

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL SESSION CASE NO. 25 OF 2015

REPUBLIC

VERSUS

RASHID SALIM MOHAMED@ RASHID RAMADHAN

JUDGEMENT

10th May & 18th June 2021

Rwizile, J

The accused stands charged on one count of trafficking in Narcotic Drugs. This however is contrary to section 16(1)(b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs Act [Cap 95 R.E 2002]. Facts, of this case can be clearly stated thus; that, the accused person on 24th July 2010 arrived at the Julius Nyerere International Airport (JNIA) in Dar-es salaam. He was coming from Brazil via Doha aboard Qatar Airways. On his arrival at JNIA, a police officer who had an intelligence clue arrested him. He was suspected of having trafficked into the country narcotic drugs. He was detained for days at JNIA and kept under observation. In between the date he was arrested and 26th July the accused emitted from his stomach 82 pellets of a substance suspected of being narcotic drugs. The suspected pellets were then taken to the Chief Government Chemist Laboratory for examination and analysis.

It was found that the same were narcotic drugs known as cocaine hydrochloride weighing 1374.32grams. Its value was 54,972,800/=.

The accused was then charged of the offence. Before this court, he denied the charges. This prompted the prosecution lead by a team of 8 Attorneys namely Veronica Matikila, Apimaki Mabrouk, Annunciata Leopold and Chivanenda Luwongo Senior State Attorneys, Clara Charwe, Estazia Wilson, James Palangyo and Monica Matwe State Attorneys to call a total Number of 10 witnesses and tender 6 exhibits. For the defence

it was Mr. Ally Hamza and Amary Sinda learned advocates. The defence had the evidence of the accused and also tendered 5 exhibits.

Before venturing into the evidence, I think it is important to state albeit brief, the submissions of the learned counsel. Mr. Hamza for the accused person discussed key concepts to guide the court on its verdict. It was his submission that the case was not proved against the accused person. He said, section 110, 111 and 114 of the Evidence Act, mandates the prosecution to prove the charge beyond reasonable doubt. The duty never shifts to the accused person, it remains the prosecution's duty. The learned advocate highlighted the following points that have created doubt in the prosecution case;

1. That the name of the accused has not been proved by evidence since it is disputed and the prosecution did not have any material evidence to prove the name, exh. D5 the accused's passport speaks for itself.
2. That the prosecution case has been marred by inconsistencies in the prosecution witnesses. That there is to say, the names of the accused person were not remembered by the witnesses such as Amina Shoko (Pw2)
3. That the evidence on the chain of custody was totally broken. It was his submission that there was no evidence that the exhibit was labelled by the police officers who handled it. He said Pw3, 5, 7, 8 and 9 did not prove the paper trail on the movement of exh. P1.
4. Failure to Label the same contravenes the PGO 229 para 8, 16 and 28 for failure to also file PF-180 showing when and how exhibit P1, 82 pellets was handled. This also affects exh. P2, the report from Chief Government Chemist. He referred to the Cases of **R v Joel Msukwa**, Criminal session 54 of 2016 and **DPP vs Addul Mohamed Omary Nondo**, RM, Criminal Appeal No.10 of 2019 and that of **Abdul Nondo** are clear that these exhibits even though admitted in evidence should not be regarded. They should be expunged.
5. On the caution statement, the learned advocate asked this court to follow the case of **Alberto Mendes v R, Criminal Appeal No. 473 of 2017** which distinguished the case of **Chacha Jeremiah Mrimi and 3 Others v R, Criminal Appeal No. 551 of 2015** and the court held that a caution

statement recorded out time cannot be admitted. It should be expunged from record. He therefore asked this court to acquit the accused person.

