid Rashid, a neighbour, led to the seizure of 400 grams of cannabis sativa (Exhibit P4). The seizure was done vide a certificate of seizure tendered and admitted in court as Exhibit P3. Subsequent thereto, Exhibit P4 was taken to the Weights and Measures Agency where it was determined to weigh 683.6 grams. 22.1 grams were extracted from the same for testing by the Government Chemist Laboratory Authority at Mwanza. PW3, Kagera Zakaria, a chemist

who conducted the test returned test results that revealed that Exhibit P4 was indeed cannabis sativa. This was contained in a report admitted as Exhibit P1. It was also testified that the appellant who was put under restraint at Busega Police Station recorded a cautioned statement, taken by PW5, E9187 DC Enock, and that he confessed that the seized drugs were recovered from his possession.

In his defence, the appellant recounted the events of that fateful day, arguing that the search, which he termed as irregular, came up with nothing and that he was made to append his signature on a document whose contents he did not know. He added that he signed what he discovered later as a cautioned statement after a heavy beating administered by police officers who effected the arrest. He flatly denied that the alleged drugs were found in his possession.

The trial court was ultimately convinced that a case had been made out against the appellant and that Exhibit P4 was seized from the appellant's possession. The trial court convicted and sentenced the appellant to imprisonment for 20 years.

The conviction and sentence were not to the appellant's liking. Vide a petition of appeal filed on 21st July, 2020, Criminal Appeal No. 53 of 2020 was instituted in the High Court, and seven grounds of appeal were

raised against the trial court's findings and verdict. The 1st appellate court found nothing meritorious in the appeal. While expunging Exhibits P1, P2 and P3 whose tendering and admission was shrouded in irregularities, the learned Magistrate (Extended Jurisdiction) did not find any blemishes in the trial magistrate's finding of guilt against the appellant. He, however, varied the sentence by enhancing it to 30 years' prison term instead of 20 years.

It is this decision that has irked the appellant, hence his resolve to prefer an appeal to this Court. The Memorandum of Appeal filed in this Court on 30th July, 2021, raised 11 grounds of appeal one of which (ground four) was abandoned during the hearing. For reasons that will be apparent shortly, we find no reason to reproduce the said grounds of appeal in this judgment.

At the hearing of the appeal, the appellant appeared in person and enjoyed no legal representation whilst the respondent was represented by Ms. Suzan Masule, Messrs Jukael Jairo and Goodluck Saguya, all learned State Attorneys. When she rose to address the Court, Ms. Masule conceded to the appeal, choosing to support it. She argued that, since the search in the appellant's house was not preceded by issuance of a search order or warrant, in terms of section 38 (1) of the Criminal Procedure Act, (the CPA), search of the appellant's and seizure of Exhibit P4 were both

illegal. Matters were exacerbated, argued the learned State Attorney, by the expunging of exhibits irregularly tendered during trial. The chalking off of the exhibits affected the Certificate of Seizure, Exhibit P3, whose presence would, in some way, blur the effect of absence of the search order or warrant. Ms. Masule took the view that, the absence of these important documents inflicted a significant blow to the prosecution's case, and that the net effect of all this is that the prosecution did not prove its case beyond reasonable doubt.

For his part, the appellant had nothing more to submit. He prayed the Court to consider his grounds of appeal and allow the appeal, set aside the sentence and set him free.

From these concurring submissions by the parties, the narrow issue to be resolved is whether, as conceded by the respondent's counsel, the search into the appellant's house fell short of the required standard and, if so, what is the resultant consequence?

Search and seizure of objects of crime are matters that are regulated by law. In our jurisdiction, the guiding pieces of legislation are the CPA and Police General Orders (PGO). While the CPA provides for a high-level procedure on how search and seizure should be carried out, the PGO compliment the provisions of the CPA, by providing the nitty gritty

details on how police officers should carry out their mandate in effecting search and seizure. For ease of reference, it behooves us to reproduce the provisions of section 38 of the CPA, as hereunder:

"(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.

