

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**CORRUPTION AND ECONOMIC CRIMES DIVISION**

**AT DAR ES SALAAM**

**ECONOMIC CASE NO. 11 OF 2018**

(Originating from the Economic Crime Case No. 04 of 2018 of the  
Resident Magistrate's Court of Kinondoni at Dar es Salaam)

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

**VERSUS**

**AKIDA ABDALLAH BANDA ..... ACCUSED**

**JUDGMENT**

Date of Last Order: 21/10/2019  
Date of Judgment: 19/12/2019

**MASHAKA, J.**

The charges advanced by the prosecution against the accused person Akida Abdallah Banda in the first count with 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] as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. In the second count is charged with Trafficking in Narcotic Drugs contrary to section 15(1)(b) of Act No. 5 of 2015 read together with paragraph 23 of First Schedule to the EOCCA, Cap 200 R.E 2002 as amended by Act No. 3 of 2016.

The particulars of the offences in the **first and second count according** to the amended information are that on the 7<sup>th</sup> November 2016 at House No.717 Itaga Street near Ben Pub Kinondoni B area within Kinondoni District in Dar es Salaam region trafficked in narcotic drugs namely cannabis sativa commonly known as 'bhangi' weighing 58.49 kilograms and khat (Catha Edulis) commonly known as 'mirungi' weighing 26.51 grams.

Before the court, Mr. Yamiko Mlekano, Senior State Attorney, Ms. Veronica Matikila, Senior State Attorney, Ms. Narindwa Sekimanga, State Attorney, Ms. Florentine Sumawe, State Attorney, Ms. Batilda Mushi, State Attorney represented the Republic and Mr. Ambrose M. Nkwera, Advocate represented the accused. I extend my appreciation for the commitment, hard work in representing the interests of your clients, dedication and cooperation for the pursuit of justice in this case and timely filing of final submissions.

On the 26<sup>th</sup> October 2018 the accused person entered his plea on the first and second counts. In his plea, the accused person denied both the two counts and the court entered a plea of not guilty to both counts. On the same day, the court conducted preliminary hearing. Facts of the case were read over to the accused person and the accused admitted his name, his arrest and arraignment before the subordinate court. On the 09/08/2019 the Republic sought for the leave of this Court to amend the information by adding the words "House No.717 Itaga Street near Ben Pub Kinondoni B area..." immediately after the date in the first count. The amendment to second count was to add the words "Catha Edulis" to the particulars

of offence after the word khat. The defence side had no objection and prayer was granted by the court. The Republic substituted the information and it was read over to the accused person and asked to plead thereto.

The brief facts of the case are that the accused Akida Abdallah Banda stands charged with trafficking in narcotic drugs namely cannabis sativa and Catha Edulis commonly known as 'bhangi' and 'khat' respectively. It is alleged that the 07/11/2016 at 8.00pm at BEN PUB in Kinondoni area, Kinondoni District, Dar es Salaam region, when the accused saw David Modestus, he left the Ben Pub, got into a motor vehicle make TOYOTA HARRIER LEXUS with registration no. T494 BPX and drove away to avoid DAVID MODESTUS. In the course of escaping and driving away from David Modestus, the accused knocked down the fence of the house of one WILBERT KITIMA and DAVID MODESTUS was able to catch him and immediately informed the Police. The Police arrived at the crime scene and conducted a search in the motor vehicle, which was being driven by the accused person.

A search was conducted by the Police in the motor vehicle in the presence of an independent witness together with the accused person. After the search, the Police seized several items, to wit 3 bags which were suspected to contain "bhangi", a bunch of "mirungi", motor vehicle registration card for motor vehicle T494 BPX, one match box, four pieces of chewing gum make PK, driver's license, ignition key, five keys of padlocks, several clothes, one pair of "malapa", catapult 'manati' and a 'panga' and listed in the certificate

of seizure. The accused person and the seized items were taken to the Oyster Bay Police Station for further investigations. Later the 3 bags of suspected 'bhangi' and bunch of 'mirungi' were taken for scientific testing and analysis. It was found that the three bags contained narcotic drugs cannabis sativa commonly known as 'bhangi' weighed 58.49 kilograms and the bunch of Catha Edulis 'khat' commonly known as 'mirungi' weighed 26.51 grams.

The prosecution paraded six (6) witnesses to prove their case. The witnesses were PW1 Elias Zakaria Mulima, PW2 E4150 CPL Innocent, PW3 SSP. Iddi Kiyogomo, PW4 Wilbert Kitima, PW5 E3857 D/CPL Deusdedit and PW6 Asha Omari Mkumbi. A total of five (5) exhibits were tendered and admitted namely, the GCLA laboratory report Form No. DCEA 009 dated 19/06/2018 Exhibit P1, 3 bags and one envelope Exhibit P2 (a)(b)(c) and (d) collectively, the certificate of seizure dated 07/11/2016 Exhibit P3, the motor vehicle T494 BPX Toyota Harrier Lexus, black in color Exhibit P4 and the Form No. DCEA 001 dated 15/11/2016 Exhibit P5.

