

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA
CRIMINAL SESSIONS CASE NO. 02 OF 2020

THE REPUBLIC

Versus

MARWA S/O NYARAITA @ CLEMENT

JANETH W/O NYAMHANGA @ RWABE

JUDGMENT

The two accused persons Marwa s/o Nyaraita @ Clement (first accused) and Janeth w/o Nyamhanga @ Rwabe (second accused) are jointly arraigned for trafficking in narcotic drugs contrary to section 15(1)(b) of the Drugs Control and Enforcement Act No. 5 of 2015.

It is alleged in particular of offence that on 24/5/2016 at Kamange Village within Tarime district in Mara region, the first and second accused were found trafficking 122.52 kilograms of narcotic drugs of cannabis sativa commonly known as bhangi by using a motor vehicle with registration number T 445 DGD make Toyota Probox. The duo accused persons denied an information.

A recap of evidence adduced at a trial, is as below.

It was the prosecution evidence in particular PW2 and PW3 that on 24/5/2016 at 15.00 hours while on patrol at Kemange Village they saw a white motor vehicle with registration number T 445 DGD make Toyota Probox, cruising to their direction at a narrow path and an interior area, therefore they suspected it. When they approached nearby, it stopped, doors were opened where three youths alighted and run away. Police officers attempted to chase them, in vain. Inside that car, were seen one male (alias Afande) on the steering wheel and a lady on a rear seat. The duo later introduced as Marwa Clement (first accused) and Janeth Nyamhanga (second accused), respectively. PW2 conducted search in that car T 445 DGD (exhibit P5), where he seized cannabis sativa contained in two sulphate bags and four sacks which had contained small nineteen bags and two black nylon bags contained seeds of cannabis sativa, all were marked exhibit 4 collectively. A car exhibit P5 and cannabis sativa and seeds of cannabis sativa exhibit P4 were seized through a certificate of seizure, exhibit P3.

According to PW2 after search, the two suspects, a car exhibit P5 and cannabis sativa and seeds of cannabis sativa exhibit P4 were taken to

Tarime Police Station and handed over to DC Simon (PW5). On 24/5/2016 PW5 recorded a caution statement in respect of the second accused, which was received and marked exhibit 7. On 25/5/2016 Lameck Masiaga (PW6), erstwhile Ward Executive Officer and Justice of Peace at Sabasaba Ward, recorded an extrajudicial statement of the second accused, was received and marked exhibit P9.

On 26/5/2016, Experius Nicholous PW4 measured weight of cannabis sativa got 122.520 kilograms and seeds of cannabis sativa got 7 kilograms as per a report exhibit P6. On the same date to wit 26/5/2016 samples were taken in respect of cannabis sativa which were twenty envelopes and seeds of cannabis sativa contained inside two envelopes, which were sealed and submitted by DC Reguro. On 17/6/2016 DC Rugero handed over samples contained in twenty envelopes and two envelopes, to Tupeligwe Reuben Mwaisaka PW1, who is the chemist at the Laboratory of Chief Government Chemist, for analysis. PW5 preserved exhibit P4 collectively which was inside a car exhibit P5, until when were produced in court.

The first and second accused persons on defence, while both admitted to have boarded a car exhibit P5 as mere passengers, they denied knowing

each other. They disowned cannabis sativa and seeds of cannabis sativa exhibit P4 collectively. DW1 (first accused) denied to had been driving a car exhibit P5 and refuted owning it.

The issue for determination, is whether the prosecution managed to prove a charge beyond reasonable doubt.

The evidence tendered by PW2 and PW3 (arresting officers) was to effect that the first and second accused person were arrested at Kemange in Tarime vicinity, which is an interior village and narrow path, notorious for lawlessness. That the duo accused persons were arrested while boarded a motor vehicle T445 DGD make Probox exhibit P5, which at the boot had loaded two sacks and eighteen small black bags containing dry leaves and two small black bags containing seeds of cannabis sativa exhibit P4. According to the testimony of PW2, exhibits P4 and P5 were seized through a certificate of seizure exhibit P3, also supported by PW3. PW1 explained that she conducted analysis in respect of samples of dry leaves and seeds submitted by Reguro and confirmed were leaves and seeds of cannabis sativa as per a report exhibits P1 and P2, respectively.

However, this testimony falls short: for one thing, DC Reguro who was allegedly to have submitted samples to PW1 was not summoned, neither submission form was tendered to substantiate the alleged submission and handing over. For another, PW1 alleged to have received samples on 17/6/2016, while PW5 said samples were packed on 26/5/2016. There was no explanation as to why it took so long almost twenty-three days, to submit samples from Tarime to the office of government chemist at Mwanza. More important, it is not clear as to who actually packed samples taken from the seized two sacks and eighteen small black bags of leaves and two small bags of seeds suspected to be cannabis sativa. PW5 during examination in chief was not specific as to who packed the samples. On cross examination, PW5 stated that an exercise of packing samples was supervised by himself (PW5), OCCID and DC Reguro. Another gap, PW5 stated that after samples were packed and sealed were preserved by the OCCID. However, PW5 was unable to explain as to when exactly samples moved from the hands of the said OCCID to DC Reguro. Seemingly after seizure of exhibit P4, it was handled and exchanged hands locally, without any documentation. This can be evidenced by the testimony of PW5 who said that after receiving, he took an ignition switch locked a car and an

