

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT ARUSHA

ECONOMIC CASE NO. 6 OF 2022

THE REPUBLIC

VERSUS

SEURI KISAMBU @MOLLEL

JUDGMENT

18th and 22nd December, 2023

KISANYA, J.:

In this case, Seuri Kisambu @ Mollel is charged with trafficking in narcotic drugs, contrary to section 15 (1) (a) and 3(iii) of the Drug Control and Enforcement Act, Cap. 95, R.E. 2019 (the Drugs Act), 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, Cap. 200, R. E., 2019 (the EOCCA).

It is stated in the information that, on 30th June, 2020 at Engalaoni-Mwandeti area within Arumeru District in Arusha Region, the accused perso was found trafficking in narcotic drugs namely, cannabis sativa commonly known as *bhangi* weighing 626.45 kilograms.

During the trial, the Republic was represented by Ms. Upendo Shemkole, Ms. Naomi Mollel, Ms. Lydia Miyaye, and Ms. Neema Mwijage, all learned State Attorneys. On the opposing side, the accused person received legal representation from Mr. Joshua Minja, learned advocate.

In its pursuit to prove the case against the accused person, the prosecution marshalled a total of five (5) witnesses and tendered eleven (11) exhibits, all of which were admitted in evidence. Conversely, the accused person opted to testify as the sole witness for the defence.

The prosecution witnesses firmly stated that, on the morning of 30th June 2020, Inspector Beatus (PW3) from the Drugs Control and Enforcement Authority (DCEA) - Dar es Salaam was at Usa River Police Station. Acting on information received from an informant, PW3 learned about a person involved in the trafficking of narcotic drugs at the Mwandeti area. He then obtained a search order and proceeded to the Mwandeti area accompanied by fellow officers.

Upon arrival, PW3 in collaboration with other officers set up a strategic plan to apprehend the suspect. The informer guided them to the residence of the person under suspicion. PW3, along with the accompanying officers, organized a trap to capture the suspect. He instructed the officers to surround

the house. Following these preparations, PW3 knocked on the door, and the accused person was put under arrest upon opening it.

Simultaneously, the police officers saw Maximillian Silayo (PW4) in the vicinity. PW4 was approached and requested to serve as an independent witness during the search. Subsequent to a thorough search conducted in the accused person's house, the officers found and seized 32 bags containing dry leaves suspected to be narcotic drugs, namely cannabis sativa. Additionally, three (3) motorcycles with registration numbers MC 316 BNK, T852 BAD, and MC 868 BXT, along with packaging bags/envelopes (*vifungashio*), were seized. This seizure was documented in a certificate of seizure, duly attested by PW3, PW4, and the accused person.

Following the search, the accused person, along with the seized items from his house, was ferried to the Usa River police post, where a case was officially opened as number DCEA/AR/1R/01/2020. The bags containing dry leaves suspected to be narcotic drugs were individually labeled from numbers 1 to 32.

In continuation, PW3 handed over all the seized items from the accused person to the exhibit keeper, D/SGT Henry (PW2). Then, D/SGT Henry registered the said exhibits in the Court Exhibit Register - PF16. He

designated them as exhibit number 82/2020. This documentation (exhibit no. 82/2020) was admitted in evidence as Exhibit P2.

Thereafter, PW2 stored the items seized from the accused person's house in the exhibit room. On the following day, 1st July 2020, he handed over the 32 sulphate bags containing dry leaves to PW3 for the purpose of sampling. The sampling procedure took place in the presence of various stakeholders, including PW5 Nestory Baro (magistrate) and PW1 Erasto Mbalamwezi Laurance (chemist).

During the sampling process, PW3 drew duplicate samples from each sulphate bag containing dry leaves. Furthermore, he weighed the sulphate bags, recording both the gross and net weights, which amounted to 629.450 kilograms and 626.450 kilograms, respectively. To substantiate his account of the sampling and weighing process, PW3 tendered 32 sampling inventory forms which were, collectively admitted in evidence as Exhibit P5.