On the other side, the prosecution led by Matikila SSA, had it that the case has been proved as the law requires. Her submission was that the following have been proved;

1. The accused has been identified in court by all prosecution witnesses.
2. That the chain of custody has not been broken since the witnesses have given oral evidence to prove the chain
3. That labelling of the exhibit as a legal requirement has been complied with Pw9. She said, she did so by assigning case Number which is in line with PGO 229 para 14. It was stated that since witnesses properly identified the exhibit the dictates of section 61 and 62 of the evidence Act was complied with. Here I was asked to follow the case of **Livinus Uzo Chime Ajana vs R**, Criminal Appeal No. 13 of 2018 and the **case of Marceline Koivogui v R**, Criminal Appeal No. 469 of 2017
4. Commenting on the case of **Alberto** (supra) it was stated that the prosecution did not prove the chain of custody by either oral or documentary evidence. On contradiction it was said, the contradiction stated are minor and did not go to the root of the case as held in the case of **Deus Josias Kilala@Deo v R**, Criminal Appeal, No. 191 of 2018
5. She submitted further that, the accused did not tender a notice under section 194(4) and (5) on the evidence of Alibi. She asked this court to disregard the same as in the case of **Kubezya John v R**, Criminal Appeal, No. 488 of 2015.
6. It was further said, that the prosecution case has been proved and the same fetches support in the defence case for corroboration since the accused denied everything. He made a total denial which is corroborating the case for the prosecution as per the case of **Nkanga Daudi Nkanga vs R**, Criminal Appeal No. 316 of 2013

7. On the statements procured under section 34B TEA, it was said that since the same were not objected to, there was no reason for prosecution to prove the inconsistency stated.

Having shown the key principles to bear in mind in criminal cases, it is important to note that this case as any other criminal case, has to be proved to the said standard. In doing so, the prosecution must first prove that the accused was arrested, with an exhibit P1. That is 82 pellets. That the same pellets were narcotic drugs. The prosecution as well has to prove that the chain of custody was not broken from the time the same were arrested, transferred from one place to another, kept and ultimately tendered in evidence.

In this case as shown before 10 prosecution witnesses were tendered. As to whether the prosecution proved that the alleged pellets were narcotic drugs, the following evidence had it so. The evidence can be summarized as follows;

Amina Mwinyi Shoko (Pw2)

She testified that she lived close to the officers of ADU at Kurasini. For about 30yrs, she has lived at the same place. She testified to have lived there doing small business of selling vegetables.

As well, she was a leader of Chama cha Mapinduzi in that street. On 29th July 2010, at 7.00am, she got a police officer to call her to the officers of ADU. As she arrived at the officers, she found commissioner Nzowa and other police office to include Neema, Wamba and Salmin. She witnessed parking of 82 pellets. The parking was done by SSP Neema. The accused was also present. They were parked in a khaki envelope, sealed by red seal and sole tape. The same were after parking taken to the Chief Government Chemist. Then Pw2 showed the envelope with a red seal. It is identified as exhibit P1.

F. 4147 D/CPL EMMANUEL (Pw3)

He worked with Ant-drugs unit at its headquarters in Dar-es salaam as investigator since 2005. He testified that on 24th July 2010, was directed by commissioner Nzowa to go to the Airport and deal with the accused person who was arrested. At the Airport, he met DC Gabriel and DC Jafary with the accused Rashid Salim Mohamed. They

handed to him, the accused with 15 pellets thought to be drugs which he kept them safely in the officer locker. On the same day at different time, in company of Hafidhi and DC Engelbart, he witnessed evacuation of 11 pellets by the accused person at about 7.44 Pm. As well on 25th July 2010, at 3.00am, 24 pellets. According to his evidence, at the time he left his office in the morning, he had 50 pellets. The same were taken to ADU and handed to Insp. Neema, the exhibit keeper.

On the same day, he went back to office in a night shift at JNIA. He was with DC Engelbart. He received from Dc Gabriel, 9 pellets and the accused were handed to him. On 26th July 2010 at about 12.50 am, with Mganga Nassoro, and DC Engelbart, they witnessed defecation of 11 pellets.

He testified further that in the morning that followed he handed him to DC Athuman and took 20 pellets to the office at ADU. They were handed to Insp. Neema, the exhibits keeper.

Pw3 went on testifying that DC Engelbart is now deceased while DC Gabriel left the job and does not know where to find him. He lastly identified the exhibit P1 and the accused person in the dock.

