

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL SESSION CASE NO. 13 OF 2015**

**REPUBLIC**

**VERSUS**

**1. MOHAMED BAKARI MNEGA**

**2. ATHUMAN OMARI KWANGAYA**

**JUDGEMENT**

4<sup>th</sup> & 23<sup>rd</sup> June 2021

**Rwizile, J**

The accused persons stand charged on one count of trafficking in narcotic drugs. This, however is contrary to section 16(1)(b) of the Drugs and Prevention of Illicit Trafficking in Drugs Act [Cap 95 R.E 2002], to be referred herein as the Act. It has been alleged that on 26<sup>th</sup> January, 2013 passed mid-night at Bwawani area along Morogoro -Dar Highway, the police officers namely E.2898 D/CPL KIZITO, D 8644 D/CLP ABDUL, E. 2621CPL TUMWIDIKE and F.2164 CPL STEVEN were on normal night patrol. They received police information from Morogoro, informing them that a motor vehicle, make Toyota Noah with registration number T856 BZC suspected to have carried cannabis was cruising at a very high speed along Morogoro -Dar Es salaam road.

Following that notification, a road block was set at Bwawani to stop the same. Some minutes later, at the same place the said police officers saw a similar car in a dangerous driving speed. Their efforts to stop the same nipped in the bud. Even shooting at it, could not stop it, due to its speed. The same swerved along, but managed to escape. They started pursuing it. Meanwhile they notified police officers at Chalinze who set another road block.

Despite their coordinated efforts, it was to their surprise that they could not trace it until they met a Chalinze road block. With the Chalinze police officers, they decided to retreat. They went back searching. At kibiki area along the same way, they saw marks of car tires leading to the bush.

This time, their search efforts proved fruitful. A motor vehicle Toyota Noah with registration number T856 BZC was found hidden in the bush few metres from the road. The police officers charged towards and surrounded it. Shouting around with intention to shoot whoever is seen nearby the car, the second accused came out beseeching them not to. They arrested him and took him to the car. They inspected the car and found nineteen (19) sacks of plants suspected to be cannabis. One police officer E.2898 D/CPL KIZITO prepared an emergency seizure note where those sacks of cannabis were recorded upon being seized. The second accused person signed that seizure note among others. He told them that they were two, with a fellow who was not seen around.

The motor vehicle was searched around. They found no ignition key. They pulled it by using their vehicle to Chalinze Police Station together with the 19 sacks of the plants. These exhibits were handed over to E.9425 D/SSGT GEOFFREY for his custodianship. The second accused person was also taken to Chalinze Police Station. As they were going back to their duty station at about 6.30 am, the same officers met someone along the same road at the place they found the second accused. He was suspected and upon stopping him and interrogating him, he admitted to have been with a fellow in a Noah transporting cannabis hours before. This is the first accused, who was also arrested and taken to Chalinze police post and joined with the second accused.

The two accused persons were interrogated and confessed to have committed the offence. Investigation was mounted. Ultimately, they were charged of trafficking in narcotic drugs contrary to section 16(1)(b) of the Drugs and Prevention of illicit Traffic in Drugs Act [ Cap 95 R.E. 2002].

The said 19 sacks were later taken to Chief Government Chemist for examination. It was confirmed that those sacks had contained cannabis sativa weighing 390.50 kilogram.

According to the Certificate of Value issued by the Ant-drugs authorities, the said cannabis was valued at Thirty-Nine Million Fifty Thousand only (Tshs 39,050,000/=).

To prove the charge, the prosecution brought in 9 witnesses. The prosecution, was led by Veronica Matikila being assisted by Mr. Apimaki Mabrouk, Ms. Anunciata Leopold and Ms. Chivanenda Luwongo senior State Attorneys, Ms. Clara Chawe, Ms. Estazia Wilson, Ms. Monica Matwe and Mr. James Palangyo State Attorneys. The defence was mannered by two counsel, Ms. Hajira Mungula, Advocate for 1<sup>st</sup> accused and Mr. Ambrose Nkwera, Advocate for 2<sup>nd</sup> accused. The accused persons testified on their own without calling witnesses. For the sake of clarity, the evidence is summarized as hereunder;

**Christopher Joseph Shekiondo** (Pw1). He was of the evidence that before retirement, he worked as the Commissioner for the National Coordination of Drug Control Commission. He therefore had mandate vested by law to value and issue certificate of value of narcotic drugs or psychotropic substances. It was his evidence that on 26<sup>th</sup> March 2013 received a letter from the police asking him to value and issue a certificate of valuation of cannabis sativa@Bhang. According to him, the same was weighing 390.50kg. He told this court that from the office data base, the value of cannabis per kilogram was at 100,000/=. He therefore multiplied the same with the number of kilograms and found the value was 39, 050,000/=. He therefore issued the certificate. It was previous admitted at the preliminary hearing as exh. P2. He read it in court.