In his testimony, PW1 Elias Mulima, testified that on the 15/11/2016 he was in his office at the Government Chemist Laboratory Authority (hereinafter referred as GCLA) doing his duties. He received exhibits which were 3 bags/sacks which contained leaves suspected to be 'bhangi' and one envelope contained leaves which were suspected to be khat "mirungi" from a Police Officer called Deusdedit for laboratory analysis. He registered the exhibits and gave a Laboratory number 1971/2016. After registration he took the exhibits and the Form No. 001, which submitted the exhibits to the

laboratory for tests of the exhibits and analysis as requested. After being satisfied with the information and the exhibits brought are correct, PW1 signed the Form No. DCEA 001 and placed the GCLA official stamp. PW 1 testified that, he removed the leaves from the bags and weighed them and got a total of 58.49kgs. Also, he weighed the bunch of leaves in the envelope, weighed 26.51gms. He took sample from each of the 3 sacks/bags for preliminary analysis and the results showed that the leaves were cannabis sativa commonly known as 'bhanghi'. The preliminary analysis of the sample taken from the envelope showed it was khat (*Catha edulis*) commonly known as 'mirungi'.

PW1 returned the 'bhanghi' leaves into the 3 sacks repacked and sealed the sacks with a cello tape with the GCLA logo. PW1 signed on each of the three sacks, wrote the laboratory number 1971/2016 on each sack, marked each of them "A" and marked 'B' on the envelope. PW1 also returned the leaves into its envelope, repacked and sealed it with a cello tape brown in colour, signed on the envelope and handed the exhibits over to the police officer Deusdedit for custody and storage of the exhibits. The evidence of PW1 shows he conducted the confirmatory tests on the 19/06/2018 and prepared the report on the same day by filling the Form no. DCEA 009 dated 19/06/2018 tendered by PW1 before this court and admitted the same as Exhibit P1. That it took him a long time to conduct the tests because there were lots of samples exhibits and the laboratory equipment required service. The testimony of PW1 supported by the exhibits 3 sacks and one envelope were tendered by him and admitted as Exhibit P2 A, B, C and D respectively.

In his testimony, PW2 E4150 CPL Innocent stated that he is an exhibit keeper since 2002 up till the date he was testifying in court, responsible to receive exhibits, issue reference number and keep under safe custody. That on the 07/11/2016 he received phone call from SP. Iddi Kiyogomo (as he was then) to go to his office, after his arrival at the said office, SP. Kiyogomo handed over to him 3 sacks with leaves suspected to be 'bhangi' that two of the sacks were covered with a foil paper on top of the sacks and one sack covered with leaves "majani" and an envelope containing leaves suspected to be "mirungi". He took the said exhibits, registered them by the case no. OB/IR/10924/2016 and placed the number on respective exhibits together with serial No. 58 and kept the exhibits under his custody. That on the 15/11/2016 PW2 handed over the exhibits to D/CPL Deusdedit in the absence of the accused person to take to the Government Chemist. On the same day around 3.00pm D/CPL Deusdedit returned back with the exhibits, which had been signed and sealed by the GCLA cello tape. PW 2 received the exhibits and kept them under custody using the same IR No.OB/IR/10924/2016. PW 2 identified all marks on exhibits as he mentioned in his testimony.

During cross examination by Learned Counsel for accused person, PW 2 stated that he received the exhibits in the morning from the reception after being instructed by SP. Iddi Kiyogomo. PW2 stated that due to lack of office equipment and stationaries in his office, he did not use Police Form No. 145 to label the exhibits.

The testimony of PW3 SSP. Iddi Kiyogomo stated that on the 07/11/2016 at around 9.00pm he arrived at Kinondoni area near Ben Pub. According to the information he received from the controller of Police Radio that a motor vehicle make Harrier with registration no. T494 BPX color black had knocked a wall of a house. That one Mr. Kitima PW4 introduced himself as owner of the house and introduced another guy as the driver of the said car was placed under arrest by 2 other men named Adam Bush and David Modestus. The driver of the said motor vehicle introduced himself to SSP. Kiyogomo as Akida Abdallah Banda, the accused person. PW3 instructed one of the police officers to go and call the “mjumbe” of the area one Asha Omari Mkumbi PW6, who came to the scene of accident. PW6 being the independent witness to witness the search of the motor vehicle, which was involved in the accident. PW3 conducted the search of the motor vehicle in the presence of PW6 Asha Omari Mkumbi the independent witness, the house owner Mr. Kitima PW4, Akida Abdallah Banda the accused person, Mr. Adam Bush and Mr. David Modestus. As PW3 conducted the search, in between the driver and passenger seats, he found one bundle of khat, which he suspected to be a narcotic drug. Then he continued with the search of the whole motor vehicle. In the boot of the motor vehicle he found 3 (three) sacks/’gunias’ tied by sisal rope, 2 (two) of them had been covered inside by a silver nylon on top and one covered by grass. He took them out of the motor vehicle, cut the sisal ropes of the sacks to see what was inside the 3 (three) sacks and he found the 3 sacks containing leaves which he suspected to be a narcotic drug.