Following the sampling process, PW3 returned the sulphate bags containing dry leaves to PW2 who stored them in the exhibit room. This handover was documented through PF-16 (Exhibit P2). Later, PW3 dispatched the collected samples to the Government Chemist Laboratory Authority (GCLA) for analysis.

Upon arrival at the GCLA, the samples were received by PW1, who registered them as Lab. No. NZL 499/2020. PW1 went on acknowledging the receipt of the samples by signing both a sample submission form (Exhibit P6), presented to him by PW2, and a sample receipt notification form (Exhibit P7).

On 2nd July 2020, PW2 handed over the 32 sulphate bags containing substances suspected to be cannabis sativa to PW3 for the purpose of destruction. Upon receiving the said exhibit, PW3 proceeded to the Resident Magistrate Court of Arusha. There, he met with the magistrate (PW5), who issued an order for the destruction of the dry leaves contained in the 32 sulphate bags. To support this fact, the prosecution tendered an inventory of seized exhibits for disposal, Form No. DCEA 006. It was admitted in Court as Exhibit P8.

In compliance with the said order, the substances contained in the 32 sulphate bags were disposed of through burning on 2nd July 2020, as detailed in the certificate of destruction (Exhibit P9). Subsequent to the destruction of exhibits, PW3 returned the 32 empty sulphate bags to PW2 for safe custody. These empty bags, along with the three motorcycles, remained under the custody of PW2 until he tendered them as evidence before this Court.

During the trial, the 32 empty sulphate bags were collectively admitted as Exhibit P3, while the three motorcycles bearing registration numbers MC 316 BNK, T852 BAD, and MC 868 BXT were collectively admitted as Exhibit P4. It is also important to note that every movement of exhibits between PW2 and PW3 was recorded in PF16.

Returning to the office of the GCLA, PW1 undertook the analysis of the 64 samples received from PW3. The analysis affirmed that all the samples were indeed narcotic drugs namely cannabis sativa, with a total weight of 626.45 kilograms. Based on the said results, PW1 prepared and signed a Government Chemist Report dated 9th July 2020. It was admitted in evidence and marked as Exhibit P1.

In view of the foregoing evidence, the accused person was brought before this Court, as previously mentioned.

The accused person strongly denied the allegations against him. He asserted that the case had been fabricated. He contended to have been arrested on charges of housebreaking. The accused went on claiming residence in the Kibaoni Ngaramtoni ya Juu area and not in Engalaoni-Mwandeti. Furthermore, he contended that he did not own a house in the Mwandeti area. Regarding the three motorcycles (Exhibit P4 collectively), the

accused person stated unequivocally that they did not belong to him. He further maintained that the evidence presented by the prosecution referred to someone named Seuli Kisambo Mollel and not him. As a result, he earnestly requested the Court to acquit him of the charges.

After a thorough examination of the evidence given by the prosecution and the defence, the pivotal issue at hand is whether the prosecution has successfully proved the case beyond reasonable doubt, as mandated by criminal law.

According to sections 15(1)(a) and 3(iii) of the Drugs Act, the offence of trafficking in narcotic drugs is proved by establishing two key elements: *first*, that the accused person trafficked in narcotic drugs, and *second*, that the weight of the narcotic drugs, namely cannabis sativa involved exceeds fifty kilograms. The information in the matter at hand asserts that the accused person was found trafficking in narcotic drugs namely, cannabis sativa, with a weight of 626.45 kilograms. Consequently, the two key issues for determination are:

1. Whether the accused person was involved in the trafficking of narcotic drugs, namely cannabis sativa.

2. Whether the weight of the cannabis sativa was indeed 626.45 kilograms.

The crux of the first issue hinges on confirming two sub-issues: the presence of 32 sulphate bags in the accused person's house and ascertaining whether the contents of these bags were indeed a narcotic drug namely, cannabis sativa.

Regarding the first sub-issue, PW3 testified that upon receiving information about the accused person's alleged trafficking in narcotic drugs, he organized a team of police officers and proceeded to the house indicated by the informant. PW3 stated that the accused person himself opened the door to the house during the subsequent search. The search, conducted in the presence of PW4, who happened to be passing near the accused person's house, resulted in the seizure of 32 sulphate bags containing dry leaves suspected to be cannabis sativa, along with packaging envelopes and three motorcycles (Exhibit P4 collectively). PW3 explained that the motorcycles were seized because the accused person claimed to use them for the distribution of narcotic drugs.

