

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL SESSIONS CASE NO. 65 OF 2016
REPUBLIC
VERSUS
JOSEPH CHUKWUEMEKA NWABUNWANNE

JUDGMENT

E.B.LUVANDA,J

The accused person above named is indicated for trafficking in narcotic drugs contrary to section 16(1)(b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 R. E. 2002. The accused had denied a charge.

The evidence presented during trial, is summarized in chronological order as hereunder.

It was the prosecution evidence that on 15/4/2012 at about 23.05 entered a passenger (the accused person herein) who had carried a plastic bag (*rambo*) on his hand. According to the prosecution witness (PW8), the accused was the first passenger to enter at a checkpoint security gate. It

was the testimony of PW7 Salum Gamka who was the machine operator at checkpoint, that the accused put on a screen machine his stuff a plastic bag, where PW7 detected something like pellets, then summoned Julius Mgaza (PW8) to look on the image into the x-ray and thereafter to conduct physical inspection by hands in respect of that plastic bag. PW8 explained to have conducted further inspection in respect of accused's stuffs, where he first looked to establish the owner, then verified if the luggage belong to him, including asking questions whether he personally packed and if he is ready for inspection. In the inspection which was conducted in the presence of Mohamed Kibengo (PW10) and Rahel Qoro (PW15), saw sulfate bag after opening there was a nylon bag (*rambo*) inside had contained 19 pellets. They launched a second search (body search), where the accused volunteered and removed small bag from his private parts which had contained 26 pellets. Thereafter the accused was handed over to Anti Drugs Units Police Post where he was placed under observation and Rahel took the 45 pellets and handed over to Salmin Shelimo (PW9).

While under observation, the accused defecated 16 pellets on 15/4/2012 at about 13.12 hours witnessed by A/Insp. Brown (PW5), Jefferson Denis Sylvester (PW12) and Sylvester Siame (PW12), as per observation form exhibit P7. On 15/4/2012 at 21.00 the accused defecated 10 pellets in the presence of S/Sgt Dacto (PW16) and Fundisha Ezekiel Mayombola (PW18). On 16/4/2012 the accused defecated 12 pellets, witnessed by PW16 and Stanslaus Ngasomo (PW17).

In totally, 83 pellets were seized from the accused through search 19 pellets, voluntary surrendering 26 pellets, and defecation 38 pellets. The 83 pellets were receive and marked exhibit P2 collectively.

According to PW8, after search of 19 pellets and voluntary surrender of 26 pellets, making a total of 45 pellets were handed over to Rahel (P15), who in turn handed over to Salmin Shelimo (PW9). PW9 handed over the 45 pellets to ASP Neema (PW2), who is the exhibit keeper at Anti Drugs Unit. PW5 A/Insp. Brown who witnessed defecation of 16 pellets, explained that the 16 pellets remained under custody of Siame (PW13). PW13 stated to had handed over the 16 pellets to ASP Neema (PW2). S/Sgt Dacto (PW16) who witnessed defecation of 10 pellets and second round 12 pellets stated that he handed over the same to ASP Neema (PW2) immediately after defecation.

ASP Neema (PW2) packed and sealed the 83 pellets on 19/4/2012 in the presence of the accused person, Zainabu Duwa (PW4) and Insp. Makole (PW4). On 21/4/2012 PW2 who was escorted by PW4, submitted the 83 pellets to the laboratory of Chief Government Chemist, where the exhibits of 83 pellets were received by Ziliwa Peter Machibya (chemist), who testified as PW11. After preliminary test, PW11 handed back to PW2. PW2 preserved the exhibits and later tendered it in Court.

Ziliwa Machibya (PW11) examined the 83 pellets containing flours through preliminary test also called chemical test, where the result developed into green colour which according to PW11 is an indication of the presence of heroine. PW11 conducted a

second confirmatory test done through machine—gas chromatography mass spectrometer by using standard heroine, where after the samples were injected for analysis into the machine, the results of that instrumentation or machine analysis was heroine, as per a report exhibit P8.

