IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT MUSOMA SUB-REGISTRY

ECONOMIC CASE NO. 1 OF 2023

REPUBLIC

VERSUS

JUSTINE ELIAS GARANI

JUDGMENT

27th June, & 21st August, 2023

ISMAIL, J.

Justine Elias Garani, the accused person in these proceedings, was arraigned in court on a charge of trafficking in narcotic drugs, contrary to the provisions of section 15 (1) (a) of the Drugs Control and Enforcement Act, 2015, read together with paragraph 23 of the 1st Schedule to, and section 57 (1) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2019.

The information that founded these proceedings reveals that the offence was allegedly committed on 9th August, 2022, at Mogabili Area, within Tarime District, in Mara Region. The subject matter of the charge is

1453.28 kilograms of cannabis sativa, which was intended to be trafficked, aboard Mitsubishi Fuso with registration No. T 597 CYF.

It is gathered from the facts read out during the preliminary hearing, that the incident constituting the alleged wrong doing occurred on 8th August, 2022, at Mogabili Area, within Tarime District, in Mara Region. On that fateful day, Officer Commanding the District (OCD), SSP Ramadhan Sarige, received a tip from PW5 to the effect that, a motor vehicle make Mitsubishi Fuso with Registration No. T597 CFY, was loaded with a substance suspected to be narcotic drugs and that the consignment was intended to be trafficked out of Tarime. SSP Sarige conveyed the information to PW2 and connected him with an informer for further action. PW2, along with his colleagues, tracked the said motor vehicle and located it at Mogabili Area, within Tarime District. On board the said vehicle were two suspects, Justine Elias Garani, the accused herein, and a certain Mr. Said Bakari Omary. It was further alleged that the duo was in the process of trafficking the substance suspected to be narcotic drugs. The motor vehicle was impounded and taken to Tarime Police Station for search and inspection. At the police station, the vehicle was searched and a total of 68 bags containing substance suspected to be narcotic drugs were retrieved.

On seizure, a certificate of seizure (Exhibit P4) was filled and allegedly signed by all the parties. The search was witnessed by an independent witness, Samweli Ayoma Nyakech (PW3). Subsequent thereto, PW2 instructed PW7 and his other colleague to label the bags. While the suspects were incarcerated, the seized substance was handed to Sgt. Daudi, PW6, an exhibits keeper, for safe custody.

On 13th August, 2022, Boaz Fabian Mirazi, a Mwanza based Government Chemist (PW1), went to Tarime Police Station where he met PW6 who released the consignment to Hamis and Ernest both of whom, together with the accused persons, took the exhibit to the Weights and Measures Agency at Sirari for weighing it. The gross weight of the substance was 1453.28 kilograms. After weighing it, PW1 extracted samples for laboratory analysis. Submission of the sample was done through Form DCEA 001 (Exhibit P2). After completion, PW1 sealed exhibit P3 and handed it back to Hamis the latter of whom conveyed it back to PW6.

The findings of the analysis carried by PW1 returned a positive verdict to the effect that Exhibit P3 was indeed narcotic drugs known as cannabis sativa, commonly known as bhangi. The analysis report was admitted in Court as Exhibit P1.

Findings of the police investigation pointed an accusing finger at the accused person. This necessitated the institution of the instant proceedings. The accused person pleaded not guilty to the charges, thereby triggering the instant trial proceedings. Before the full trial, a preliminary hearing was conducted during which facts were read out to the accused. The accused person disputed all facts save for the personal particulars and the fact that he was arrested and arraigned in court over allegations that he denied any knowledge of. Seven witnesses were lined up and testified for the prosecution while the defence testimony was the accused person's own account of facts, narrated when he featured as DW1. Those who testified for the prosecution were: Boaz Fabian Mirazi (PW1); ASP Bruno Celestine (PW2); Samweli Ayoma Nyakech (PW3); Said Bakari Omari (PW4); F20742 A/Inspector Agripina Edmund Mmassy (PW5); E.6435 Sgt. Daudi (PW6); and E.9218 D/Sgt. Ernest (PW7).