exhibit was preserved in a car. PW5 did nothing more. In other words, PW5 did not bother even to register or label the exhibit in the exhibit register. Probably that was not his mistake, because throughout his testimony, PW5 did not explain if at all he is a designated exhibit keeper for that purpose. In absence of paper trail, and in view of the above depicted loopholes and gaps, it cannot be said that prosecution have proved their case on the required standard. This is because there was notable breakage of chain of custody, to the extent of creating serious doubts if at all what was received by PW1 is an exactly samples taken from exhibit P4. To be precisely, there is no evidence to prove that what was received by PW1 is the same package of sealed samples which were taken from exhibit 4. Unfortunate the alleged samples were not tendered in court for PW5 to establish if are the very same envelopes packed and sealed on 26/5/2016. This is because, PW1 alleged to had disposed them after proceedings of analysis were over.

Even the arresting officers did not discharge their duty properly, PW2 who was a seizing officer did not sign exhibit P3, which is contrary to Form No. DCEA 003 found in the Third Schedule, to Act No. 5 of 2015, which require the executing officer to append his/her signature at item 4. PW2 and PW3

did not make it clear regarding how the alleged three youths who disembarked from exhibit P5 and run away, as to which door they used. PW2 and PW3 just said the three youths opened the door, alighted and run away. This create doubts regarding a fact that the first accused was a driver, because on defence the first accused refuted that allegation on explanation that he was a mere passenger. Even PW2 said the first accused had told them that the driver was one Yasin who is among the youths who run away. More important, the prosecution did not tender a driving licence or summon the owner of a motor vehicle to substantiate that indeed the first accused was a driver and in charge of a car exhibit P5. No witness testified that he saw the first accused driving a car exhibit P5, apart from oral testimony by PW2 and PW3 that the first accused was at the drivers' seat, while a car had stopped. PW2 and PW3 did not state if at all they demanded a driving licence from the first accused. Neither stated that the first accused was seen driving a motor vehicle without a driving licence. A mere fact that the first accused was seen at a driver's seat on itself is not a conclusive proof that he was a driver, in particular herein where there is an evidence that three youths had sneak out through inexplicable door or side. Also a defence by the first accused that he

sustained fatal huge deep recovered wound from the shoulder to the elbow on his right hand side and therefore is disabled, totally weak and unable to drive.

Regarding a caution statement exhibit P7, is also suspect, as PW5 who recorded it did not append a signature, only recoded his force number. This offends the provision of section 48(2)(a)(ix) of Act No. 5 of 2015 (supra). More important, the second accused did not make a certification as provided for in a prescribed Form No. DCEA 005, Third Schedule to Act No. 5 of 2015. This makes a caution statement exhibit P7 unreliable.

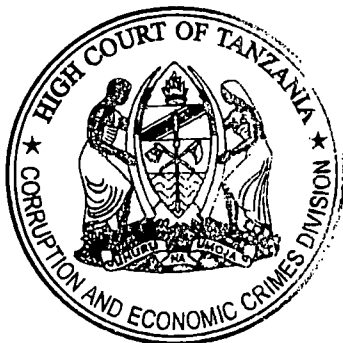
The extrajudicial statement exhibit P9, suffer the same faulty. To buff up my conclusion, I ascribe to the submission of the learned defence Counsel for the second accused that PW6 did not record time when the first accused was arrested, neither indicated where the first accused had slept prior being taken before him. This contravene Chief Justice's Instructions on guide for justice of peace stated in **Petro Teophan vs Republic**, Criminal Appeal No. 58/2012 C.A.T. at Dodoma (unreported), which was cited by the learned Counsel for second accused, therein the Court of Appeal cited **Japhet Thadei Msigwa vs Republic**, Criminal Appeal No. 367 of 2008 (unreported), where the C.A.T. observed, I quote,

*'So, when Justice of the Peace are recording confession of persons in custody of the police, **they must follow the Chief Justice's Instructions to the letter.** The section is couched on mandatory terms'* emphasis added

Therefore, it can be said that Chief Justice's Instructions are cumulative, the justice of peace ought to comply with the said instructions altogether and not in isolation. In view of that, an argument by PW6 that the second accused had confessed voluntarily before him, is suspect. In short, the extrajudicial statement exhibit P9 is unreliable.

I therefore differ with opinion of wise assessors who unanimously opined a verdict of guilty in respect of both accused persons. As depicted above, the prosecution evidence is wanting.

An information for an offence of trafficking in narcotic drugs contrary to section 15(1) (b) of the Drugs Control and Enforcement Act No. 5 of 2015 is dismissed. The first accused and second accused are acquitted.



E.B. Luvanda
JUDGE
5.11.2020

ORDER

- i. 122.520 kilograms of dry leaves of cannabis sativa and 7 kilograms of seeds of cannabis sativa, exhibit P4 collective, to be disposed through burning as per the rules.
- ii. A motor vehicle registration number T445DGD make Probox, exhibit P5 to be released forthwith.



E.B. Luvanda
JUDGE
5.11.2020