The second witness for the prosecution is **Assistant Inspect Geoffrey** (Pw2). As the police officer, he said he worked with police force at Pwani Region as an exhibits' keeper. He testified, he worked in the RCO's office. His evidence is that, on 26<sup>th</sup> January 2013 when on duty, he received instructions from the RCO one Juma Yusufu to receive exhibits and the accused persons. He was in the company of Inspect Minja.

He said, they were 19 sacks of the substance suspected to be cannabis sativa, parked in Silver Noah car with Reg. No. T856 BZC. The suspects were Mohamed Mnega and Omary Kwangaya.

According to his evidence, he was given a case file number assigned to the same from Chalinze where the matter originated. It was CHAL/IR/231/2013. The same contained details of the substance and there was also a certificate of seizure.

Upon receiving the same, he registered it with PF-16 and assigned each sack, serial number from 1-19. He also wrote the case Number on the car that kept the exhibits. According to his evidence, Pw2, then, locked the car and parked it at a special area within the police premises and surrounded the same with a red tape for security purpose. He said, all this was done in the presence of the accused and the exercise was completed in the late evening of the same day.

Further, on 31<sup>st</sup> January 2013, he took the exhibits with some extracted samples to the office of the Chief Government Chemist for analysis. At the Chief Government Chemist, the exhibits were assigned Lab No. 70/2013 at the reception. Upon preliminary test, it was found that all 19 sacks of the substance were confirmed to be cannabis sativa weighed 390.50kgs. The preliminary results were confirmed as such because the report was out on 26<sup>th</sup> March 2013.

His evidence did not end there, upon receiving a report, he went to the Commissioner for the National Coordination of Drug Control Commission for valuation of the same. He got the certificate from Pw1. He recorded the statement of Isaka and Minja in 2014. He went on saying, the two persons are now deceased. The witness tendered their statements under section 34B of the evidence Act. They were marked P3 collectively. The report from the Chief Government Chemist was admitted as P4 and 19 sacks of cannabis sativa as P5.

**Professor Samuel Manyere** (Pw3) is the lecturer at the University of Dar-es salaam. He is trained as the chemical and processing Engineer and became a professor in the field since 2011. In 2013 to 2018 he was the Chief Government Chemist. Based on his knowledge and expertise, he is, as a matter of law entitled to verify the reports on examination of exhibits upon laboratory examination. In respect of this case, he told this court was furnished with a report done by one of the chemists in his office called Isaka

who is now deceased. It was on 21<sup>st</sup> March 2013 when the same was brought to him. It was in the file containing detailed information on how the exhibit was tested and analysed. According to him, he confirmed that the findings arrived at, were accurate. He therefore verified the same. He then identified the report as exhibit P4

**Ex- E 2898 DC Kizito** (Pw4) is the retired policeman. He worked at Chalinze police station in 2013 before retirement. On 25<sup>th</sup> January 2013, he was assigned to patrol along Morogoro -Dar Road. His duty station was at Mdaula out post. In the company of Cpl Abdul, Steven and Tumwidike went to patrol at Mwidu.

At about 2.00 am, he received a phone call from police Morogoro alerting him to stand steady along the same road and stop a motor vehicle which was suspected to have carried bhang. He prepared his guard and put a road block at Bwawani. He was told that the suspects are in Toyota Noah, Silver coloured with registration No. T856 BZC.

At about 2.55 am, the same car was noticed in a very high speed. It was stopped without success. Even efforts to shoot at it could not be successful because cpl Steven who was commanded to shoot at its tyre failed. He shot the board instead, which caused the motor vehicle to swerve but did not stop.

They tried to pursue it in vain, until they reached Chalinze where they had previously alerted their fellows and had set another roadblock. Upon meeting at Chalinze, he went on saying, with his team and policemen from Chalinze, they went back tracing the same. At Kibiki Village, along the same high way, they saw wheel tyre marks deflecting to the bush. They followed the way and managed to see it parked in the bushes some few metres from the main road.

He asked his men to charge towards the bushes with their guns ready to shoot whoever is found. Someone shouted from the bush asking them not to shoot. He introduced himself as Athuman and said he does not know where his fellow Mohamed was. He was arrested. It was at about 3.00am. He seized 19 sacks of bhang and prepared a seizure note. He signed it and Athuman signed too.

They pulled the motor vehicle to Chalinze police post and arrived at Chalinze at about 6.30 am. They handed the car and its exhibits and the suspect one Athuman Mohamed and then left.