As for the exhibits, the following exhibits were tendered by prosecution: Government Analyst Report of the samples by GCLA (***Exhibit P1***); Form No. DCEA 001 – Request for submission of samples (***Exhibit P2***); 68 'Sulphate' bags containing substance believed to be narcotic drugs (***Exhibit P3)***; Form No. DCEA 003 which is a Certificate of Seizure (***Exhibit P4***); Motor Vehicle with Registration No. T597 CFY (***Exhibit P5***); Letter on

investigation No. 58/2022 dated 11/08/2022 (***Exhibit P6***); and Inventory Order dated 11/08/2022 (***Exhibit P7***).

Taking charge for the prosecution was Mr. Moses Mafuru, learned State Attorney. His counterpart for the defence was Ms. Mary Joachim, learned Counsel.

Midway through the proceedings and after closure of the prosecution's case, the Court delivered a ruling on whether the accused person has a cease to answer. The Court took the view that the prosecution's testimony passed a ***"sufficient evidential mark"*** that established a *prima facie* case. Consequently, the Court held that the accused person had a case to answer, and was called upon to defend himself. He chose to testify on oath and had nobody else to testify in defence. He did not tender any documentary or physical exhibit, either. He protested his innocence and downrightly denied any involvement in the trafficking in narcotic drugs or at all.

The accused person began his defence by identifying himself as a grower of tomatoes, cabbages and bananas, and domiciled in Rozana Tarime. Recounting the events of the 9th August, 2022, the accused person stated that he was arrested at Mogabili in Tarime District, while standing

beside a motor vehicle make Toyota Fuso. He contended that he was talking to two young men, one of whom was Saidi Bakari. He testified that the duo wanted to be directed to a nearby petrol station and that, as he was doing that police men pounced on them and put two of the three under restraint. The driver of the vehicle fled. The police told them that they were suspected of trafficking in narcotic drugs, an allegation that he denied. The accused person testified that his defence counted for nothing as he and Saidi Bakari were conveyed to Tarime police station, along with the vehicle.

The accused person further testified that on 10th August, 2022, they were let out of the cell and told to sign some papers, while on 13th August, 2022, they were taken to Sirari where Exhibit P3 was sent for weighing. On 22ndAugust, 2022, he, alone, was arraigned in court on allegations of trafficking in narcotic drugs the involvement of which he denied. Disputed as well is the prosecution's contention that he willingly appended his signature on the certificate of seizure, Exhibit P4, or at all.

When the parties' cases were closed, leave was granted for the counsel to prefer final submissions. This order was duly complied with by both counsel.

Kicking off the discussion was the prosecution side. Counsel for the prosecution confined his submission to three areas, namely; credibility and reliability of testimony of the prosecution witnesses; search and seizure; and chain of custody of the drugs allegedly seized from the accused person.

Describing the testimony, learned Attorney argued that the same was positive as it came from the people who witnessed the incident. That included the search through which 68 bags of narcotic drugs were seized from beneath the banana bunches. The witnesses include PW2, PW3 and PW4, the latter of whom was an independent witness. In the prosecution's contention, this is a direct, positive evidence that left no doubt about the accused person's involvement in the offence of trafficking in narcotic drugs. The prosecution counsel quoted the case of ***Vuyo Jack v. DPP***, CAT-Criminal Appeal No. 334 of 2016 (unreported), in which reference was made to the decision in ***Commonwealth v. Webster*** 1850 vol. 50 MAS 255. In the latter, it was held:

> *"The advantage of positive evidence is that it is direct testimony of witness of a fact to be proved who if speaks the truth so it done."*

Turning to the question of coherence and demeanor of the witnesses, the prosecution is of the view that their testimony was coherent of each other and free from contradictions. In the counsel's conclusion, the witnesses were credible, worth of belief, and in the mould of the testimony described in the case of ***Goodluck Kyando v. Republic*** [2006] TLR 363, wherein it was held as follows:

> *"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

With regards to validity of the search and seizure of Exhibit P3, the argument by the prosecution is that, while aware of requirements set out in section 38 of the Criminal Procedure Act, Cap. 20 R.E. 2022 (CPA), search and seizure exercised in this matter was in realization of the fact that PW2, who carried and supervised it, was deputizing as Officer Commanding the Station who, in terms of section 2 of the CPA, he is allowed to exercise such powers.