One of the sacks was bigger than the other 2 (two). PW 3 further stated that, he closed the 3 sacks with the sisal ropes and placed the bundle of khat in a khaki envelope. PW3 seized the 3 (three) sacks and the bundle of khat, the motor vehicle registration no. T494 BPX make Toyota Harrier, black color, a big knife 'sime', clothes, match box, driving license with the names Abdallah Banda and filled a certificate of seizure listing all seized items. The certificate of seizure was tendered and admitted as Exhibit P3.

That PW6 Asha Omari Mkumbi placed her signature on the certificate of seizure Exhibit P3 together with Akida Abdallah Banda the accused. After completion of signing the said certificate PW3 took the accused and the exhibits back to the Oyster Bay Police station where he reported to the RCO, recorded his statement on trafficking narcotic drugs and the case number is OB/IR/10924/2016. He called up the Exhibit keeper, while the accused person had been received by the Charge Room (CRO) and placed in lock-up. The exhibits 3 sacks suspected to contain "bhangi" and one bundle of khat 'mirungi', all suspected to be narcotic drugs were under his custody. PW3 identified the Exhibit P2 A, B, C and D before the court to be the same as the items seized at the scene of accident. That at 10.00 pm at night when CPL Innocent came to his office, PW3 handed over the 3 sacks suspected to be of "bhangi" and one bundle suspected to be khat "mirungi" to CPL. Innocent using the case no. OB/IR/10924/2016. That the motor vehicle T494 BPX Toyota Harrier Lexus, black in color, which he tendered and admitted as Exhibit P4 remained under his custody. When cross examined by Learned Counsel Nkwera for the accused person, PW3 stated that the



motor vehicle Exhibit P4 was not under the custody of the Exhibit Keeper PW2. Further PW3 explained that the driving license he seized did not have the name of the accused and even the motor vehicle registration card did not have the name of the accused but the driver of the motor vehicle was the accused Akida Abdallah Banda. PW3 admitted that he did not see the accused person driving the said motor vehicle Exhibit P4.

Mr. Wilbert Kitima PW4 testified that, on the 07/11/2016 he was at his home, he heard a big thud outside his house on his fence and went outside. He saw a motor vehicle had knocked down his wall which had fallen down. The said motor vehicle was black in colour make Harrier with registration no. T494 BPX was on the wall, which had fallen down. PW 4 identified Exhibit P4 by its color and registration number. That two unidentified men opened the motor vehicle to take out the driver who was still in the motor vehicle. After taking out the driver from the motor vehicle PW4 decided to call the Police while the two men assisted to place the accused under arrest. That when the Police arrived and he introduced himself to be the owner of the house and told them what happened. The Police requested for the 'mjumbe' PW6 to be present'. The 'mjumbe' came and PW3 led the search of the motor vehicle where the accident took place, in the presence of the two men, PW6, PW4, the accused person as identified in the dock by PW4 and other people.

PW4 testified that he witnessed 3 'virobas' were removed from the motor vehicle by PW3 who opened the ropes and PW4 saw the leaves suspected to be 'bhangi'. PW 4 identified the Exhibit P2 A, B,

C. He also saw some leaves, which were in a bundle near the driver seat, which PW3 stored in a khaki envelope; it was identified by PW4 as Exhibit P2D before this court. After the search, the items were listed down and the police left with the items. PW4 stated there was enough light of tube lights from neighboring houses, which assisted in the search. While under cross examination by Learned Counsel, PW 4 said that he knows that the accused person is a driver but he had never seen the accused drive a motor vehicle.

PW5 E3857 D/CPL Deusdedit, testified that on the 08/11/2016 at 11.55 am in the morning at the Oyster bay Police station working he was called by PW3 SP. Kiyogomo (as he then was) and instructed him to go to the lock up and get a suspect called Akida Abdallah Banda who was arrested on the night of 07/11/2016 that he had committed two offences. One offence involves a traffic issue and the other offence is being suspected to be found with narcotic drugs, namely 'bhangi' and 'mirungi'. PW5 took Akida Abdallah Banda to the office used by investigators to interrogate suspects and record statements of witnesses. PW5 informed Akida Abdallah Banda the allegations against him, that he was found with suspected leaves to be "bhangi" and "mirungi". PW5 informed him his rights and after that he commenced to interrogate and record his statement, the accused person signed his statement and was returned back to the lock up.

