

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

**ECONOMIC CASE NO. 08 OF 2018**

*(Originating from Economic Crime Case No. 62/2017 in the Resident Magistrate Court of  
Dar es Salaam at Kisutu)*

**THE REPUBLIC.....PROSECUTOR**

**VERSUS**

**STEPHEN GERALD SIPUKA.....ACCUSED**

Date of Last Order -11/03/2019

Date of Judgment - 31/05/2019

**JUDGMENT**

**L.L. MASHAKA, J**


The accused person one Stephen Gerald Sipuka is charged with two alternative counts. The first count is trafficking in narcotic drugs, contrary to section 15(1)(b) of the Drug Control and Enforcement Act, No.5 of 2015 read together with paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act (CAP 200 R.E 2002) (hereinafter referred to as EOCCA) as amended by the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016.

In the alternative; in the second count, the accused person is charged with the offence of unlawful possession of narcotic drugs, contrary to Section

15(1)(a) of the Drug Control and Enforcement Act, No.5 of 2015 read together with section 60(2) and paragraph 23 of the First Schedule to the EOCCA as amended by the Written Laws (Miscellaneous Amendments) Act, No 3 of 2016.

The particulars of the offence allege that on the 6<sup>th</sup> October, 2017 at Kitwana Manara street Buguruni, within Ilala District in Dar es Salaam Region, the accused was trafficking or found in unlawful possession of narcotic drug namely Heroin hydrochloride weighing 226.06 grams.

On the 20/06/2018 the amended information was read over again to the accused person; he denied the charge and a plea of not guilty was entered. The facts of the case were read over to the accused person and he admitted his name and that he was found with NMB and ACB Bank ATM cards and two mobile phones. He denied the rest of the facts read out to him by the prosecution.



The prosecution paraded 7 witnesses and seven exhibits. The witnesses are Elias Zacharia Mulima(PW1), A/Inspector Brown Mndeme (PW2), Optatus Kimunye(PW3), Mhando Abdallah Salim(PW4), Jackson Ligoha (PW5), SP. Neema Mwakagenda(PW6) and Glory Shida Henji (PW7). The exhibits tendered in evidence were one big envelope containing 14 small envelopes labelled 'A, B, C, D, E, F, G, H, I, J, K, L, M and N' which were collectively marked Exhibit P1, Government Chemist Analyst Report marked Exhibit P2, certificate of seizure marked Exhibit P3, two mobile phones make Samsung and Huawei, three Bank ATM cards and National Identity card of the accused collectively marked Exhibit P4 and lastly the sample submission

form dated 9/10/2017 marked Exhibit P5. During the defense case, the accused person was the only witness to testify.

In brief the facts which are not disputed are that on the 6<sup>th</sup> October 2017 the accused was at his residence at Kitwana Manara street Buguruni area in Ilala District, Dar es Salaam region. The officers of DCEA entered his house and introduced themselves to the accused person in the presence of the independent witness one Mhando Abdallah Salim (PW4) to witness the search. In the course of search the following items were found as listed in Exhibit P3 the certificate of seizure; that is the white powdery substance kept in a black nylon bag and immersed in another black plastic bag, eight (8) small packages wrapped in papers containing powder suspected to be narcotic drugs, three (3) of the packets were wrapped in a newspaper, National Identity card of the accused, NMB ATM card, Umoja ACB card, NMB Instant card, another one (1) packet in black paper containing powder suspected to be narcotic drug, one (1) packet in a white paper containing powder suspected to be narcotic drug found in the outside room and two mobile phones make Samsung and Huawei. That the accused together with the seized items were taken by PW2 to the DCEA office for further investigations. At the DCEA office, the packets suspected to contain narcotic drugs were handed to PW3 and later handed over to PW6 who packed into small envelopes, labelled with the marks 'A, B, C, D, E, F, G, H, I, J, K, L, M and N' and sealed in the presence of the accused person, independent witness one Jackson Ligoha (PW5) together with SP Neema (PW6) who signed on the seal. The exhibits were taken to the office of Government Chemist Laboratory Agency (hereinafter referred to as GCLA)

on 09/10/2017 for analysis. The results of the analysis revealed that one packet/envelope marked 'N' contained the substance narcotic drug namely Heroin hydrochloride weighing 226.06 grams.

It was contested that the packets/envelopes in the big envelope tendered by the prosecution side as Exhibit P1 collectively were not the packets which were seized from the house of the accused person and recorded in the certificate of seizure.