Submitting on the chain of custody, the contention by learned counsel for the prosecution is that the oral testimony proved that chain of custody of Exhibit P3 was maintained and that, at no point was it broken.

Learned counsel took the view that proof of maintenance of chain of custody is not confined to paper trail alone. Buttressing this contention, learned counsel cited the decision of the Court of Appeal of Tanzania's decision in ***Abas Kondo Gede v. Republic***, CAT-Criminal Appeal No. 472 of 2017 (unreported). The cited decision quoted, with approval, the holding in ***Wallenstein Alvarez Santillan v. Republic***, CAT-Criminal Appeal No. 68 of 2019 (unreported). In the latter, it was held:

> *"Having critically evaluated the evidence on record, we entirely agree with the learned state attorney that there is sufficient direct oral evidence to show that the handling of the respective exhibits demonstrate that the chain of custody was not broken."*

He concluded by maintaining that chain of custody was unbroken.

On the crucial question of trafficking in narcotic drugs, the submission by the prosecution is that the testimony of PW3 clearly demonstrated the accused person's involvement. The prosecution further contended that, through PW3, it became evident that the seized consignment was under the control of the accused person who was trafficking it to its final destination. The learned Attorney argued that this contention was not challenged during cross-examination. In the

prosecution's view, this was a proof of possession and control over the consignment. The prosecution premised its contention on the decision in the case of ***Simon Ndikulyaka v. Republic***, CAT-Criminal Appeal No. 231 of 2014 (unreported), which borrowed the reasoning in ***Moses Charles Deo v. Republic*** [1987] TLR 134. In both of the decision, the holding was that possession of goods, whether actual or constructive, must be preceded by proof that the possessor was aware of presence of the goods or exercised control over them.

It was the learned Attorney's further argument that circumstances of this case fit well in the definition of trafficking, as gathered from section 2 of Cap. 95. While maintaining its position on the accused person's culpability, the prosecution sought to extricate PW3 from any blemished role, arguing that PW5, the supervisor of the impounded vehicle learnt of the fishy business from PW3. This, in the learned counsel's view, was an indication that PW3 was not party to the offence with which the accused person was charged.

The prosecution concluded that a case had been made out against the accused person.

Ms. Mary Joakimu's starting point was to contend that the prosecution had failed in their duty of proving the case at the standard set by law. She argued that, with the exception of the requirements under section 28 (1) of Cap. 95 which is not applicable in the instant case, the requirement under section 3 (2) of the Evidence Act, Cap. 6 R.E. 2019 takes the reign. Ms. Joakimu held the view that evidence by the prosecution lacked corroboration on whether the consignment seized by the police belonged to the accused. She argued that the testimony of PW4 ought to have been corroborated by some other evidence to make it credible and watertight.

Regarding the chain of custody, the argument by Ms. Joakimu is that the same was not proved, and that the principle of law is that each step of the movement of the exhibit must be documented. Failure to do so, she argued, creates doubts on whether what was tendered in court is what was found to be in the accused person's possession. She took an exception to the movement of Exhibit P3, holding the view that the changing of hands between PW1, PW2 and PW6 was not documented, and there is no proof that the same was not tampered with. Learned counsel fortified her contention by citing the case of ***Malumbo v. DPP*** [2011] EA 280, in which it was held that chain of custody must be clearly shown with a view to establishing that the exhibits were not tampered with.