On defence, the accused stated that on 14/4/2012 at 23.30 hours he went to Julius Nyerere International Airport and after a gate for check inn was opened at 00.00 hours he entered and dropped his bag and entered through a pedestrian route, where someone asked him for something, where he said he cannot offer something and that person said he will postpone his journey. That they took his plastic bag commonly in Nigeria as Ghana bag, which had 12 black plastic bag, when he concentrated on them, one person asked him from behind, what is this, he disowned, but that person said he collected them from the small plastic bag. He denied. He was told that it was a narcotic drug and said this is a Nigerian. That they searched him they got nothing. That they took him to another office, where they gave him a food and later he requested to go to toilet thrice, but he was embarrassed and didn't feel to go to toilet again, as he was followed by many people and one was armed with a gun. He went back to the lock up, then asked them to take him to a toilet, where he emitted but he did not defecate any pellet as he did not swallow pellets. That later after sometimes he was asked to sign an observation form, where he refused. He also challenged the prosecution evidence on the ground that

Ziliwa Machibya (chemists) did not tender a receipt for receiving the 83 pellets, being a form PF 180 request for analysis of exhibit, was not there. That all prosecution witness said the pellets were of the size and shape of thumb finger while some witnesses were tall, others short, fat and slim. He queried that, the analysis was conducted four months later after submission of pellets. That there was no test conducted, as it is impossible to use micro grams to know substance of pellets.

In this matter, Ms Anunciata Leopold learned State Attorney, Mr Costantine Kakula learned State Attorney and Estazia Wilson learned State Attorney were for the republic and the accused was unrepresented after he refused a service of Mr Issah Chundo learned Advocate and Ms Monesta Menard learned Counsel and opted to proceed on his own.

Issues for deliberation and determination comprises the following proposition: first, whether the 83 pellets were seized from the accused out of search (19 pellets), voluntary surrendering (26 pellets) and defecation (38 pellets); secondly whether the 83 pellets were narcotic drugs; thirdly, whether the chain of custody was properly maintained.

The first issue: the evidence presented by the prosecution is straightforward that a total of 83 pellets were seized from the accused through search into his plastic bag (19 pellets), voluntary surrendering 26 pellets, and defecation 38 pellets. The 83 pellets were received and marked

exhibit P2 collectively. PW7 saw the accused entered at the check point, carried a plastic bag (*rambo*) on his hand which he put on a screen machine. Upon reading the image on a scanner, PW7 detected something like pellets, then summoned Julius Mgaza (PW8) to conduct physical inspection by hands in respect of that plastic bag. PW8 established and verified the accused being the proprietor and owner the luggage which he personally packed. Inside the plastic bag there was a sulfate bag and a nylon bag which had contained 19 pellets as put by PW8, PW10 and PW15. Thereafter the accused was cooperative, where he volunteered and removed small bag from his private parts which had contained 26 pellets. While under observation the accused defecated 16 pellets on 15/4/2012 at about 13.12 hours witnessed by A/Insp. Brown (PW5), Jefferson Denis Sylvester (PW12) and Sylvester Siame (PW12). On 15/4/2012 at 21.00 the accused defecated 10 pellets in the presence of S/Sgt Dacto and Fundisha Ezekiel Mayombola (PW18). On 16/4/2012 the accused defecated 12 pellets, witnessed by PW16 and Stanslaus Ngasomo (PW17), as per observation form exhibit P7. Therefore a defence by accused that the pellets were planted by someone after he refused to offer bribe are unfounded, as on cross examination he stated that he was arrested by witnesses who had testified on the prosecution case, but he did on his evidence in chief he did not mention specifically who had demanded for corruption including the one alleged planted the pellets into his stuffs. Also his defence that he did not defecate pellets on reason that he did not swallow the same is baseless. As the evidence adduced by PW5, PW12, PW18, PW16 and PW17 is direct and implicates the accused to had been

seen or observed defecating the pellets from his anus, where he defecated 16 on the first trip, 10 pellets on the second round and 12 pellets on phase three. Indeed the accused had admitted to have been taken to toilet several times.

More important the accused had appended a signature in an observation form exhibit P7. An argument that he refused to sign an observation form, has no bearing at all. As for one thing, an observation form was admitted into evidence without any objection from defence. For another thing, on cross examination, a question as to whether the accused had signed or not was not tested. It is true that an observation form exhibit P7 is not statutorily provided for, as raised by the accused. However, still it served a purpose of substantiating that the mentioned pellets were emitted by the accused.

Also a critic by the accused that all prosecution witness said the pellets were of the size and shape resembling thumb finger of a particular witness, while some witnesses were tall, others short, fat and slim. Of course, prosecution witnesses majority resembled the pellets with the size of their respective thumb finger. But that alone cannot negate a fact that the 83 pellets were seized from the accused through search 19 pellets, voluntary surrender 26 pellets and defecation 38 pellets. Therefore the first issue is answered in the affirmative.

Regarding the second proposition whether the 83 pellets were narcotic drugs. It is in evidence that the 83 pellets were submitted to the chief government chemist laboratory, where PW11 Ziliwa Machibya chemists, measured weight of 83 pellets got 1245.96 grams, conducted a preliminary test and confirmatory or instrumentation machine test. In conducting preliminary test, he used chemicals, where he drilled all 83 pellets and took small micrograms of flours in each pellet, and compared or matched with actual or standard heroine, where result in chemical was green colour which according to PW11 is an indication of the presence of heroine. He took minor samples in each 83 pellets, and analyzed using gas chromatography mass spectrometer –GCMS, where he also used actual drug or standard heroine, injected the samples in the machine where the results was heroine, as per a report exhibits P8.

