IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT BABATI

CRIMINAL SESSION NO. 67 OF 2017

THE REPUBLIC ..... PROSECUTOR

VERSUS

1. MSAFIRI MICHAEL NDOSI)

2. WISTON SENYA MMARY) ..... ACCUSEDS

JUDGMENT

Date of Last Order: 15/05/2020
Date of Judgment: 21/05/2020

Masara, J.

The accused persons, **Msafiri Michael Ndosi** and **Wiston Senya Mmary,** jointly stand charged with the offence of Trafficking Narcotic Drugs, contrary to section 15(1)(b) of the Drugs Control and Enforcement Act, No. 5 of 2015 (herein after "Cap. 95"). The particulars thereof were to the effect that on the 4th day of November, 2015 at Tarangire National Park, within Babati District, Manyara Region, the two accused persons were found Trafficking Narcotic Drugs, namely ***'catha edulis',*** commonly known as "mirungi", weighing 363 kilograms in a motor vehicle make Toyota Land Cruiser Prado with Registration No. T166 AGL. The accused persons pleaded not guilty to the Charge.

In order to prove the case against the accused persons, the Prosecution/Republic paraded seven (7) witnesses and tendered eight (8) exhibits. Mr. Praygod Raphael (PW2), a game officer at Nkungunero Game Reserve, and his colleagues are said to have arrested the two accused person. PW2's testimony was that while on their routine patrol on 4th November, 2015 at around 12:00hrs, they spotted a car driving fast and when they signalled it to stop it did not show signs of stopping. They decided to block it whereupon it stopped. They found the two accused persons therein. The car was Toyota Prado with Registration Number T166 AGL (Exhibit P1). Upon interrogation, the driver, whom he identified as the first accused, told them that they were from Arusha to Kondoa. They searched the vehicle and found mirungi in numerous packs tied in newspapers. They took the accused persons and the vehicle to Babati Police Station where they found Assistant Inspector Aloyce Malima (PW1) and explained to him what had happened. PW1 rearrested the Accused persons and filled a certificate of seizure form (exhibit P2). The next day PW1 weighed the mirungi and found it to be 363kgs. The weight was filled in the certificate of seizure in the presence of PW1, PW2, the accused persons as well as other officers. On 6 November 2015, Kaijunga Tryphone Brass (PW5) from the Office of the Chief Government Chemist Northern Zonal Office arrived in Babati and had the exhibit weighed again. The weight remained the same. He is said to have taken a sample that he later took to Dar es Salaam for examination of the contents. PW7, Elias Zacharia Mulima, of the Chief Government Chemist Office Dar es Salaam, received the said samples on 13/11/2015 but worked on it on 14th January 2016.

On examination of the said samples, it was revealed that they contained a chemical known as *cathinone* which is a peculiar chemical in Khati or mirungi. PW7 therefore concluded that the samples he examined are from khati.

In their sworn evidence, the two accused persons denied to have committed the offence they stand charged with. They admitted to have been arrested on 4th November, 2015 in the said car enroute from Arusha to Kondoa at Tarangire National Park (exhibit P1). They however denied that they were driving the vehicle. They said that they were only passengers and that the driver of the said vehicle disembarked and vanished after seeing the vehicle in which PW2 and his colleagues were in. They denied knowledge and ownership of the said Mirungi and the motor vehicle, Exhibit P1.

During the trial, the Prosecution was represented by Mr. Petro Ngasa and Ms. Rhoida Kisinga, Learned State Attorneys while the accused persons were represented by Mr. Abdallah Kilobwa and Mr. Erick Machua, learned Advocates. Issues for determination in this case are whether the leaves apprehended by PW2 and handed over to PW1 were narcotic drugs; to wit Khat or Mirungi, whether the accused persons were found in possession and thus in the process of trafficking of the said narcotic drugs, and whether the Prosecution proved its case to the required standard. Assessors who sat with me at the hearing of this case, Mr. Yusuph Juma and Ms. Farida Diago, were unanimous that the Prosecution failed to prove

its case against the two accused persons beyond reasonable doubts. They advised me to acquit the two accused persons for insufficiency of evidence against them.