Although the search order and certificate of seizure were not admitted due to non-compliance with Rule 8(2) of the Economic and Organised Crime

Control (The Corruption and Economic Crimes Division)(Procedure) Rules, 2016, GN No. 267 of 2016, I find the oral testimonies of PW3 and PW4 convincing in establishing that 32 sulphate bags containing dry leaves suspected to be the narcotic drug commonly known as cannabis sativa were seized from the accused person's house. Importantly, this evidence remained unchallenged during cross-examination. It is also noteworthy that, neither PW3 nor PW4 had any prior acquaintance with the accused person before the incident, and there is no indication of animosity between them. The accused person's assertion during the defence case that he was not a resident of the Mwandeti area suggests that he relies on the defence of alibi. However, neither notice of *alibi* was given during the preliminary hearing nor particulars of *alibi* issued before closure of the prosecution case as mandatorily required under section 42(1) of the EOCCA. Furthermore, the accused person did not substantiate his *alibi* on the balance of probabilities due to lack of supporting testimony from relatives or leaders from Kibaoni Ngaramtoni ya juu. As such, I will not consider the defense of *alibi* in my evaluation of the case.

Given the circumstances and considering that there appears to be no plausible reason for PW3 and PW4 to falsely implicate the accused person without cause, I find the first sub-issue to be affirmatively answered. The prosecution has successfully proved that 32 sulphate bags containing

substances suspected to be cannabis sativa were indeed discovered and seized in the accused person's house

With the first sub-issue resolved in the affirmative, the subsequent consideration pertains to the sub-issue, whether the substances contained in the 32 sulphate bags seized from the accused person's house were indeed a narcotic drug, namely cannabis sativa. As per section 48A(2) of the Drugs Act and in alignment with the case of **Omary Said Athumani vs R**, Criminal Appeal 58 of 2022, 2022 TZCA 270, the analysis of substances suspected to be narcotic drugs falls within the purview of the Government chemist.

In this case, PW1, a chemist from the GCLA-Arusha, adduced a testimony affirming that he examined the samples received from PW3. This indicates that PW1 had the power to conduct the analysis of the samples. He then explicitly stated that his analysis confirmed the nature of the samples as narcotic drugs, namely cannabis sativa. Notably, the defence did not challenge his evidence. PW1's evidence finds support in the Government Chemist Analyst Report (Exhibit P1). In accordance with section 48A(2) of the Drugs Act, the evidence pertaining to the facts stated in the report (Exhibit P1) is considered conclusive unless rebutted.

The critical question that arises is whether the analysis conducted by PW1 was based on the dry leaves derived from the sulphate bags seized from the accused person. It is undisputed that the actual sulphate bags containing substances seized were not directly submitted to the GCLA for analysis. According to the sample submission form (Exhibit P6) and sample receipt notification form (Exhibit P7), the GCLA received 32 samples in duplicate for analysis. The determination now hinges on whether these samples accurately represented the contents of the sulphate bags seized from the accused person.

Indeed, PW2 and PW3 clearly testified that the sulphate bags seized from the accused person were retrieved from the exhibit room for the purpose of sampling. PW3 further attested that two samples were drawn from each sulphate bag seized from the accused person's house. This entire process, encompassing both sampling and weighing, was conducted in the presence of various stakeholder, including the magistrate (PW5), State Attorney, and PW1 (chemist). Both PW1 and PW3 concurred that, 32 sampling inventory forms were filled out after the sampling process. Remarkably, all sampling inventory forms received certification from the Resident Magistrate (PW5) who was present. They were tendered as evidence collectively, marked as Exhibit P5.

However, there is discrepancy between Exhibit P5 (the sampling inventory forms) and Exhibit P1 (the Government Chemist Report) which gives rise to doubt about the basis of the analysis leading to Exhibit P1. The sampling inventory forms collectively marked "1(1)" through "32(2)" indicate 64 representative samples certified by the magistrate. But, Exhibit P1 shows that PW1 received 64 samples marked "A1" to "A32", thereby creating a notable inconsistency.