(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, being 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 is added]

The prescription in the cited provision is in sync with PGO No. 226 paragraphs 1 (a), (b) and (c) and 2 (a) whose substance reads as follows:

"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 private premises 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 Incharge) Station, O/C. C.I.D. [Officer In Charge Criminal Investigation of the District], Unit or investigation 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 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**”.*

[Emphasis is ours]

The important takeaway that we discern from the foregoing excerpts is that search into a suspect’s private premises and possession of any article or thing therefrom must either be carried out by the police officer in charge of a police station or, where it is practically impossible for him to do so, then the officer to whom such responsibility is delegated must be issued with a search warrant or order. This trite position was amplified in our decision in **Doreen John Mlemba v. Republic**, Criminal Appeal No. 359 of 2019 (unreported), wherein we held:

"In other words, all things being equal, for a search into private premises to be a lawful search, it must be conducted by either an officer in charge of a police station or another police officer with a search warrant as per the provisions of section 38 (1) of the CPA and PGO No. 226 paragraphs 2(a) quoted above".

Accentuating the enduring fact that compliance with the law on search is not a mere public relations exercise, the Court made the following observation in **Doreen John Mlemba v. Republic** (supra):

*"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 peoples' private premises in fulfilling their undisclosed ill motives- see **Badiru Musa Hanogi v. R**, Criminal Appeal No. 118 of 2020 (unreported)".*

Noticeably, the foregoing position highlights the Court's earlier subscription on the subject. In **Shabani Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019 (unreported), the Court borrowed a persuasive position held in the South African case of **The Minister of Police v. Kunjana**, 2016 SACR 473 (CC) and reasoned as follows:

"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 also **Ayubu Mfaume Kiboko & Another v. Republic**, Criminal Appeal No. 694 of 2020 (unreported).

As rightly conceded by Ms. Masule, the process that led to the recovery of Exhibit P4 was a travesty that had no regard to the law. PW4, whose testimony appears at pages 20 and 21 of the record of appeal has testified, unhesitantly, that on verbal instructions from OC-CID, he led a team of police officers to the appellant's house and carried out a search that culminated in the seizure of the alleged narcotic drugs (Exhibit P4). There is no mention, in the entirety of his testimony or that of any of the prosecution witnesses, of the issuance of a search warrant prior thereto,

or that he, PW4, was an officer in charge of a police station, in terms of section 2 of the CPA and whose conduct is excepted by section 38 (1) of the CPA. Nothing suggests, either, that this was an emergency search covered by section 42 (1) of the CPA and in respect of which a warrant or an order is not a prerequisite. This contention is fortified by PW4's own testimony when he stated that subsequent to instructions by OC-CID, he mobilized his colleagues, suggesting that he had ample time a slice of which would be used to obtain a search warrant or order.

The totality of all this is that the search conducted by PW4 and his companions leading to recovery of Exhibit P4 whose possession has been credited to the appellant, was illegal. Needless to say, therefore, that the product of such illegal indulgence, that is Exhibit P4, is nothing less than an illegally obtained evidence which cannot be allowed to see the light of the day. It is a piece of evidence whose admission did not conform to the imperative requirements of section 169 (1) and (2) of the CPA, and as underscored by this Court in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported).

It is in view of the foregoing that we accede to the submission and prayer by Ms. Masule, and expunge Exhibit P4 from the prosecution's evidence. Having done so, we find that whatever is left of the prosecution's testimony against the appellant is too paltry to put the

appellant in any blemished position. Consequently, we allow the appeal, quash the conviction and set aside the sentence against the appellant. We order that he be immediately released from prison unless he is held for any other lawful cause.

DATED at **SHINYANGA** this 11th day of December, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 12th day of December, 2023 in the presence of the appellant in person and Mr. Louis Boniface Mbwambo, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