Starting with the first issue, it is a requirement of the law that for a person to be held responsible for an offence under Section 15(1) (b) of Cap. 95, it must be proved that the substance found in his possession is in fact narcotic drugs as per the law. The proof required has to come from experts. In Tanzania such expertise lies, to a large extent, with the Chief Government Chemist's Office. That means, what was found in the vehicle, Exhibit P1, remained to be suspected drugs until an official report was given to prove the content thereof. The fact whether it was established that the 363kgs leaves in Exhibit P1 underwent laboratory tests so as to determine their contents is what this Court is tasked to decide.

The testimonies of PW1, PW2, PW3, PW4 and PW6 were generally on the fact that the two accused persons were found trafficking leaves suspected to be mirungi and how the alleged leaves were handed. PW5 testified on how the alleged leaves were handed to him at Babati Police Station and how he made a choice of samples and took them to Arusha before taking the same to Dar es Salaam for examination of their contents. It is therefore worth noting that the only person whose evidence suggested that the 363kgs leaves were mirungi is PW7. The evidence by PW7 and exhibit P7, which is the report of the Chief Government Chemist, proved that the taken samples handed over to him had a chemical known as *cathinone*

which is found in mirungi (khat) or *Catha edulis* only. Unfortunately, the Prosecution's evidence linking leaves that were ceased at Babati and what was examined by PW7 was weak.

The Prosecution evidence stipulated that an unknown quantity of sample out of all the packs of the suspected mirungi was taken to the Chief Government Chemist for testing. There is, however, no documentary proof to conclude that the sample examined came from the consignment apprehended in the Tarangire National Park. Unfortunately, apart from the oral evidence of PW3 and PW5, there is no document that details the samples taken from Babati. The chain of custody form which was tendered as Exhibit P4 does not show whether anything was taken from the consignment stored by PW4. The Exhibit handover form (exhibit P3) appeared to miss necessary details including whether a sample was taken and the weight of the consignment weighed by PW5. Furthermore, the Prosecution did not show how the sample moved from the Chief Government Chemist Authority (Northern Zone Office) in Arusha to Dar es Salaam headquarters, and how it was received. The paper trail of the movement of the exhibit was necessary. It is the requirement of the law under Order 40 of the Police General Orders that any transfer of custody of an exhibit from one officer to another be recorded on the exhibit label. This is a serious irregularity which in my view poses doubts on the prosecution evidence.

Yet, there is another anomaly in the Prosecution case. This relate to the silence of the chain of custody form (exhibit P4) on whether PW1 weighed the alleged mirungi and got the 363kgs as was testified. PW1, PW2 and PW4 testified that on the 5/11/2015 PW1 weighed the consignment and it weighed 363kgs. The evidence on record shows that the mirungi were placed under the custody of the exhibits keeper (PW4) on the 04/11/2015 when the accused persons were apprehended. How then PW1 got access to the exhibit, the Prosecution evidence is silent as it is nowhere shown in the chain of custody form. In such circumstances, I am inclined to make a finding that the chain of custody was noticeably broken before and after the sample was taken by PW5 and PW7. The Court of Appeal has on a number of occasions given guidance on this aspect. That is, on the importance of showing any hand over of an exhibit in the chain of custody form. In the case of ***Chukwudi Denis Okechukwu and 3 others Versus Republic***, Criminal Appeal No. 507 of 2015 (Unreported) the Court of Appeal cited with authority its previous decision of ***DPP Vs Shiraz Mohamed Shariff*** [2006] TLR 427 where it held:

> *"There is need therefore to follow carefully the handling of what was seized from the appellant up to the time of analysis by the Government Chemist of what was believed to have been found on the appellant. We think the vital missing link in the handling of the samples from the time they were taken to the police station to the time of chemical analysis has created real doubt if the prosecution proved its case against the appellants to the required standard."*

See also ***Siahi Mauiid Jumanne Versus Republic***, Criminal Appeal No.292 of 2016 (Unreported)