The court has drawn and undertakes to consider and determine the following issues:


1. Whether or not the items/packets retrieved from the house of the accused and listed in the certificate of seizure were the same tendered in court.
2. Whether or not the chain of custody was broken.
3. Whether the defence raised by the accused person raised reasonable doubt in the prosecution case.
4. Whether or not the accused person was trafficking or found in possession of Heroin hydrochloride as charged.



Regarding the first issue on whether the packets which were retrieved from the house of the accused person and listed in the certificate of seizure were the same. The prosecution side presented A/Insp. Brown Mndeme (PW2) the DCEA Officer who conducted the search and seized the packets, Mhando Abdallah Salum (PW4) an independent witness the Ten Cell leader (*Mwenyekiti wa Mtaa*). The officers A/Insp. Emmanuel, Titoulas, Zuwena

and Selemani were said to be present at the accused's house but they were not called to testify before the court.

PW2 A/Insp. Brown Mndeme being an Investigation Officer and the leader of the team of DCEA officers who went to the house of the accused person for search and arrest testified to the effect that, on 06/10/2017 at midnight he was called by his boss in the office and informed that, he received information from his informants on a person who is trafficking narcotic drugs and directed them to go to Buguruni Malapa. PW2 together with other officers of the DCEA went to the house of the accused person who opened the door for them, PW2 introduced himself to the accused and asked A/Inspector Emmanuel and Selemani to get an independent witness the Ten Cell leader of that area/street. They left and came back with PW4 Mhando Abdallah Salum the Ten Cell leader who found them with the accused. PW2 introduced himself and the officers to PW4 and informed him the purpose of their visit that they received information the owner of the house they intend to search is involved in trafficking narcotic drugs. That PW4 Ten Cell Leader identified the accused as the owner and resident of his area and street. Earlier the suspect/accused introduced himself as Stephen Gerald Sipuka to the DCEA officers.



That before commencement of search, the DCEA officers removed everything they had in their pockets and handed over to the officers who did not enter the house. PW2, Zuweni and Titoulas entered the house to conduct search and found nothing in the sitting room. That in the bedroom they found eight (8) folded packets/pieces of paper cream in color contained inside white powder substance and other three (3) pieces of folded

newspaper contained white powder substances suspected to be narcotic drugs. In total there were 11 packets, and it was his testimony that among the 11 packets one had barks of trees (*magome ya miti*) and another one had dried leaves. It was his testimony that they also found a black nylon packet and inside there was another black nylon bag contained a white powder substance. They also found two (2) mobile smartphones make Samsung and Huawei, three (3) ATM cards from ACB (1) and NMB (2) and a National Identity card of the accused person. The accused showed him his other room, led them and they entered the room, searched and found and seized another packet, which was a paper folded contained a white powder substance. PW2 prepared a certificate of seizure and listed all the items seized from the house of the accused person.

During cross-examination PW2 admitted that the dried leaves packet packed in envelope marked 'C' and barks of trees (*magome ya miti*) packet packed in envelope marked 'D' were not listed in the certificate of seizure Exhibit P3 because he had forgotten to list in detail the items found, but they were among the substances which were taken to the GCLA for analysis. PW2 confirmed that item no. 1 listed in Exhibit P3 the certificate of seizure was recorded as one black plastic bag contained another black plastic bag which contained a white powder substance is the one which was marked 'N' by SP. Neema the custodian of exhibits.



According to PW2 he handed over all the seized items to PW3 Optatus Kimunye at the DCEA office as instructed by his boss SSP Salmin Shelimoh. PW2 did not label and seal each item seized as listed in certificate of seizure Exhibit P3 in front of the accused and PW4 the independent witness at the

crime scene. PW2 recorded the statement of PW4 at the crime scene. PW2 stated that there was a handover writing in a counter book on the handing over of the seized items to PW3 Optatus but failed to produce and tender in court.

Further during cross examination PW2 admitted that the powder in envelope marked 'N' in Exhibit P1 was 'khaki' in color and there were 4 packets/pieces of newspaper material containing white powder instead of 3 packets as listed on Exhibit P3 the certificate of seizure. PW2 insisted that he properly recorded the certificate of seizure - Exhibit P3. PW2 admitted to have wrongly recorded item no. 8 on Exhibit P3 to be black paper instead of black plastic bag.