Learned counsel submitted further that the law, as it currently obtains, is to the effect that an accused person cannot be convicted on the weakness of his defence but only on the strength of the prosecution's case. He took the view that the prosecution's case is perforated and full of doubts which, as a matter of law, should be resolved in favour of the accused person. She prayed that the Court should declare that the prosecution has failed to prove the case and that the accused person should be acquitted of the offence charged.

The parties' brief representations bring out a singular issue. This is as to whether the testimony adduced by the prosecution breeds an incontrovertible conclusion that the accused person's guilt has been established.

As we grapple with this broad issue, it behooves me to state, albeit in brief, that the established position in criminal trials is that conviction against the accused person should only be grounded if the totality of the evidence adduced by the prosecution has met the legal threshold. In legal parlance, the known threshold is proof beyond reasonable doubt. This is in terms of sections 110 and 112 of the Evidence Act (supra).

Conformity with the requirements of the cited provisions has been accentuated through judicial pronouncements (See: ***Joseph John Makune v. Republic*** [1986] TLR 44), and the undisputed principle distilled from the said pronouncements is that conviction of an accused person must only be premised on the strength of the evidence and not on the weakness of his defence (See: ***Christian Kale & Another v. Republic*** [1992] TLR 302). It means, therefore, that no duty is cast on the accused person to prove his innocence.

So important is proof of a case beyond reasonable doubt that in ***Yusuph Abdallah Ally v. Republic*** CAT-Criminal Appeal No 300 of 2009 (unreported), it was underscored that such proof requires that the prosecution evidence must be strong as to leave no doubt regarding criminal liability of an accused person. It is why credibility of the testimony is preferred to the number of witnesses paraded in a case.

Deducing from the information and the testimony adduced by the parties, and in addressing the broad question of whether a case has been made out by the prosecution, the following key issues arise:

(i) *Whether search and seizure was lawfully conducted and that the drugs were recovered from the accused;*

(ii) *Whether the substance seized from the accused person was*

narcotic drugs;

(iii) Whether chain of custody in the handling of the said narcotic drugs was established; and

(iv) Whether the prosecution has proved the case against the accused person beyond reasonable doubt.

The framing of the first issue is intended to establish if the search and the eventual seizure of the narcotic drugs (Exhibit P3) conformed to the requirements of the law that governs search and seizure of the subject matter of the trial proceedings. This considers the fact that a search and/or seizure that is effected in violation of the law is faulty and lacking in legitimacy. The general rule is that search and seizure of items that lead to any criminal action must be carried out in line with what section 38 (1) and (3) of the CPA, read together with paragraphs 1(a), (b), (c), 2(a) and (d) of the Police General Order (PGO) No. 226. These provisions require that, save for an emergency search under section 42 (1) (b) (ii) of the CPA, any search and eventual seizure of any items constituting the subject or instrumentality of a criminal act must be preceded by issuance of a search warrant.

See also: ***Ayubu Mfaume Kiboko and another v. Republic,*** CAT-Criminal Appeal No. 694 of 2020; ***Director of Public Prosecution v. Doreen John Mlemba,*** CAT-Criminal Appeal No. 359 of 2019; and ***Joseph Charles Bundala v. Republic,*** CAT-Criminal Appeal No. 15 of 2020 (all unreported).

The contention by the prosecution is that PW2 who carried out the search and seizure was clothed with powers to do so and he required no search warrant or order to do that. I am in agreement with this contention whose basis is the provisions of section 2 of the CPA which defines an Officer Commanding Station to include an officer that deputizes him in his absence. The said provision states as hereunder:

> *"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."*

Since PW2 was in charge of the station at the time of conducting the search, he was an officer whose performance of duties fell under the powers granted under section 38 (1) of the CPA. Need did not arise, in the circumstances of this case, for him to seek and obtain a search order or warrant to perform the function that he performed in the seizure of the substance. It is my conclusion that the search and seizure carried out by PW2 was proper and regular, and that what came out of it is the substance that was subsequently confirmed as narcotic drugs. This answers the first issue in the affirmative.