PW5 further testified that PW3 handed over the motor vehicle with registration number T494 BPX make Harrier black colour to him for proper custody. PW5 was informed that the motor vehicle was

used to carry the suspected narcotic drugs and it was seized in this case. On the motor vehicle was written the case file number; one was a traffic case and the other on being found with narcotic drugs which was OB/IR/10924/2016. On the 15/11/2016 at 9.30 am, the Exhibit Keeper who is CPL Innocent handed over to PW5 the exhibits which were 3 bags containing leaves, which were suspected to be 'bhangi' and the envelope that had inside khat 'mirungi'. After receiving the exhibits PW5 prepared a letter to submit the said exhibits to the Government Chemist and he filled a form DCEA No.001 and he had labelled the 3 bags with the marks 'A' and the envelope with "mirungi", was marked 'B', then he sealed with a red paper like a cello tape, which he used on the envelope marked 'B'. When he received the exhibits, one of the bags was big, there was a sisal rope tied around the said bag, inside the bag there was a silver bag which contained the leaves and placed in the sulphate bag, it was greyish in color. The other two bags were small, one had a silver cover and tied by sisal rope and the second bag had some grass covering the top and it was tied by a bark of a tree. Inside both the bags had leaves, which were suspected to be narcotic drug. PW5 took the exhibits to the Government Chemist, handed over the letter and the form which he had earlier filled DCEA No.001 to the reception; they inspected it and they filled a form to take the exhibits to the laboratory. At all this time, the exhibits were under his custody. He went to the Laboratory and found a Government Chemist PW1, who received and inspected the exhibits 3 sacks and one envelope, the form which was filled by the receptionist and the form DCEA No.001 together with the letter from Oyster bay Police Station.

PW1 the Government Chemist received, signed the form DCEA No.001 and placed the GCLA official stamp. After weighing the 3'gunias' PW1 got the weight 58.49 kilograms of the leaves suspected to be 'bhangi' and the bunch of leaves suspected to be khat "mirungi" weighed 26.51 grams. After completing the weighing exercise, PW1 conducted tests and issued a report Exhibit P1.

That PW1 proceeded to repack and seal the exhibits, he placed the seal of the GCLA and his signature on each of the 3 bags/'gunias' and also on the envelope. PW1 sealed the exhibits with a cello tape, which had the GCLA logo, then he handed over the exhibits back to PW5 who returned back to the Oyster bay Police Station and handed them over to PW2 CPL. Innocent the Exhibit keeper. The testimony of PW5 is supported by form number DCEA 001 dated 15/11/2016 which was admitted in evidence and marked Exhibit P5. PW5 identified the Exhibit P2 A, B, C and D (3 "gunias" containing 'bhangi' and khaki envelope containing khat "mirungi") and Exhibit P4 the motor vehicle registration number T494 BPX. While under cross examination by Learned Counsel for the accused, PW5 stated that he was not the custodian of the motor vehicle Exhibit P4.

The independent witness PW6 Asha Omari Mkumbi testified that she is the 'mjumbe' since 1978 of Itaga Street. That on the 07/11/2016, while at her house she was informed that she was required at Mzee Kitima's place, there is occurrence of an act. PW6 went to the place of occurrence where she was informed that a motor vehicle had knocked down the wall of Mzee Kitima and the driver had been placed under arrest. PW3 informed her that she has to witness

the search of the motor vehicle. That the police officers tried to open the doors of the motor vehicle, they were locked. The police officers decided to break the small window on the back-side seat and were able to place their hand inside and unlocked the door on the left side behind passenger seat.

The police officers searched the motor vehicle, they found 3 (three) sacks or 'virobas' in the boot of the motor vehicle, PW3 took out some leaves and PW6 saw the leaves. That PW3 continued to search the front seats and found on the side of the driver's seat, a bundle of leaves which had not been tied, it was kept in a 'mfuko'. That PW3 police officer stated that the leaves found were 'mirungi.'

PW6 further testified that, after the police officers removed the items, the 3(three) 'virobas', 'mirungi', "mkeka wa kuswalia", some clothes and other small items they returned the items back into the motor vehicle where they were initially found. She recorded and signed her statement. That she was told to sign on a document together with the suspect after the said document has been read to her by the police officer. She also told the court that a torch was used to provide light for her to sign the document. Also, there were lights in the area coming from the neighboring houses therefore there was moderate light at the scene of accident. PW 6 identified the accused person in the dock as the person placed under arrest at the place of accident, also identified Exhibit P2 A, B, C, and D to be the 3 sacks and 'mirungi' found in the motor vehicle driven by the accused person, Exhibit P3 as the document she signed after the seized items were listed and read over to her and the Exhibit P4 the motor vehicle

she saw on the day of accident. When cross examined by the Learned Counsel for the accused, she stated that, the 3(three) “virobas” are still the same here in the Court, as she first saw them at the scene. That at the scene she found the accused seated outside the motor vehicle just near the said motor vehicle. That she only witnessed the search and left. She did not know at that time who was the owner of the motor vehicle.