On their way back, they saw someone in barefooted and without a shirt. He was suspected and arrested. It was around the place where the 2<sup>nd</sup> accused was found. He admitted to have been with Athuman. He was called Mohamed, first accused. They also took him to Chalinze and joined his fellow. He tendered the seizure note as an exhibit, P6

**Ziliwa Peter Machibya** (Pw5) is another witness for the prosecution. It was his evidence that he worked with the Chief Government Chemist laboratory as the chemist. He remembered that on 31<sup>st</sup> January 2013, he was in the officer with Isaka. They received exhibits with Lab No. 70/2013. It was 19 sacks of the substance suspected to be bhang. He assisted Isaka now deceased to take samples and gave him for testing. After doing that it was ruled out that the same was pure bhang. It was from a policeman called Geoffrey from police Pwani. He said, Isaka kept the sample for confirmatory test which he did later. The exhibit according to him was taken back to the same policeman. He identified the report as P4

**G. 2780 PC Paulo** (Pw6) he works with police force as the driver and a policeman. He worked with RCO Pwani. According to his evidence, on 26<sup>th</sup> January 2013 he was directed by his boss to go to Chalinze to assist pull a motor vehicle with exhibits to Kibaha police station. At Chalinze, he met one Khamis the exhibits keeper. Because he has technical expertise in motor vehicles, and the same could not move, he assisted to pull it. According to him, he was with Khamis the fellow police officer and two others, he was told were accused persons. They arrived at Kibaha with the car, exhibits and the accused at about 3.00pm. Upon reporting to the RCO, Geoffrey and Minja were called by the RCO. They were handed the exhibit by Khamis. According to him, at about 6.00pm, he was discharged.

On 31<sup>st</sup> January 2013, he was again asked to take exhibits from Kibaha to Dsm at the government Chemist for analysis. He did so with Geoffrey. He was asked to do the same on 11<sup>th</sup> May 2021 to take the same from Kibaha to this court for the case.

**D 2121 DSST Mussa** (Pw7) is the police officer who retired in 2015. Before his retirement, he worked with the police force for atleast 27 years. He told this court that on 26<sup>th</sup> January 2013, at about 7.30 pm, he was directed by his boss to handle an accused person called Athuman Omary. He wanted to make a confession. Upon meeting him and observing all his right, the same admitted to him to have committed the offence. He reduced his confession into writing. It was admitted as P7. He identified the person as 2<sup>nd</sup> accused Athuman Omary Kwangaya.

**Ex. 8654 D/SSGT Khamis** (Pw8), is the police officer who worked at Chalinze police post. He told this court that he was an exhibits keeper at the station. On 26<sup>th</sup> January 2013, he received a directive from his boss in the morning hours as he got to the daily duty. He was asked to take the arrested persons and their exhibits to Kibaha at the RCO's office. He got the same from Kizito. He started the safari to kibaha at about 12.30 pm and arrived at Kibaha by 3.00pm where he handed the same to one Minja and Geoffrey. He said, the exhibits were in a motor vehicle a Noah- silver in colour T856 BZC. He identified the accused persons in the dock as the person he travelled with on that date but could not figure out who is Mohamed or Omary.

**E. 9057 D/SSGT Douglas** (Pw9), is a policeman working with the police at Kibaha. He testified that he was instructed on 26<sup>th</sup> January 2013 at 19.22 hours to record the statement of Mohamed Bakari Mnega. He did so upon observing all his rights. He tendered the same. It has been admitted as P8. He told the court the accused admitted to have transported cannabis.

On the side of the defence, the accused persons have testified and denied to have committed the offence. They have tendered no witnesses and exhibits save for the statement by Ziliwa Peter Machibya (Pw5) as exhibit D1 arising from cross-examination.

On his part, the first accused person, who has been represented by Hajira learned advocate has told this court that, on 25<sup>th</sup> January 2013, he travelled to Mdaula. He said, he does business of selling goats. He buys them from different markets and auctions. At Mdaula where he went by bus and arrived in the evening from Dsm where he lives, he spent a night there and in the next morning at about 6.30 am on his way to the market, he was arrested by four policemen. They interrogated him and arrested him, on suspicion that he is among those who were trafficking in narcotic drugs the previous night.

Apart from taking his cell phone a nokia, they also took his capital, the sum of 1,500,000/=, which was for buying goats. He was then taken to the police station at chalinze and given the case, and he was brought to Kibaha. He was later charged. He denied to have known the 2<sup>nd</sup> accused person before. He only admitted to meet him in court when they were first charged.