The second issue requires the Court to pronounce itself on whether what was allegedly seized from the accused person is narcotic drugs. The testimony adduced by PW2 has stated that 68 bags of dry leaves suspected to be narcotic drugs (Exhibit P3) were seized from the vehicle that was bound for Arusha. There is also the evidence of PW1, the Government Chemist, who carried out the analysis and issued a report (Exhibit P1). The report returned a verdict which read as follows:

> *"Nimefanya uchunguzi na kupata matokeo yafuatayo:*
>
> ***KIELELEZO: MAJANI MAKAVU YADHANIWAYO KUWA NI DAWA YA KULEVYA AINA YA BHANGI***

Kielelezo kimechunguzwa na kuthibitishwa kuwa ni ***bhangi (Cannabis Sativa)*** *Uzito wa jumla wa kielelezo bila vifungashio ni* ***kilogramu 1453.28***

Bhangi ina kemikali aina ya ***"Tetrahydrocannabinol" (THC)*** *ambayo husababisha ulevi usioponyeka kirahisi* ***(Drug Dependence)*** *na kuharibikiwa akili kwa mtumiaji."*

From this excerpt, the obvious fact is that what was seized from the accused person and from which samples were taken for analysis is narcotic drugs known as Cannabis Sativa (bhangi). This fact clearly supports the information that founded these proceedings and answers the question in the second issue in the affirmative.

Next in the list of issues relates to the chain of custody of Exhibit P3, and the question is whether such chain of custody was established in this case. Framing of this issue is a realization of the indispensable requirement that, where in criminal trials the subject matter of the trial is seized and placed in the custody of the law enforcement agencies, the handling of the seized object must be foolproof, and that the chain of custody must be unbroken. The unbroken chain must be conserved throughout to the time the object of the proceedings is tendered in court. A litany of court proceedings has emphasized on the mighty importance of conforming to this requirement. In the case of ***Moses Muhagama Laurence v. The***

Government of Zanzibar, CAT-Criminal Appeal No. 17 of 2002 (unreported), the Court of Appeal of Tanzania guided as follows:

> *"There is need therefore to follow carefully the handling of what was seized from the appellant up to the time of analysis by the Government chemist of what was believed to have been found on the appellant."*

As repeatedly observed by this Court, establishment of the chain of custody entails tracing the movement of the exhibit and the manner in which it changed hands, with a view to seeing that no human intervention occurred and resulted in the tampering of the said exhibit. It is in view thereof, that in ***Chacha Jeremiah Murimi and 3 Others v. Republic***, CAT-Criminal Appeal No. 551 of 2015 (unreported), the upper Bench reasoned that:

> *"In order to have a solid chain of custody it is important to follow carefully the handling of what is seized from the suspect up to the time of laboratory analysis. Until finally the exhibit seized is received in court as evidence...The movement of exhibit from one person to another should be handled with great care to eliminate any possibility that may have been to tempering of that exhibit."*

See also: ***The Director of Public Prosecutions v. Shirazi Mohamed Sharif***, CAT-Criminal Appeal No. 184 of 2005 (unreported.

I have scrupulously reviewed the testimony adduced by the prosecution witnesses, and I can state without any fear of contradiction, that handling of Exhibit P3 was consistent with what the law requires. There was nothing on which to build an impression that tampering would be done to the detriment of the accused person. I am satisfied that the testimony adduced by the prosecution proved that the chain of custody was duly established. This settles the matter in the prosecution's favour.

The last issue queries if the totality of what has been stated above proves the case against the accused person, beyond reasonable doubt.