After close of the prosecution case, the court found on the basis of the evidence adduced by the prosecution, a prima facie case was established against the accused and the accused person has a case to answer. The accused was called upon to defend himself.

The defence case is based on the testimony of one defence witness, the accused person. DW1 Akida Abdallah Banda stated that on 7/11/2016 at around 2.00pm or 3.00pm while at his business place at the Mwananyamala market he received a phone call from one Adam Bush who wanted to see the accused person about his rice business, they agreed to meet at Ben Pub in Kinondoni at 6.30pm. That when they met Adam Bush was accompanied by one David Modestus who was known to the accused person DW1. That they meet and there was no discussion about rice business, instead the two men started a quarrel with the accused person. It was alleged that David Modestus suspected the accused person had an affair with his wife one Stella John. The accused person alleged that they took him and placed him into their motor vehicle where there was a driver who drove off after the accused was placed in the said motor vehicle. That in the course of attempting to save himself he jumped

on to the steering wheel which caused the car to knock down the wall, thereafter the two guys Adam Bush and David Modestus took him out and placed him into the other motor vehicle which was after them. DW1 further stated that the two guys took him to the scene of accident where they found police officers and a lot of people. That the police wanted him to sign the paper and he refused to sign the same but he signed a plain paper at the Oyster bay Police Station.

Having gone through the evidence adduced by the prosecution and the defence, the issues for determination are as follows: -

1. Whether the leaves contained in the 3 sacks Exhibit P2 A, B, C and D and leaves contained in the khaki envelope are narcotic drugs.
2. Whether the search was conducted in the presence of the independent witness and the accused person.
3. Whether the chain of custody was according to the standard required or broken.
4. Whether the defence raises any reasonable doubt against the prosecution case.

On the first issue, whether the leaves contained in the 3 sacks and leaves contained in the khaki envelope Exhibit P2 A, B, C and D are narcotic drugs. The testimony of PW1 stated he conducted preliminary and confirmatory tests on the leaves found in the 3 sacks and contained in the khaki envelope admitted as Exhibit 2 A, B, C and D collectively and prepared the report admitted as Exhibit P1. The report stated that the Exhibit P2A, B, C confirmed to be a narcotic drug namely cannabis sativa and commonly known as

‘bhangi’ and Exhibit P2D confirmed to be narcotic drug namely ‘khat’ (Catha Edulis) and commonly known as ‘mirungi’.

The testimony and scientific report tendered by PW1 a Government Chemist provides an independent analysis to the court by way of objective unbiased opinion on his expertise. Therefore, the court holds the leaves in 3 sacks and the bundle of leaves in khaki envelope Exhibit P2 A, B, C and D are narcotic drugs, commonly known as ‘bhangi’ and ‘mirungi’ respectively.

The second issue to be addressed is whether the search was conducted in the presence of an independent witness and the accused person. It is clear from the testimonies of PW3, PW4 and PW6 that the PW3 conducted the search and seized items listed on a seizure certificate Exhibit P3 from the motor vehicle, make TOYOTA Harrier Lexus with registration no. T 494 BPX (Exhibit P4), in the presence of an independent witness PW6, PW4 and the accused person himself.

Section 38 (3) of the Criminal Procedure Act, [CAP 20 R.E. 2002] provides that:

*“(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.”*



The testimonies of PW4 and PW6 the independent witness confirmed to have witnessed the search conducted in the motor vehicle Exhibit P4 and PW6 signed the seizure certificate Exhibit P3 to acknowledge the search conducted by PW3 in the presence of the accused person. As a requirement of the law, the signatures of PW6 the independent witness and accused person signifies and acknowledges their presence at the place and time of search together with PW3 the officer who executed the search. PW3 filled and signed the seizure certificate. The certificate of seizure Exhibit P3 listed all items seized from Exhibit P4.

In the case of **David Athanas@ Makasi Joseph Masima@ Shando Vs the Republic**, Criminal Appeal No. 168 of 2017, CAT (unreported), the Court of Appeal held that;

*“..... the certificate of seizure ought to have been signed at the place where the search was conducted and in the presence of an independent witness. .... considering that there was no independent witness present as required by law, the said certificate cannot be accorded weight.”*

In this case the contention by the accused person that he did not sign the certificate of seizure at the scene of accident where the search was conducted and exhibits were seized is not grounded. PW6 the independent witness testified that she witnessed the search, signed the certificate of seizure and recorded her statement. The accused was present and he also signed the certificate of seizure. The evidence to the effect that he was given a plain paper to sign while he was at the police custody does not hold any weight. The court finds

the search was properly conducted in the presence of PW6, PW4 and the accused and both PW6 and the accused signed the certificate of seizure at the scene where the search was conducted by PW3.