Nassor Mganga (Pw4)

He is the Immigration officer in Mkinga District of Tanga Region since 2018. Previous he worked at JNIA, in the same capacity. He told the court that on 24th July 2010, at about 2.45pm, was informed that there was a person suspected of have carried narcotic drugs in his stomach from Brazil to Tanzania. He was called Rashid Salum Mohamed. That person was held by the Anti-Drugs Unit at JNIA. On 26th July 2010, at about 12:45am, he said was called by DC Emmanuel a police officer. He wanted him to witness the accused emit pellets. In the presence of DC Engelbart and DC Emmanuel and the accused, 11 pellets were emitted at about 12.50am. He then identified exhibit P1

A/I JAFARY (Pw5)

He said, in 2010, worked with Anti-Drugs Unit (ADU). He was a sniffer-dog handler and investigate crimes related to drugs. He alleged that on 24th July 2010, at about

2.00pm. a passenger called Rashidi Salum Mohamed who was coming from Brazil aboard Qatar airways arrived. He was stopped because he was suspected to have carried narcotic drugs based on intelligence reports. He was kept for care and observation at offices at the JNIA.

He told the court that at about 5.40 pm, the accused wanted to go to the toilet. Independent witnesses were invited to witness if he had drugs.

Among them were Peter Kavishe an officer from TRA, while DC Gabriel and DC Valentine as police officers were present to witness the evacuation process. When he was doing so, they were witnessing. The accused got to the toilet he evacuated 9 pellets, thought to be narcotic drugs. He kept 9 pellets in the office locker, special for that matter. Since he was the shift in charge, he took custody of the same. At about 6.40pm, in presence of the same people, the accused defecated 6 pellets. He did it again at 7.00Pm where 6 pellets were evacuated. They were 15 pellets that he surrendered to DC Emmanuel as he finished his duty of the day. At about 2.00pm, with DC Gabriel and Valentine, and Jonas Sosthenes from TRA. The accused emitted other 9 pellets. The accused was identified and the witness also identified exhibit P1.

Hafidhi Abdallah Lupenu (Pw6)

In 2010, worked at JNIA at the customers department. On 24th July 2010, he testified, was on duty. At about 2.45 pm, was called at ADU, by Dc. Emmanuel. As an independent witness, in the presence of DC Engelbart, he witnessed the accused Rashid Salim Mohamed defecating 11 pellets. It was his evidence that again on 25th July 2010, at about 3.00am. he witnessed the similar exercise where the accused emitted 24 pellets. It was his evidence that the same was done in the presence of DC Emmanuel, Engelbart and the accused. In both situations, he said, the pellets looked similar, in a size of his thumb, rolled in light white sole tape. Pw6, apart from identifying an accused in the dock, he also identified pellets exhibitP1.

A/Insp. Wamba (Pw7)

He is the police who worked with the ant-drugs Unit (ADU) for about 16 years. Apart from other duties, he worked in the investigation department. It was his evidence that he was informed of the accused person called Rashid Salum Mohamed and assigned

to interrogate him which he did. He then recorded the cautioned statement. It was on 29th July 2010. According to him, all rights were observed before the statement was recorded. It was read to him, he admitted to have committed the offence he therefore signed. He said, he confessed having transported narcotic drugs in his stomach. The caution statement was recorded at 8.00 am to 9.24 am. He tendered the cautioned statement and admitted as P3, which was read in court.

ASP Petro Maskamo, (Pw8)

In 2010, he worked with Ant Drugs Unit. On 24th July 2010, he was assigned to investigate the case where the suspect was Rashid Salim Mohamed, the accused. He was with A/I Wamba who assisted him. After that he further said, the accused was recorded to have been trafficking in narcotic drugs from Brazil via Doha to Dar es salaam. It was stated that he had boarded Qatar airways. He was arrested at 14:45 hrs. Pw8, arrived at JNIA. He found him under arrest in the hands of DC Jafary and DC Gabriel.

On 26th July 2010, he recorded the statement of F.8835 DC Engelbart, Peter Kavishe, January Sospeter, Hafidhi Lupenu and F 4147 DC Emmanuel. It was at the office of ADU and that the same were recorded under section 34B of evidence Act. He tendered statements of January Sospeter, Peter Kavishe and F 8835 Engelbart, which were collectively admitted P5.