Response to this question begins with a review of the charges facing the accused person. He was indicted under the provisions of section 15 (1) (a) of the Drugs Control and Enforcement Act (supra), read together with paragraph 23 of the 1st Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act (supra). This is the offence of trafficking in narcotic drugs. One of the key ingredients of the offence is possession of the substance which is proved to be narcotic drugs. This is in terms of section 2 of the Drugs Control and Enforcement Act (supra). Successful proof of the offence by the prosecution involves demonstration of the fact that the accused person was found in possession of narcotic drugs; and that there was an act of trafficking the said drugs, within the

meaning of section 2 of the Act. There is also a requirement of confirmation that the substance which was found in the possession of the accused person or was in the process of being trafficked was proved; by the government chemist is indeed narcotic drugs.

See also: ***Alberto Mendes v. Republic***, CAT-Criminal Appeal No. 473 of 2017; and ***Hamis Mohamed Mtou v. Republic***, CAT-Criminal Appeal No. 228 of 2019 (both unreported).

As submitted by learned counsel for the prosecution, the testimony that holds the accused person to a blemished account has shown that, acting on information of PW3 as conveyed to PW5, the accused was arrested and that, on search of the vehicle, a consignment of narcotic drugs was found and seized by PW2. The testimony further revealed that the seized substance was put to test and the findings confirmed that the substance was indeed narcotic drugs. This testimony further revealed that the said drugs were *en route* to Arusha where they would meet their ultimate consumers. The aggregate value of this testimony is to prove that the accused person was involved in the trafficking of the narcotic drugs.

The accused person has denied any wrong doing. His side of the story attempts to show that he found himself on the wrong side of the things

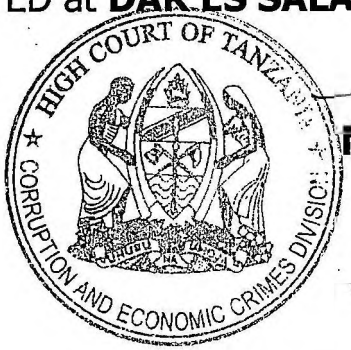
when he volunteered to help PW3 and the driver of the vehicle to direct them to a nearby petrol station. This implies that the accused person had no business in what the vehicle carried. He was simply not involved. While this defence is attractive and may resonate to some, it does not wash, as far as I am concerned. It is too light to outweigh what the prosecution testified on in this case. The testimony of PW3, which is thoroughly credible, has shown that the accused person was involved and divulged information to the former that the accused person was under instructions to take charge of the consignment and ensure that it reached the ultimate destination. In law, the side whose testimony is heavier carries the day and, in this case, my conviction is that the prosecution's side presented a case which outweighed that of the accused person.

In my unflustered view and, in the whole, the prosecution has surpassed the threshold set out for proof of cases in criminal proceedings. The testimony convinces me that the accused person committed the offence with which he is charged. Consequently, I find him guilty and convict him of the offence of trafficking in narcotic drugs in contravention of 15 (1) (a) of the Drugs Control and Enforcement Act, 2015, read together with paragraph 23 of the 1st Schedule to, and section 57 (1) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2019.

Order accordingly.

Right of appeal duly explained to the parties.

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



M.K. ISMAIL

JUDGE

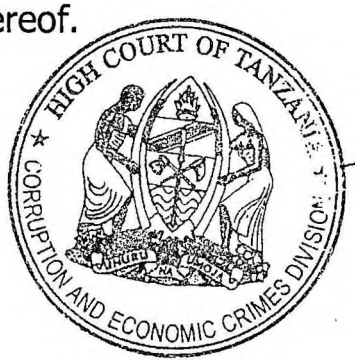
21.08.2023

SENTENCE

This Court has considered submissions by counsel for the parties. Particularly, the fact that the accused is a first offender with no blemished criminal record.

There is also the fact that the accused has been in incarceration for in excess of one year now. However, as we consider all these, we are not lost on the fact that the offence with which the accused persons is charged in serious, and the amount of drugs involved attracts a maximum sentence with no flexibility by the Court. It is also a fact that the impact of the accused's involvement in this illegal conduct is due and intolerable.

Consequently, I sentence the accused to life imprisonment effective from the date hereof.



M. K. Ismail
Judge
21/08/2023