Moving to the third issue is whether the chain of custody of the narcotic drugs was according to the standard required or broken. The prosecution evidence demonstrated the Exhibit P2 A, B, C and D were seized at the scene of accident by PW3 and taken to the Oyster Bay Police station under the custody and care of PW3. PW3 testified to the effect that, the exhibits remained under his custody until he handed them over to PW2 the exhibit keeper. However, during the testimony of PW2 under cross examination, he revealed that he took the Exhibit P2 A, B, C and D from another officer at the reception of the Oyster Bay Police station and not from PW3. PW3 never handed over the said exhibits to PW2 as alleged and there is no proof of such handing over.

The prosecution evidence confirms that the exhibits were taken by PW2 from the reception for custody, were labeled and sealed in the absence of the accused person and an independent witness. It was the position of the prosecution that the chain of custody has been proved through all prosecution witnesses who testified to the effect on how the Exhibit P2 A, B, C and D were seized from the motor vehicle, how they were handled up to the point of tendering in court. The State Attorney referred the case of **Goodluck Kyando Vs R (2006)** TLR at 363; where the Court of Appeal held that;

*“Witnesses are entitled to their credence and their testimonies must be believed unless there are cogent reasons for questioning their credibility.”*

Learned Senior State Attorney claimed that the chain of custody of the narcotic drugs was proved by oral evidence as in the cases of **Charo Said Kimilu and Mbwana Ruakaba vs R**, Criminal Appeal No. 111 of 2015, CAT at Tanga (unreported) and **Chacha Jeremia Murimi and 3 others vs R**, Criminal Appeal No. 551 of 2015, CAT at Mwanza (unreported).

In response to the chain of custody issue, Learned Counsel for the accused person maintained that, prosecution failed to establish the chain of custody for the reasons that, the exhibits were moved from one place to another without involving the accused person, therefore there was a high possibility of tampering with the exhibits.

The principle of chain of custody as expounded in the case of **Paulo Maduka & 4 Others Vs the Republic**, Criminal Appeal No. 110 of 2007, CAT at Dodoma (Unreported) is the *‘chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic’*. The Court of Appeal further explained that, *‘the idea behind recording the chain of custody ... is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance having been planted fraudulently to make someone appear guilty... 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”.*

I find the collection of prosecution evidence the exhibits did not observe and apply this guiding principle. The Exhibit P2 A, B, C and D collectively were seized at the scene of accident by PW3, taken to the Oyster Bay Police station under the care of PW3. However, the Exhibit P2 A, B, C and D did not remain under the custody of PW3 and not handed over to PW2 as alleged by PW3. The testimony of PW2 reveals that, PW2 took the Exhibit P2 A, B, C and D from another officer at the reception whose name was not mentioned by PW3 or PW2. The said officer was not called to testify in court. The court observes that the exhibits were possibly handed over to the unidentified officer at the reception or left at the reception by PW3 the seizure officer. Then the exhibits were handed over to PW2 by an unidentified officer or just collected from the reception by PW2 and later handed over to PW5 to take to the GCLA for tests. In all the steps moving from one person to the other, there is no chronological documentation to show the handing over and handling of exhibits at each stage of custody through which the exhibits passed. Also, there is no oral evidence of the police officer who was at the reception when PW3 left the exhibits and PW3 collected the said exhibits.

Secondly, the evidence clearly shows after the exhibits were taken by PW2, he proceeded to seal and label the exhibits in the absence of the accused person and an independent witness. This raises serious doubts as it is not known if the exhibits are the same as those found and seized from the motor vehicle Exhibit P4. This

raises suspicions of the Exhibit P2A, B, C and D might have been tampered with during the time not under the custody of PW3 the seizure officer or any other person. The court finds the narcotic drugs 'bhangi' and 'mirungi' Exhibit P2A, B, C and D collectively did not remain under the custody of PW3 before being handed over to PW2, there is no evidence to establish that PW2 received the exhibits from an unidentified officer at the reception or just collected from the reception. The unidentified officer alleged to be at the reception was not named nor summoned to testify before the court. Also, there was no documentation on this aspect. In the case of **Abuhi Omari Abdallah and 3 Others V Republic**, Criminal Appeal No. 28 of 2010, CAT at Dar es Salaam (Unreported) the Court of Appeal held that,

