

IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT DAR ES SALAAM

ECONOMIC CASE NO. 19 OF 2021

THE REPUBLIC

Versus

MUSSA JUMA BAKARI

JUDGMENT

14/09/2022 & 26/10/2022

E.B. LUVANDA, J.

In this case Mussa Juma Bakari is arraigned for trafficking in narcotic drugs contrary to section 15(1)(a) of the Drugs Control and Enforcement Act No. 5 of 2015 read together with paragraph 23 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E. 2019. Where it is alleged that on 13/12/2018 at Kiromo Magengeni Area along Bagamoyo- Dar es Salaam road within Bagamoyo District in Pwani Region, the accused trafficked in narcotic drugs namely *Catha edulis* commonly known as Mirungi weighing 109.17 kilograms. The accused person refuted these accusations.

During the trial, Ms. Aurelia Makundi learned Senior State Attorney and Ms. Laura Kimario learned State Attorney appeared for the republic and Ms. Tukelage Frank learned Advocate was representing the accused.

The issue for determination is whether the accusation were proved on the standard.

In totality, the evidence of the prosecution was to the effect that on 13/12/2018 at Kilomo Village, Magengeni hamlet, the accused was arrested for over speeding a car T924 AST Toyota Corola white colour exhibit P3, upon inspection it was discovered the said car loaded bundles of khat at the rear seat and inside a boot. It is when SGT Machiwa (PW1) conducted a formal search which entailed counting, which was witnessed by Sgt James (PW10) and Silvanus Xzavery (PW9) who is a civilian and participated in counting those 66 bundles. Thereafter a formal seizure was effected via a certificate of seizure exhibit P1, which was also signed by PW10. As such an argument by the accused (DW1) that there was no independent witness, is without substance. Because PW9 was there at the scene of arrest and search, and was the first person who created doubt to the accused's conduct at his (PW9) farm, which obliged PW9 to pursue and trail the movement

and manner of the accused, only to see the accused was already arrested by the police officers (PW1 and PW10), as aforesaid.

The accused also introduced a defence of *alibi*, alleging that on 13/12/2018 he was not at the scene, rather he was at police remand, and denied to have been arrested on 13/12/2018, instead mentioned a date of arrest of his own, purporting to be on 11/12/2018.

However, the issue as to when the accused was arrested, was not among the issue on contention. This is because during preliminary hearing, the accused admitted a fact that he was arrested on 13/12/2018, as per the memorandum of matters not in dispute signed by the accused on 16/11/2012¹. Indeed PW1, PW9, P10 were not cross examined regarding a fact that the accused was arrested on 13/12/2018. As such the accused is barred and estopped to re-open up for discussion that fact.

It was the defence of the accused that on 18/12/2018 when it is alleged by Mwanakombo Athuman Twaibu (PW7), A/Insp Rosemary Ringo Kamugimsha (PW5) and D/Cpl Mariam Henry Mchele (PW3), that he (DW1) attended disposal of 66 bundles of khat wrapped by gazette, done at the Police Station of Bagamoyo, via an inventory exhibit P4, he disputed that fact on explanation that on the alleged date he was at Kigongoni Remand

Prison Bagamoyo, where he was remanded on 17/12/2018 as per the court proceedings cum order dated 17/12/2018 Economic Case No. 34/2018, exhibit D1.

This argument is skeptical. Exhibit D2 indicate that the learned Senior Resident Magistrate had made an order on 17/12/2018 remanding the accused in custody till on 31/12/2018 when the matter was scheduled for mention. Indeed a remand warrant issued on 17/12/2018, indicate that the accused was received at the remand facility on 17/12/2018 via admission registration number 765/2018 inserted in the remand warrant. The records of the subordinate court reveal further that on 20/12/2018, the OCCID-Bagamoyo had requested a removal order in respect of the accused, for the later to be removed from Remand Prison at Kigongoni Prison where he was remanded, and be removed on 21/12/2018 for further investigation procedures, and thereafter be taken back to the remand facility. This application was made via a letter ref. No. BAG/CID/130/VOL.XVII/245 dated 20/12/2018.