PW4 Mhando Abdallah Salum, the Ten Cell leader an independent witness testified that he together with the accused person, the accused's wife and 4 DCEA officers entered the house of the accused person for search. PW4 witnessed the search and seizure process conducted by DCEA Officers at the accused person's house, the officers started in the bedroom and at the corner of the said room found a black nylon bag inside was another black nylon plastic bag containing a powder substance. That other packets containing powder substances were found in the wardrobe. That they entered another room and found one packet and the ATM cards were also found there. PW4 stated that other items seized were two mobile smartphones but he did not know where they were found; also, he admitted to have signed the certificate of seizure Exhibit P3. PW4 was given Exhibit P1 for identification and he managed to identify envelope marked 'N' which was two black nylon bags, one of them containing a powder substance as


the one which was found in the bedroom and the nylon bags were worn out and old, not new as he saw them on the material day. On the color of the powder substance in envelope marked 'N', PW4 stated that the said substance in court is not clear white, while the color of the powder seized on the material day was white in color. That what he witnessed were powder substances contained in the packets but there were no pieces of dried leaves and barks of trees (*magome ya miti*). PW4 further emphasized that there were 3 items/packets folded in newspapers which he witnessed to have been seized as listed in Exhibit P3 but in court Exhibit P1 shows that there are 4 items/packets folded in newspaper and he did not know why they were four (4) instead of three (3) packets.

Apart from the testimonies of PW2 and PW4 for the purpose of establishing the link of the items seized and those tendered in court the prosecution called PW3 Optatus Kimunye, the officer PW2 handed over the seized items/exhibits found at the accused's house, PW6 SP. Neema Andrew Mwakagenda the Exhibit Keeper at the DCEA Office and PW1 Elias Zakaria Mulima, the Government Chemist from GCLA.

PW3 Optatus Kimunye admitted that on the material date at 6.00 morning hours PW2 handed over the seized items/exhibits to him. That he waited for the Exhibit Keeper PW6 who arrived at the office at 11.00 hours and handed the seized items to PW6 who received and registered them in an exhibit register. According to PW3 the seized items/exhibits which were handed over to him some had powder substances which were white in color, some had dried leaves folded in newspapers. And that they were the same items he handed over to the Exhibit Keeper PW6 who labelled and marked 'A, B, C,

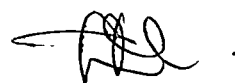


D, E, F, G, H, I, J, K, L, M and N' which in total were fourteen (14) packets. He stated that the items/exhibits which were handed over to him were taken by him and sent to the GCLA office for analysis. Furthermore, he witnessed when PW6 was packing, labelling and sealing the exhibits together with PW5 Jackson Ligoha the independent witness and the accused at the DCEA office during the packing and labelling exercise. PW3 mentioned exhibits he received from PW2 to be **3** ATM cards, National Identity card, **2** (two) mobile smartphones and **14** pieces/packets of folded papers some contained white powder substances and some had dried leaves.

During cross examination on discrepancies on the number of packets which, were handed over to him as recorded in his statement PW3 stated he received 8 small packets, he admitted it was a typing error and denied to have planted any exhibits. PW3 failed to provide any proof of receiving the items seized by PW2 and handed over to him though he stated that there was proof in the office. Likewise, he did not show any evidence to prove the handing over of the seized items to PW6 the Exhibit Keeper. 

PW6 SP. Neema Andrew Mwakagenda, custodian and keeper of exhibits at the office of the DCEA, confirmed the receipt from PW3 a total of 14 packets suspected to be narcotic drugs. She registered in the exhibit register as DCEA/IR/17/2017. She labelled them with marks 'A, B, C, D, E, F, G, H, I, J, K, L, M and N' and that envelope marked 'C' had dried leaves and the one marked 'D' had barks of trees, packed in small envelopes and sealed them in one big envelope. The exhibit register was not tendered in court.

In order to resolve this issue, I have considered the evidence of DW1 the accused who testified that they found his traditional medicines for his own use in different packages. That there were nine (9) plain paper packets and one (1) was found in one of his rooms in the outside/backyard building, three (3) packets of newspaper material were found in his bedroom, one (1) black nylon bag was found in his bedroom containing a white powder traditional medicine for his own use, 3 ATM bank cards; one from AKIBA, 2 cards from NMB and own National Identity card. DW1 confirmed that the items which were properly listed in Exhibit P3 certificate of seizure were the same items which were found and seized from his house. The accused was given Exhibit P1 and took out the envelopes marked 'A', 'C', 'D' & 'J'. He found that they were in newspaper packaging similar to those listed in Exhibit P3 which, showed that the items seized from his house were 3 items/packets in newspaper packaging material and stated that inside envelope 'A' contained nothing, envelope 'C' contained dried leaves and envelope 'D' contained 'miti'. That according to Exhibit P1, there were 4 newspaper packaging packets/items which were brought and tendered in court. The accused stated that these were not seized from his house. That the officers only seized 3 newspaper packaging packets/items from his house. That he had opened Exhibit P1, envelope marked 'L' is a piece of black nylon packaging containing dried leaves. That this item/packet with such packaging containing dried leaves was not listed in Exhibit P3. That in envelope marked 'D' is a newspaper packaging containing pieces of 'miti' but on Exhibit P3 it was not listed. That these packages in envelopes marked 'L' and 'D', were



not seized from his house and were not listed on the certificate of seizure Exhibit P3.