*"The absence of the evidence of Kenyela, Linus, the undisclosed cleaners, tester and the post office man, totally destroyed the essential chain of custody of the said pellets. This leads to a strong and irresistible suspicion that those pellets might have been tampered with. It was not for the defence to justify the suspicion. It was for the prosecution to bring cogent evidence to dispel or rule out these lingering reasonable doubts or suspicions. Settled law is to the effect that in such a situation, an accused person is entitled as a matter of right, to the benefit of the doubt or doubts."*

In the instant case the unidentified officer alleged to have received the exhibits from PW3 and handed over to the PW2 did not testify before the court, he is not known. Secondly there is no proof of PW3 handing over the Exhibit P2 A, B, C and D to another officer at the reception. PW3 testified that he handed over to PW2 while that was not corroborated by any evidence. PW2 testified that he was told

by PW3 to go to the reception, collect the exhibits and he implemented the order by his boss. There is doubt as to whether the exhibits collected by PW2 were exactly the same exhibits, which were seized and retrieved from the scene of accident before they were sent to the GCLA for laboratory analysis.

Thirdly, the absence of an independent witness and the accused person during the labeling and sealing of the exhibits by PW2 the exhibit keeper. Existence of evidence shows that Exhibit P2 A, B, C and D collectively were kept in the reception under custody of another unidentified person rather than PW3, this raises serious doubts whether the said exhibits were sealed and labeled by PW2 on the day seized or on the day the exhibits were handed over to the PW5 who stated that he labeled the 3 bags with the mark 'A', the envelope with the mark 'B' and sealed with a red cello tape. An independent witness and the accused person were not present during the sealing and labeling of the exhibits alleged to contain narcotic drugs. It is PW5 who took the exhibits to the GCLA. Here is another inconsistency which raises further doubt as to the chain of custody; who really labeled and sealed the exhibits and whether they were the same exhibits seized from the scene of accident. The chain of custody was broken down at the Oyster Bay Police station and failure of the prosecution to parade the unidentified officer at the reception who had in his possession the Exhibit P2A, B, C and D collectively. This has created irresistible suspicion that the three sacks containing alleged cannabis sativa 'bhangi' and the envelope containing a bunch of Catha edulis 'mirungi' might have been tampered with. It was upon the prosecution to bring evidence to dispel or rule out these

lingering reasonable doubts; this was held in the case of **Abuhi Omari Abdallah and 3 Others V Republic (supra)**.

In this case, there are missing links in the control and transfer of the Exhibit P2 A, B, C and D after seizure at the scene of crime to the time of analysis of the said exhibits at the GCLA, it lacks chronological documentation and oral evidence of the chain of custody. The court finds the improper or absence of a proper account of the chain of custody of Exhibit P2 A, B, C and D collectively leaves open the possibility of the exhibits being tampered with.

The fourth issue is whether the defence raised any reasonable doubt/doubts against the prosecution case. Learned Counsel for accused person submitted that, a party who alleges must prove his case as provided under section 112 of the Evidence Act, [CAP 6 R.E 2002]. To support his line of argument, he referred the case of **Said Hemed vs Republic (1987) TLR 117** where the Court of Appeal held that *“in criminal cases the standard of proof is beyond reasonable doubt”*. The same position was held in the case of **Edward Dick Mwakamela vs Republic (1987) TLR 112 at p 126** that *‘an accused person can only be convicted on proof beyond reasonable doubt’*. He further argued that, the prosecution case failed to prove the guiltiness of the accused since there is no witness who explained on how the accused was found to be trafficking in narcotic drugs, no witness proved that the motor vehicle, which is alleged to be used in trafficking narcotic drugs belongs to the accused person and that the accused person was the one driving the said motor vehicle.

Learned Counsel argued further that the prosecution failed to produce before the court, the motor vehicle registration card and the driving license of one Omari Banda which were seized at the scene of accident. Also, the prosecution failed to summon Adam Bush and David Modestus as key witnesses since they were mentioned on several occasions in connection with this case. That the prosecution failed to establish who is the exhibit keeper of Exhibit P4 the motor vehicle, that according to prosecution evidence it was not well established who was the Exhibit Keeper between PW3, PW2 and PW5. That on the part of the prosecution, Learned State Attorney submitted to the effect that all that has been testified by the accused person are lies and it is settled view that lies of the accused person can be used to strengthen the prosecution's case as stated in the case of **Felix Lucas Kisinyila Vs Republic**, Criminal Appeal No.129 of 2002, CAT at Dar es Salaam.

Learned Counsel contended that it is the testimony of PW4, he witnessed the accused person being removed from the motor vehicle Exhibit P4. However, this evidence lacks corroboration from any other witness who were physically present at the scene of accident. That the witnesses Adam Bush and David Modestus were present there and took part in arresting and removing the accused from Exhibit P4 the motor vehicle. These two witnesses were required to testify in court and corroborate the testimony of PW4. However, it was a failure on part of the prosecution to summon Adam Bush and David Modestus to testify and prove the same.