Pw8 also witnessed parking of the pellets at ADU officers. The same was done by SSP Neema before they were taken to the Chief Government Chemist on 29th July 2010. He said, the same were 82 in number.

SSP Neema Andrew Mwakagenda (Pw9)

In 2010, worked with police Ant Drugs Unit. She worked as an investigator and an exhibits keeper. According to her evidence, she kept 82 pellets of narcotic drugs. The same were kept in a special room for exhibits upon registering the same. She said, she had received the same from DC Emmanuel and DC Gabriel on different dates.

They are the same drugs which she parked on 29th July 2010 in the morning hours and sealed. He identified them with reference No. KLR/ 1R/2458/2010. They were sealed, according to her in the presence of the head of the unit one Nzowa, Amina

Shoko, the accused Rashid Salim Mohamed and other police officers. She testified that before sealing them she did following things:

- i. counted the 82 pellets
- ii. put them in an envelope, an A3 one
- iii. sealed them with sole tape around it.
- iv. sealed with red fire seal (lakiri ya kuchoma).
- v. wrote the case No as KLR/1R/2458/2010.
- vi. wrote on it "pipi 82" zenye dawa zidhaniwazo kuwa za kulevya) (substance suspected to be narcotic drugs).

Upon doing that, she took them to CGC for test and analysis. She was in a company of Inspector Duma and Dc Emmanuel. At the CGC office, they were received and given lab No: 542/2020.

It was her evidence further that Mamuya the chemist apart from weighing them she preliminarily ruled out upon analysis as cocaine, weighing 1374. 32 gm.

After the confirmatory test, she said, a report from the government chemist confirmed it was cocaine hydrochloride. Exhibit P1, the pellets were identified along the report exhibit P2. She also identified the accused Rashid Salum Mohamed.

Bertha Fredrick Mamuya (Pw1,)

Her evidence was that in May 2014 to 2017, she worked with the Chief Government Chemist Laboratory. She did investigation/analysis of samples in Criminal offences because she has expertise in forensic science. She told the court that she worked for over 30 years in the field. On 29th July 2010, she testified, she got 82 pellets from Pw9, SSP Neema. Upon preliminary test, it was found, the same were narcotic drugs known as cocaine. The same according to her evidence weighed 1,374.32gm. After that, the same was re-parked and sealed and given back to Neema.

Further to that, Pw1 did the confirmatory test by a machine called gas chromatography to identify and confirm that it was cocaine hydrochloride. On 7th September 2010, a report was prepared in response to a letter from ADU. The same was referred to the acting CGC, for approval. Pw1 then tendered 82 pellets. They were admitted as P1 while the report was admitted as P2. From this report and the evidence of Pw1. Based

on the experience and the expertise that Pw1 has, this court is of the firm view that the same 82 pellets were cocaine hydrochloride.

Christopher Shekiondo (Pw10)

Last witness for the prosecution is retired commissioner for National Coordination of Drug Control Commission. He tendered the certificate of valuation of the drugs. The value of which is according to him was 54,972, 800/= . It was admitted as P6.

Defence case

The accused denied the charges as stated before. He totally denied any involvement in the commission of the offence. He told the court that although he is a frequent traveller but did not travel to Brazil in 2010. He had been there in 2009. In several other occasions, he had gone to Brazil, Singapore, China, Hong Kong etc. The purpose of his travelling, he told the court, is to do business. When he last went to Singapore and Hong Kong was for checking prices of cars. He further said, on the day it is alleged he committed the offence, was in Tanga celebrating 40th day following his father's death. Stating how he was arrested, he testified, he was arrested on 27th July 2010 at place called Chipolopolo at Magomeni where he lived. He was arrested by police officers who had in their motor vehicle a person called Issa. The reason for this case, he testified was that, he had a conflict with Issa. He was having an affair with his girlfriend. He in actual fact snatched her from him and promised to fix him if he was to still follow her. Upon his arrest on that fateful day, he was taken to Msimbazi police station and after three days or so was charged in court for the offences alleged here.

In yet another material defence the accused denied the name of Rashid Salim Mohamed appearing in the charge sheet but accepted that his name is Rashid Ramadhan Mohamed. This means according to his evidence, all charges facing him are not his, since they are facing a quite different person. He tendered his passport to prove his name(D5) and asked for an acquittal. He did not call other evidence.