Acting upon the said request, the learned Senior Resident Magistrate issued a removal order via Criminal Form No. 13, directing the officer in charge of Remand Prison Kigongoni Prison, to produce the accused before the court

on 20/12/2018 at 8:00 o'clock in the forenoon. In other words, according to the documentation, there is no any documentary evidence suggesting that the accused was removed from remand prison on 18/12/2018 when the disposal of 66 bundles of khat were alleged executed via inventory exhibit P4.

This argument is very disturbing in a sense that the oral testimony of PW7 who is a resident magistrate, was to the effects that the accused was on attendance on account that she even engaged the later on prank that "brother the cargo is too big", where the accused responded "it is a disaster". Again an inventory P4, indicate that the accused signed to have been on attendance on 18/12/2018. Indeed when exhibit P4 was tendered there was no any reservation. PW7 was not crossexamined regarding the veracity of the accused signature reflected on exhibit P4.

Nevertheless, it is not the rule that the suspect (accused person for this matter) must be on attendance during the disposal proceedings. Both under the parent statute that is The Drugs and Control Enforcement Act, Cap 95 R.E. 2019 specifically section 36 and regulation 14 of The Drugs Control and Enforcement (General) Regulations, G.N. No. 173 of 2016, are silent as to

the requirement of attendance of the accused. For appreciation, I quote regulation 14(1) as below,

'The destruction of seized narcotic drug or psychotropic substance except for dugs mentioned under the Tanzania Food and Drugs Authority Act, shall be carried out in the presence of-

- (a) A judge or magistrate, as the case may be;*
- (b) A representative of the Commissioner General, Inspector General of Police, Director of Public Prosecutions, Chief Government Chemist;*
- (c) A representative from National Environment Management Council and the Tanzania Intelligence Security Services; and*
- (d) Any other person as the Commissioner General may appoint'*

Even under sub regulation (6) of regulation 14 (supra) which cater for destruction of small quantity of seized narcotic drugs (as defined under regulation 3(1) G.N. No. 173 of 2016 (supra), there is no mention of the suspect or accused in a coram of destruction proceedings, for appreciation I reproduce as hereunder,

'Where a small quantity is seized the magistrate may order for destruction upon application by a prosecutor in the

presence of the magistrate, prosecutor or an authorized officer'

That said, notwithstanding the fact that presence of the accused at the alleged destruction of sixty six bundles of khat on 18/12/2018 at Bagamoyo Police Station as per the inventory exhibit P4 vis-à-vis court proceedings/order dated 17/12/2018 exhibit D1 suggesting the accused was at remand, raises creepy question on that fact, but still it cannot bail out the accused. My undertaking is grounded on the fact that the law governing destruction proceedings, dispensed with the requirement of a suspect or accused physical attendance.

Regarding the argument by the accused (DW1) that a seizure certificate exhibit P1 and an inventory exhibit P4, his signature differs and were forged, is unmerited. This is because when DW1 was cross examined by the learned Prosecuting Officer, the former conceded that no objection was raised when exhibit P1 and P4 were tendered. When PW1, PW7 and PW10 were adducing evidence regarding seizure certificate (PW1 and PW10) and inventory (PW7), no question appertaining to the accused's signature was asked and a fact of forgery in respect of the accused signature was not raised. As such raising it at the stage of defence, is an afterthought. And therefore, is ignored.

That said, the information for trafficking khat was proved on the standard.

The accused is therefore guilty for trafficking khat and is convicted forthwith.

E.B. Luvanda
Judge
26/10/2022

SENTENCE

The accused is sentenced to serve a term of 20 years in jail, which is the minimum under The Tanzania Judicial officers sentencing Guidelines, page 74.

E. B. Luvanda
Judge
26/10/2022

Order: I decline to the invitation by the learned state Attorney, who argued me to confiscate a car T924 AST Toyota Corola, Exhibit P3, because ownership was not established in lieu thereof the prosecution will be at liberty to pursue their course as provided under the procedure.



E. B. Luvanda
Judge
26/10/2022