Learned Counsel contended that from the findings and observations above, the prosecution failed to prove that the accused person is the owner of the motor vehicle Exhibit P4, which he was allegedly found trafficking in narcotic drugs.

Learned Counsel submitted that there are contradictions in the testimonies of PW2, PW3 and PW5 on who was the Exhibit Keeper of Exhibit P4 the motor vehicle, as shown in prosecution evidence the Exhibit Keeper in this case PW2 denied to have kept the Exhibit P4 under his custody. While PW3 stated that he handed Exhibit P4 to PW5 who denied the same. This contention was not address or cleared out by the prosecution. It is clear that there are contradictions on who was the custodian of the motor vehicle. In the case of **Said Ally Ismail Vs R, Criminal Appeal No. 29 of 2008 (unreported)** the Court of Appeal stated that; *"it is not every discrepancy in the prosecution's witnesses that will cause the prosecution's case to flop. It is only where the gist of the evidence is contradictory then the prosecution's case will be dismantled."*

Learned Counsel argued that it is apparent the witnesses were not consistent on the issue of custody of the motor vehicle Exhibit P4. Therefore, the contradictions go to the root of the case which were material to the prosecution case.

On the last issue raised by the defence case, it was the testimony of PW6 that, the police officers tried to open the doors of the motor vehicle Exhibit P4, the doors were locked. That the police officers decided to break the small window on the back-side seat and

were able to place a hand and unlocked the door on the left side behind the front passenger seat. The prosecution evidence demonstrates that the accused person was at the scene of accident at all material times, however the prosecution evidence did not illustrate why the police officers did not use the motor vehicle key which obviously must have been in the motor vehicle to unlock the motor vehicle instead they decide to break the window, while the accused person who is alleged to be the driver of the said motor vehicle was there. Learned Counsel submitted that the Court of Appeal held in the case of **Christian s/o Kaale and Rwekiza s/o Bernard Vs R** [1992] TLR 302 *“that an accused ought to be convicted on the strength of the prosecution case.”*

The above observations explain the reasonable doubts raised by the defence case against the prosecution case. The crucial two witnesses who were present at the scene of crime Adam Bush and David Modestus were present there and took part in arresting and removing the accused from Exhibit P4 the motor vehicle. It is the testimony of PW4, he witnessed the accused person being removed from the motor vehicle Exhibit P4 by these two witnesses. These two witnesses were listed by the prosecution to testify in court and expected to corroborate the testimony of PW4. However, it was a failure on part of the prosecution to summon Adam Bush and David Modestus to testify and prove the same. The prosecution evidence demonstrates that the accused person was at the scene of accident at all material times, however the prosecution evidence did not illustrate why the police officers did not use the ignition key of the

motor vehicle, which obviously must have been in the motor vehicle to unlock the motor vehicle instead they decide to break the window, while the accused person who is alleged to be the driver of the said motor vehicle was there. Also, among the items seized by the police after conducting search was an ignition key. If the key was there why did the Police decide to break the rear small window of the motor vehicle Exhibit P4 instead of make use of the ignition key. This part of evidence creates doubts in proving the criminal responsibility of the accused person in this case beyond a reasonable doubt. I am in agreement with Learned Counsel for the accused the doubts illustrated have raised reasonable doubts on the strength of the prosecution case against the accused person.

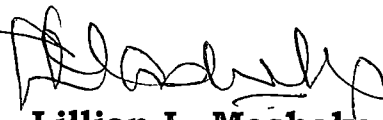
Having address all issues raised in this case, the court finds the evidence adduced by the prosecution has failed to prove this case beyond a reasonable doubt against the accused person in both counts. This failure is held in favor of the accused person. Therefore, the court finds the accused person is not guilty of the 1<sup>st</sup> count Trafficking in Narcotic Drugs namely cannabis sativa 'bhangi' 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 of the Economic and Organized Crime Control Act [CAP 200 R.E 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The court finds the accused person is not guilty of the 2<sup>nd</sup> count Trafficking in narcotic drugs namely khat (Catha Edulis) contrary to section 15(1)(b) of Act No. 5 of 2015 read together with paragraph 23

of First Schedule to EOCCA, Cap 200 R.E 2002 as amended by Act No. 3 of 2016.

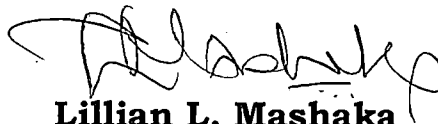
Consequently, the accused person is acquitted and be released forthwith ~~unless~~ he is otherwise lawfully held.



  
**Lillian L. Mashaka**  
**Judge**  
**19/12/2019**

Right of Appeal explained to both parties.



  
**Lillian L. Mashaka**  
**Judge**  
**19/12/2019**