This inconsistency is crucial, especially considering that samples of substances suspected to be narcotic drugs are drawn under section 36(3)(c) of the Drugs Act. Furthermore, the list of samples certified by a magistrate is considered primary evidence as provided for under section 36(5) of the Drugs Act which stipulates:

*"Notwithstanding anything contained in the Evidence Act, or the Criminal Procedure Act, every **court trying an offence** under this Act, **shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn** under subsection (3) and certified by a magistrate court **as primary evidence** in respect of such offence."* [Emphasis is supplied).

Given the lack of alignment between the samples marked in the sampling inventory forms and those received at the GCLA as per Exhibit P1, I

am compelled to hold that it is doubtful whether the analysis was based on the substance in the sulphate bags seized from the accused persons were cannabis sativa. Consequently, the prosecution has not sufficiently proven that the substances in the 32 sulphate bags seized from the accused person were narcotic drugs, namely cannabis sativa.

That notwithstanding, the second issue is whether the narcotic drugs weighed 626.55 kilograms. I am alive to that fact that the weight indicated in the Government Chemist Report (Exhibit P1) is 626.45 kilograms. However, I have considered that the GCLA received samples and not the actual sulphate bags containing dry leaves suspected to be narcotic drugs. While PW1 affirmed that he witnessed PW3 weighing the narcotic drugs, it is crucial to recognize that the weight obtained during the sampling process was duly recorded in the inventory sampling.

Upon examining the weight recorded in the sampling inventory forms (Exhibit P5 collectively), it is apparent that the total gross weight is 632.245 kilograms, with a net weight of 629.045 kilograms. The said discrepancy between the weights recorded in Exhibit P5 and Exhibit P1 raises questions about the accuracy and consistency of the reported weights.

Furthermore, the disparity in the recorded weights of the narcotic drugs in various documents adds complexity to the assessment of the case. According to the samples notification form (Exhibit P7), the weight is documented as 629.5 kilograms, whereas the sample submission form (Exhibit P6) indicates a weight of 626.45 kilograms. On the hand, the inventory of seized exhibits for destruction (Exhibit P8) suggests a weight of "(649.50 kg) 625.33 kg", and the certificate of destruction (Exhibit P9) displays a gross weight of 629.05 kilograms and a net weight of 625.33 kilograms (after taking samples).

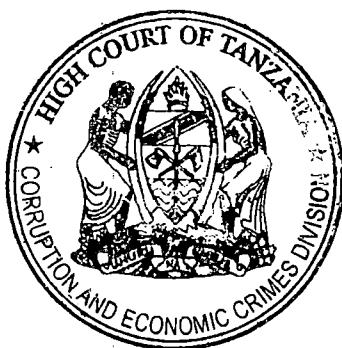
The inconsistent reporting of weights in these documents raises doubt on the accuracy and reliability of the recorded figures. It underscores the need for careful scrutiny and clarification to establish the true and accurate weight of the narcotic drugs involved in this case.

In light of the aforementioned discrepancies in the recorded weights of the narcotic drugs, the second issue is answered in the negative. In that regard, the prosecution has not proved beyond reasonable doubt that the narcotic drugs (cannabis sativa), subject to this case weighed 626.45 kilograms, as stated in the information.

As a result, I am inclined to the view that the prosecution has failed to prove the offence charged against the accused person. While the accused person may not have conclusively demonstrated that he was not present at the crime scene, a fundamental principle dictates that he cannot be convicted based on the weakness of his defense when the prosecution has not effectively proved its case.

In the event, I find the accused person not guilty and accordingly acquit him of the charge of trafficking in narcotic drugs. I further order that the three motorcycles (Exhibit P4) the ownership of which remains unknown, be confiscated by the Government for its use and ownership. As regards the 32 sulphate bags (Exhibit P3), they should be destroyed in appropriate manner and according to the law.

DATED at ARUSHA this 22nd day of December, 2023.




S.E. KISANYA
JUDGE
22/12/2023