That regarding envelope 'N' which was listed in Exhibit P3 as item no. 1 were two nylon black plastic bags with white powder substance, the accused contested that the said item no.1 which was seized from his house was his traditional medicine and it was white in color but the one which he was shown in court is different, it was 'khaki' in color hence not the item seized from his house.

Upon going through and considering the testimonies of the prosecution witnesses and of the defence, I find that, indeed there are discrepancies and inconsistencies on the testimonies of the prosecution witnesses on the exact number of items/exhibits seized from the accused's house, the items/exhibits listed on the certificate of seizure Exhibit P3 is inconsistent to what was tendered in court, even what was handed over to the Exhibit Keeper PW6 and to the Government Chemist PW1 for analysis. There is no documentary evidence on handing over of the seized items from PW2 to PW3 and from PW3 to PW6 tendered in court.



I have gone through the final submission by the accused and one of the issues which they contest is that the packets which were sealed for analysis were not the same packets/items which were seized from accused's house. The essence of tracing and recording the chain of custody is to establish whether the packets/exhibits tendered in court were the same items seized at the accused's house is in fact related to the allege crime. For that reason, before I hold on this issue, I think it is desirable to determine it together with

the second issue on whether the chain of custody was never broken to prove the offences. In the landmark case of **Paulo Maduka and 4 Others vs The Republic**, Criminal Appeal No. 110 of 2007, CAT at Dodoma, the Court of Appeal stated that *'the chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it'*.

As a matter of principle, it is well settled that as far as the issue of chain of custody is concerned, it is crucial to follow carefully the handling of what was seized from the accused person is the same which was tested by the Government Chemist and still is the same which was tendered in court. There are a several authorities providing guidance on the issue of chain of custody including the famous case of **Paulo Maduka and 4 Others vs The Republic (Supra)** which emphasized on the proper documentation of the paper trail from the time of seizure, every handling, custody or transfer must be documented to its production in court as evidence to avoid doubts and possibility of being tampered with. However, in the recent decision of the Court of Appeal in the case of **Chacha Jeremiah Murimi and 3 Others Vs Republic**, Criminal Appeal No. 551 of 2015, CAT at Mwanza (unreported), the Court held that;



*"There should be assurance that the exhibit seized from the suspect is the same which has been analyzed by the Chief Government Chemist. The movement of the exhibit from one person to another should be handled with great care to eliminate any possibility that there may have been tampering of that exhibit. The chances of tampering in the Government laboratory*

*analysis should also be eliminated. Generally, there should be no vital missing link in handling the exhibit from the time it was seized in the hands of the suspect to the time of chemical analysis, until finally received as evidence in court after being satisfied that there was no meddling or tampering done in the whole process."*

From the prosecution evidence, it is undisputed that the items/exhibits seized by PW2 from the accused's house on the material date were not labelled or marked when they were retrieved from the accused's house. PW2 A/Inspector Brown Mndeme searched, seized and prepared the certificate of seizure which was tendered and admitted in court as Exhibit P3. The accused in his defence and final submission admitted that the items listed in the certificate of seizure Exhibit P3 were the same items retrieved from his house.



To ascertain that the items seized and listed in Exhibit P3 were the same items analyzed by the GCLA and tendered in court and admitted as Exhibit P1, I find there are obvious discrepancies between what was seized from the accused and what was sealed by PW6 and later analyzed by the GCLA office and tendered in court by Elias Mulima PW1, the Government Chemist.

According to PW2 during search in the bedroom of the accused he found eight (8) packets all containing white powder substance folded in white papers and another three (3) packets containing a white powder substance folded in newspapers as reflected in Exhibit P3, in total were 11 packets. Inconsistency and doubts were raised when PW2 testified that among those 11 packets containing white powder substances there were two packets one

containing pieces of bark trees (*magome ya miti*) and another had dried leaves which were not listed in Exhibit P3.

I took time to peruse the list of items seized in Exhibit P3 in total there were 14 items/packets which all contained a white powder substance suspected to be narcotic drugs including those which were in two black nylon bags both contained white powder substance suspected to be narcotic drug, apart from the ATM cards, national identity card and the two smartphones. Here comes a question, where did the packets of paper containing dried leaves and another with barks of trees come from?