Another important fact to note is that the Prosecution did not take effort to prove whether or not the number of packs found to be trafficked was made known to the Court. That would have assisted to assess whether the evidence that a sample was taken from every pack and put in an envelope could be trusted. Also, it is noted that the exhibit which was destroyed by the order of the Resident Magistrate (Exhibit P6) is recorded as Mirungi weighing 363 Kilogrammes. By the time of destruction, on 15/11/2015, the Report proving that the leaves were mirungi had not been made. The report was made on 15/01/2016, two months after the exhibit had been destroyed. What proved to the Magistrate that the contents were mirungi remains unknown to the Court. It should have been recorded as suspected Mirungi, at the best. I am of a considered view that the correlation between the destroyed mirungi and the samples taken to the Chief Government Chemist was not clearly drawn by the prosecution.

I hold that position because; one, the exact number of packs which were found in the alleged car was not given to assess the credibility of some of the Prosecution evidence. Two, the chain of custody form (exhibit P4) does not show whether PW5 took a sample from the consignment at Babati Police Station. Lastly, the chain of custody form is silent on whether PW1 on the 5th November, 2015 weighed the alleged mirungi and found them weighing 363kgs as was testified. Consequently, the Court is not in a position to conclusively ascertain that the items seized was exactly the one that was examined and reported in Exhibit P7. That said, however, there is on record the oral evidence of PW3 and PW5 both of whom testified that a

sample was taken from the leaves stored by PW4. There is also evidence of PW7 who acknowledged to have received the sample from PW5 and used the same to test and conclude as is shown in Exhibit P7. Much as I may wish to agree with their oral evidence, the law requires that their evidence be supported with documentary evidence. As there is such evidence, this issue is answered in the negative due to the anomalies pointed out. This is not, however, to say that what was ceased could not be mirungi. It could be mirungi only that what was tested and reported may not have come from the consignment said to have been stored and later destroyed in Babati.

Having answered the first issue in the negative, the discussion on the next issues may appear rather academic. Nevertheless, I find it imperative to deal with them anyways.

Regarding the second and third issues, it is trite law that the Court will not hold someone guilty of the offence of trafficking in drugs unless it is proved that that person was the owner or possessor of the said narcotic drugs. Cap. 95 defines Trafficking under section 2 in the following terms:

> *"trafficking" means the importation, exportation, buying, sale, giving, supplying, storing,* ***possession****, production, manufacturing,* ***conveyance, delivery or distribution, by any person of narcotic drug*** *or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer but shall not include..."* [emphasis added]

From the Prosecution evidence, five witnesses testified that the two accused persons were found trafficking the alleged narcotic drugs. However, it was only PW2 who testified to the effect that he apprehended the two Accused persons at Tarangire National Park trafficking the leaves they suspected to be khati (mirungi) by using exhibit P1. It is his evidence that the Prosecution relied in advancing its case. His evidence was challenged by the Accused persons. Had the Prosecution summoned PW2's colleagues, some of the doubts that were shown in his evidence could have been alleviated. This is not to say that his evidence alone could not suffice to prove the allegations raised against the Accused persons. Far from it, as no particular number of witnesses is necessary to prove a point in issue. There was, however, need of other evidence to corroborate the version given by PW2 on how he apprehended the accused persons. Corroboration was emphasized by the Court of Appeal in the case of ***John Mwalinzi @ Sheyo Shungu Versus Republic,*** Criminal Appeal No. 4 of 2002 (Unreported) where it was held inter alia:

> *"The word corroboration has no special technical meaning, by itself it means no more than evidence tending to confirm other evidence."*

Notably, PW1, PW3, PW4 and PW6 did not witness whether the accused persons were found trafficking the alleged narcotic drugs. What they testified remains to be hearsay. They were stating what they heard either from PW2 or some other persons. Their evidence therefore being hearsay has no evidential value as far as the offence against the Accused persons is concerned. It cannot be said to corroborate the evidence of PW2, especially on the aspect of arresting and what transpired at the scene

where the alleged narcotics were found. The Court of Appeal on several occasions has discarded such hearsay evidence. In ***Vumi Liapenda Mushi Versus Republic***, Criminal Appeal No. 327 of 2018 (Unreported) it stated *inter alia*:

> *It is evident from the record that PW1, PW2, PW4 and PW5 did not witness the incident. Their evidence was indeed hearsay.* ***Hearsay evidence is of no evidential value.*** *The same must be discredited."*(emphasis added)

The Prosecution also tendered Exhibit P1, a car make Prado with registration No. T166 AGL which they alleged that it was the means that was used by the accused persons in trafficking the narcotics. However, although ownership of the vehicle is not a legal requirement, there is insufficient evidence to prove whether Exhibit P1 belongs to any of the accused persons. The Prosecution also tendered exhibit P2 Certificate of Seizure, which was signed in the presence of PW1, PW2, one Richard Malisa and the two accused persons at Babati Police station. No independent witness witnessed the seizure because as per PW2's testimony he and Richard Malisa were the arresting officers. It is a mandatory requirement of the law (section 38 of the Criminal Procedure Act, Cap. 20 R.E 2002) that seizing any property in the custody of the accused persons must be witnessed by an independent witness. The court of Appeal in the case of ***David Athanas @Makasi and Another Versus the Republic,*** Criminal Appeal No. 168 of 2017 (Unreported) stated inter alia that;

> *"With due respect, as per section 38 (3) of the Criminal Procedure Act, CAP 20 R.E 2002, 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. Since the certificate of seizure*

was not signed at Chinangali, the place where the search was conducted and ***considering that there was no independent witness present as required by law,*** *the said certificate cannot be accorded weight."*[emphasis added]

To add salt to the wound, it seems to the Court that the Police investigators and the Prosecution left some big holes open. It is evident that the accused persons denied possession of the alleged Mirungi from the time of interrogation; it was expected that the Prosecution would have been diligent in tracing the ownership of the vehicle (exhibit P1). Exhibit P8 names Edson Daudi Kisanke as the owner of Exhibit P1. There was no evidence to prove that sufficient efforts were made to track the owner or his existence. Furthermore, the fact that the first accused denied to have been the driver of the vehicle in question would have made the Prosecution to track whether he was a licensed driver as it would be highly unlikely for a non-licensed person to drive a vehicle from Arusha to Kondoa.

Furthermore, it is noted that the accused persons had named places where they were coming from (garages) and where they were going to fix cars. It was essential for the prosecutions to track the said information to prove or disprove the accused persons' allegations. I am alive that the accused persons admitted to have been apprehended in the said car which they claimed to board as passengers on the fateful day and it is not disputed that they were apprehended in the Tarangire National Park. That fact notwithstanding, the Prosecution has failed to prove that the alleged mirungi belonged to the accused persons due to the doubts raised.

The tenets of law cast the burden of proving criminal cases upon the Prosecution. Section 3(2)(a) of the Evidence Act, Cap.6 [R.E.2002] provide that the standard of proof is beyond all reasonable doubts. In this case therefore, it was the duty of the Prosecution to prove that the accused persons committed the offence charged beyond all reasonable doubts. The anomalies stated above cast a lot of doubts in the Prosecution evidence. The doubts in the prosecution evidence cannot warrant a conviction against the accused persons. It is on that basis that I concur with the opinion of the gentleman and lady assessors on the fate of the accused persons. The last two issues are likewise answered in the negative.

Before concluding this case, I find it necessary to make a determination on what will be the fate of exhibit P1, which is a vehicle that is said to have been carrying the alleged mirungi consignment. No one has thus far claimed ownership of the vehicle. The two accused persons have also disowned the vehicle stating that the driver, and probably the owner of the vehicle, ran away on seeing the Game Warden vehicle. The fact that the two accused persons have been found not guilty does not exonerate Exhibit P1. This is more so given that the first issue was answered in the negative on technical reasons. I therefore direct that Exhibit P1 be confiscated to the State as an instrument of criminality under section 49A (1) of Cap. 95 subject to the provisions of subsections (2) and (3) thereof.

From the foregoing, and on the reasons I have endeavoured to explain, it is the finding of this Court that the case against the Accused persons has

not been proved to the required standard. Consequently, I hereby acquit them forthwith and direct their immediate release unless they are otherwise held in custody for other lawful cause.

Y. B. Masara
JUDGE

21st May, 2020