Having clearly ruled out that the pellets were drugs as charged, it is important to find out if indeed, it has been proved that the same drugs since they were found, the chain of custody was broken or not. In this case, it is Pw5 who alleged arrested the accused

at the JNIA on 24th July 2010. His arrest followed intelligence report that the same was coming from Brazil. He kept at the JNIA according to Pw5 from the date of arrest to 26th July 2010. It is this time according to him, he with Pw3, Pw4, Pw6 witnessed him defecate 82 pellets exh. P1. Among them were also Peter Kavishe, January Sospeter and DC Engelbart whose statements were recorded by Pw8. They could not be found to testify. Their statements therefore were admitted collectively as P5.

Their evidence shows that the accused defecated on 24th, 25th and 26th the accused when held at JNIA by the anti-drugs unit officers, immitted from his stomach the 82 pellets.

Pw9 kept the pellets in her officer at Ant-drugs unit at Kurasini. In his evidence Pw9 said, said she received the same from DC Emmanuel (Pw3) and Dc Gabriel also testified to that effect. Pw3 also testified so, he said he indeed took to Pw9 pellets as they were emitted by the accused person. exhibit P4 is the statement of Dc Gabriel it also categorically says, he took to Pw9 pellets on 25th July.

Pw2 witnessed Pw9 parking the pellets. It was in the officers of ADU in the presence of the accused, other police officers and Pw7. She said, it was on 29th July 2010. The same were parked and taken to the Chief Government Chemist for examination. The parking according to Pw9 was done by counting and found were 82 pellets, put in an A3 envelope, tied with sole tape around the envelope, sealed with red fire seal (lakiri ya kuchoma), then writing the case No as KLR/1R/2458/2010, then writing on it "pipi 82" zenye dawa zidhaniwazo kuwa za kulevya) (substance suspected to be narcotic drugs). After that signature followed. Pw2 was of the same evidence in respect of the exercise. As to how they were transferred to the CGC, she went Duma a police officer and Dc Emmanuel (Pw3). At the CGC office, they were received and given lab No: 542/2020.

It was her evidence further that Mamuya the chemist apart from weighing them she preliminarily ruled out upon analysis as cocaine, weighing 1374. 32 gm. In this point Pw1 and Pw9 have clearly stated so.

Before this court, as testified by Pw1, she identified the same and tendered them. the same description stated by Pw9 and Pw2 were exactly the same as seen in court. the

marks stated during the sealing process, both at ADU and CGC were shown in court. in this point I am convinced that the chain of custody was not broken.

The prosecution has that orally before this court. It should be noted that the defence counsel submitted that there was no paper trail or documentary evidence that proved the chain of custody. I agree with him that there was no such documentary proof. The chain of custody in many respects starts when the exhibit is seized. When for instance search is done a certificate is procured and that is what puts in motion the paper trail. This was categorical in the case of **Paulo Maduka and 4 others vs Republic**, Criminal Appeal No. 110 of 2007. The Court of Appeal held as hereunder;

"...Chain of custody is to mean a chronological documentation and / or paper trail, showing the seizure, custody, control transfer analysis and disposition of evidence be it physical or electronic..."

The court went on stating that;

"The prosecution had to keep a proper record of the monies seized by recording their serial numbers and the appellants and independent witness would have put their signature thereon and each retained a copy of the same. Thereafter, a foolproof chain of custody would have been set in motion. By "chain of custody" we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, transfer, analysis and disposition of evidence, be it physical or electronic".

It was further clearly said;

"...the chain of custody requires that from the moment of 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 have held that the prosecution tendered evidence proving that the chain of custody was orally proved. Rightly so because even the station diary where it is alleged pellets were recorded upon defecation as said by Pw3 and other witnesses who witnessed the so doing was not tendered in evidence. In my view, whether documentary or oral

any evidence to be used, must found credible by the court. And if I may add, when then the court encounters a situation where the evidence an allegation as it is in this case that there was only oral evidence, the duty of the court is to weigh if the present evidence is or presents a true story of how things were done. But still, it was the prosecution submission that its oral evidence is as good as oral and the Court of Appeal has ruled out so in the case of **Marceline Koivogui v. R**, Criminal Appeal No. 469 of 2017, it was held at Page 32;

"...that documentation is not the only requirement in dealing with an exhibit and it will not fail the test merely because there was no documentation, and that other facts have to be looked at depending on the circumstances in every particular case..."