It is to be noted that the evidence of PW11 is based on expert opinion, who by virtue of education, training and skills he possess is believed to have expertise and special knowledge in narcotic drugs beyond that of the average person. It is my findings that the exposition and report of PW11 is sufficient and reliable, based on his specialization as a graduate holding Bachelor of Science with Education in subjects of chemistry and biology from University of Dar es Salaam, hold a certificate of forensic science from Strathclyde Scotland UK. An argument by the accused that analysis was conducted four months after submission of exhibit or that it is impossible to use micro grams to know substance of pellets, is irrelevant, as no scientific foundation was laid as to how delays in conducting analysis could affect the samples taken or results of analysis. Secondly, the use of micro grams

samples for analysis is also not articulated scientifically. As such the two grounds cannot form a basis for doubting analysis conducted by PW11. In view of methods deployed, detailed procedures for conducting analysis explained by the chemists, findings and results for that analysis are taken to be reliable and relevant to this case.

The third issue, is whether the chain of custody was properly maintained. The evidence presented by prosecution depict vividly how the 83 pellets being 19 searched, 26 voluntarily surrendered and 38 defecated passed or exchanged hands up to the time were tendered in court during trial. According to PW8, after search of 19 pellets and voluntary surrender of 26 pellets, making a total of 45 pellets were handed over to Rahel (P15), who in turn handed over to Salmin Shelimo (PW9). PW9 handed over the 45 pellets to ASP Neema (PW2), who is the exhibit keeper at Anti Drugs Unit. PW5 A/Insp. Brown who witnessed defecation of 16 pellets, explained that the 16 pellets remained under custody of Siame (PW13). PW13 stated to have handed over the 16 pellets to ASP Neema (PW2). S/Sgt Dacto (PW16) who witnessed defecation of 10 pellets and second round 12 pellets stated that he handed over the same to ASP Neema (PW2) immediately after defecation.

ASP Neema (PW2) packed and sealed the 83 pellets on 19/4/2012 in the presence of the accused person, Zainabu Duwa (PW4) and Insp. Makole (PW4). On 21/4/2012 PW2 who was escorted by PW4, submitted the 83 pellets to the laboratory of Chief Government Chemist, where the exhibits of 83 pellets which was sealed using sealing wax was received by PW11 Ziliwa Peter Machibya (chemist). After preliminary test, PW11 handed back

to PW2. PW2 preserved the exhibits and later tendered it in Court during trial. It suffices to say that the prosecution had managed to establish a chronological events on sequence of custody in respect of 83 pellets, exhibit P2. As such, an argument by the defence (in closing submission) that the prosecution did not adhere to the mandatory procedure to ensure proper documentation or that PW11(chemists) did not tender a receipt (form 180 being a request for analysis of exhibits) for receiving the 83 pellets, has no basis at all. There was no foundation laid by the accused to suggest that the exhibits was tempered at any time or stage.

In absence of any possible tempering and breakage of chain of custody, an argument for documentation cannot hold water. Actually the defence did not cast any doubt on chain of custody apart from relying solely on paper trail in particular when cross examining prosecution witnesses. I therefore rule that the chain of custody was properly maintained.

Finally, whether the act committed by the accused person amounted to trafficking in narcotic drugs. According to penal provision to wit section 16(1)(b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95 R.E. 2002, provide that it is an offence to traffic in narcotic drugs. Section 2 of Cap 95 (supra) define trafficking to mean (and include) exportation by any person of narcotic drugs.

Now, as much the 83 pellets of heroine were certified by PW1 being valued Tsh 56,068,200/= as per certificate of value of narcotic drug exhibit P1. And so far, the 83 pellets of heroine were seized from the accused at Julius Nyerere International Airport at a movement of initial stages of checking in

at the security check point and through defecation, where the accused had a passport exhibit P3 and air ticket for Ethiopia Airline exhibit P4. Therefore the accused is taken to have been exporting heroine, which amount to trafficking in narcotic drug within the purview of the definition of trafficking depicted above.

Having premised as above, I rule that the prosecution has managed to prove the charge laid against the accused.

I therefore shake hands with unanimous opinion of wise assessors who entered a verdict of guilty in respect of accused.

The accused is convicted for trafficking in narcotic drugs contrary to section 16(1)(b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs, Cap 95 R.E. 2002.



E. B. Luvanda

JUDGE

23/10/2019