I have gathered from the testimony of PW4 the independent witness who witnessed the search and items seized, when he was shown Exhibit P1 for identification purposes he pointed that envelopes marked A, C, D and J were folded newspaper while Exhibit P3 certificate of seizure reveals that the items folded in a newspaper were 3 items. He further testified that there were neither barks of trees nor dried leaves seized on that material day. This was also supported by the accused's testimony who contested that the dried leaves and barks of trees were not found and seized from his house.

It is a settled principle that, where the court finds that there are inconsistencies and discrepancies in the testimonies of prosecution witnesses, it has to resolve it first by considering whether it goes to the root of the matter or they are minor contradictions which do not touch or affect the substance of the matter. In the circumstances of this case they go to the root of the matter, to prove and establish the chain of custody. For that reason, I am persuaded with the final submission of Learned Counsel

Ogunde for accused that the burden of proof in criminal matters lies to the prosecution to prove beyond a reasonable doubt, see the case cited of **Mohamed Said Mtula Vs Republic (1995) TLR 5**. The fact that the items listed in Exhibit P3 seized from the accused's house contradicts what was tendered in court as Exhibit P1 by the Government Analyst PW1, raises doubts if the exhibits were properly handled or they got mixed up with other items or other exhibits not connected to this case.

The fact that the exhibits when they were seized were not marked by PW2 A/Insp. Brown, therefore the way they were handled is questionable. PW2 testified that they were packed in one envelope but the accused person denied the same. There is no proof of handing over of the seized items from PW2 to PW3 and from PW3 to PW6. As emphasized in the case of **Paulo Maduka and 4 Others vs Republic (Supra)**, if the seized exhibits were marked and sealed immediately after seizure, could have removed all the doubts.

PW3 Optatus Kimunye, was the one who received the seized items retrieved from the accused's house by PW2 A/Insp Brown. According to PW3, PW2 handed over 14 packets some folded newspapers and papers containing white powder substances, some had dried leaves. Therefore, from the above evidence one may find that there is breakage of link between what was seized and listed in Exhibit P3 and what was handed over to PW3 and later tendered in court by PW1 and admitted as Exhibit P1. Therefore, it was the duty of the prosecution to fill the gaps. There is no doubt that the items/exhibits PW3 handed over to PW6 SP. Neema, she is the one who marked and sealed them for the first time in the presence of PW5

independent witness who was not present at the accused's house and the accused at the DCEA office and by the time the exhibits reached the GCLA to be analyzed by PW1 its chain of custody had been broken down whilst in the DCEA hands. From the foregoing reasons I have no other option but to hold that the chain of custody was broken as there was a missing link between what was seized and what was analyzed and tendered in court as underscored in the case of **Chacha Jeremiah Murimi and 3 Others Vs Republic (Supra)**.



Coming to the third issue, on whether the defense raised by the accused person raised doubt to the prosecution case. According to his testimony DW1 admitted the fact that on material date and time the DCEA officers searched his house but they found and seized his traditional medicines. He also admitted that the items listed in Exhibit P3 were the same items seized from his house. When shown Exhibit P1 for identification, it was his testimony that the substance in item no. 1 on Exhibit P3 was white in color while the substance in envelope 'N' Exhibit P1 was contended to be the same, was 'khaki' in color. Regarding the issue of color, I have considered the prosecution's final submission that according to PW6 SP. Neema the substances tend to change color unfortunately PW1 the Government Chemist and expert never addressed this issue. DW1 claimed that the items seized from his house were never labelled and sealed in an envelope as claimed. Therefore, in totality DW1 denied that the items listed in Exhibit P3 to be the same as those in Exhibit P1 and marked as envelopes 'A, B, C, D, E, F, G, H, I, J, K, L, M and N'. DW1 further contested that the barks of trees (*magome*



*ya miti*) and dried leaves were not retrieved from his house and concluded that it was cooked up evidence.

Due to the doubt created by the broken chain of custody, I hold the doubt in favor of the accused. I find the prosecution have failed to prove the charges of trafficking in narcotic drugs or unlawful possession of narcotic drugs against the accused person beyond a reasonable doubt. The court remains with nothing that can hold conviction against the accused person. The accused STEPHEN GERALD SIPUKA is hereby acquitted from the charges against him. Consequently, the accused be released from prison custody forthwith unless otherwise lawfully held.



  
**L.L. MASHAKA**

**JUDGE**

**31/05/2019**