Taking the decision of the court by its content, I agree with the prosecution that the position in **Paulo Maduka** and **Marceline Koivogui** have cleared the doubt on how courts have to handle both oral and documentary evidence. The test therefore is not a hard and fast rule, it all depends in the circumstances of each case. In this therefore, I hold that oral evidence has proved that the chain was not broken.

The defence case was straight forward. It stated that the case was not proved against the accused. First there is a dispute that the accused is not called Rashid Salim Mohamed. Therefore, the charges facing Rashid Salim Mohamed is not facing him but a quite different person, since he is called Rashid Ramadhan Mohamed.

To prove so he tendered his passport to prove his name. It was admitted as D5. He went on saying, at the time of his alleged arrested was not in Dar es salaam, but in Tanga. On these two issues, the prosecution has brought evidence claiming that the accused according to the charge sheet is named by all names that is Rashid Salim Mohamed also known as Rashid Ramadhan Mohamed. But according to the defence that name notwithstanding, the prosecution witnesses arrested him in Dar and was witnessed evacuating pellets as witnesses have shown.

As the defence of alibi, I was asked to disregard the same because no notice was issued under before the prosecution case was closed as under section 194 of the CPA. In this point, I entirely agree that the defence did not issue the notice showing the

particulars of the alibi as the law requires. He failed to do so before the case started as per section 194(4) and neither did he do the same before the prosecution closed its case as under section 194(5) of the CPA. But under section 194(6) the court is enjoined if neither of the two is done as in this case, under its discretion may give due weight or disregard it. In order to do that in my view, the court has to measure, if the same has credibility all along measured with other evidence on record.

The accused testified that he was arrested at the place called Chipolopolo. The source of his arrest is the conflict between him and one person about a girlfriend. Taking consideration of his evidence I do not see if the same is plausible. I do not as well believe that the same may be true. If it were then we could have seen why police officers from ADU, independent witnesses from Immigration and TRA would have also conspired with his enemy to frame up such a serious case just from nowhere. It is from this background information, I think, I have to disregard his defence of alibi.

Pw7 recorded the cautioned statement of the accused that is exh. P3. It was according to Pw7 recorded on 29th July 2010. He did so at 8.00 am to 9.20 am. He did so after he was arrested and four hours had elapsed. In the statement the accused admitted the offence and said how the same was committed. From his evidence, the accused did not at any point in time allege that he did not record the said statement or that what is recorded is not true information about what happened. The only allegation is that it was recorded out of time.

I dismiss the defence because, in my view the nature of the case could not under normal circumstance dictate that the same have the statement recorded. As well, confessional statements are statements made willingly. The accused may appear to have admitted days after his arrest and after 4 hours stated. This therefore unless proved otherwise there is no reason to disregard the same as I was asked to do. Although I am aware that the admitting the statement is one thing and giving it due weight is another, but in order to disregard the same there must be sufficient reason to do. In this case there is no such ground.

Now from the foregoing can it be said that the case has been proved? When the case was summed-up to two ladies and a gentleman assessor, there was a divided opinion.

While the two ladies were of the view that the case has been prove, the gentleman was of a different view that the case was not proved. Based on the evidence as I have shown before, I am of the considered view that the case was proved beyond reasonable doubt. I have shown how the accused was arrested at the JNIA. Witnesses have shown how he defecated pellets he carried in his stomach from Brazil. It has been chronologically shown from the seizure, custody, control, transfer, analysis and disposition here in court was done. This shown the chain was not broken. It is clear that the same were narcotic drugs of the value stated in exhibit P6. All this in my view prove the case accused committed the offence. I hereby convict him of the offence as charged contrary to section 16(1)(b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs Act.

AK. Rwizile
Judge
18.06. 2021



Recoverable Signature

X

Signed by: A.K.RWIZILE