On the second accused he gave a more or less similar account. Apart from denying to have known the 1<sup>st</sup> accused person, he said he did not commit the offence and that he never recorded any statement at the police Chalinze or Kibaha. His story is that he lives at Mbweni and does business of selling local chicken. He said, he buys the same from different markets and auctions. He said on 25<sup>th</sup> January 2013, he left for a market at Chalinze. He bought his chicken and, in the evening, as he was preparing to leave, the police motor vehicle, with policemen came by. He was arrested on allegation that he is among the bad guys who steal chicken from local people.

He was taken to the police station at Chalinze leaving behind his chicken. At the police station, other suspects who were with him in the police motor vehicle were remanded while he was not. He was taken away and told to lay down in the vehicle and started patrolling with him in the car. After a long time in the night hours, his money, the amount of 870,000/= was taken as well as the cell phone and a wallet. He was asked by the police officers to leave. He wanted his money but could not be given the same. He was ultimately, told he will be given the case.



He was taken to police station at Chalinze and remanded. In the next morning, he was taken from there to Kibaha police station. He was asked to only furnish his personal particulars which he did. On 29<sup>th</sup> January he was taken to court at Kibaha before Mshasha. He met the 1<sup>st</sup> accused there for the first time. According to his evidence, he did not take part in this offence and does not know anything about it.

Parties made closing submissions as shown hereunder. Miss Hajira for 1<sup>st</sup> accused, submitted that the first accused made his defence and told the court what happened on the day he was arrested. she said, he was arrested along the way going to the market in the morning. The learned advocate submitted further that his defence went in line with the evidence of Pw4 – Kizito, who said he was arrested on the way and not at the crime scene. According to her, it is Pw4 alone among the prosecution witnesses who said when the 1<sup>st</sup> accused was arrested.

She submitted that evidence of the 1<sup>st</sup> accused support Pw4, but contradicts the stated information which “reads in the charge sheet or information that the accused persons together were arrested trafficking in narcotic Drugs”. The statement on the information differs with evidence of Pw4 who said the two were not arrested together.

She went on submitting that exhibit P6, which is a certificate of Seizure or seizure note which was issued at the crime scene was not signed by the accused. The accused did not sign or even be mentioned anyway. This means, she submitted, he was not at the scene of the crime. This therefore conflicts the statement on the information which says they were together, the learned counsel asked this court to fetch support in the case of **David Athanas v. R** Criminal Appeal No.168 of 2017 at Page 8, Para 2 where the Court of Appeal interpreted Section 38 of CPA. She was vehement that, the accused was to sign along with independent witnesses. In the case cited, no weight was accorded to the document.

In the case at hand, she went on submitting, it is not only that the accused did not sign the statement at the Crime scene, he did not sign it at all. She was of the view therefore that, the information is at variance with evidence.

Worse still, the learned advocate commented, there was no independent witnesses. She further said, apart from having common interest to be protected by the police officers, the prosecution did not bring any independent witness, who could prove the accused admitted to commit the offence charged.

She said, there is no dispute that he was not arrested at the Crime Scene. The court has to look at what links the accused with this offence. The prosecution could have perhaps brought the owner of the car, who is called Sudi Selemani Saidi. He appeared in the list of prosecution witnesses, but that was not done. She therefore held, there is no evidence linking him with the offence charged. This, according to the learned advocate leaves the gap in the prosecution case. It is not proved therefore that the 1<sup>st</sup> accused was linked with it. The said Sudi Seleman recorded his statement, it was not even tendered.

In her view, the only evidence which would perhaps link the 1<sup>st</sup> accused with this offence is the retracted caution statement. However, she submitted, it was not corroborated by any other prosecution evidence as in the case of **Paul Maduka and other v R** Criminal Appeal No. 110 of 2007, where the Court of Appeal insisted the need for corroboration on retracted confessions. There is no corroboration what so ever, Hajira so submitted. In short, she was of the view that, since there is no evidence that links him with the case and since the information is at variance with evidence, the 2<sup>nd</sup> accused should be acquitted.

The defence counsel submitted as well that before proving the chain of custody, the prosecution had to show how the 1<sup>st</sup> accused took part in commission of this offence. This was not done. It was her prayer therefore that, the case has not been proved, because of the missing links.

Mr. Ambrose Nkwera submitted for the 2<sup>nd</sup> accused that, the case facing him was not proved for the following reasons; **One**, that the certificate of seizure or seizure note (P6) is a very weak piece of evidence. It was alleged signed by the accused who does not know how to read and write. For Mr. Nkwera, the accused was proved before this court, he does not know how to read and write, he could not therefore sign the seizure note.

Further, he submitted, there was no independent witness. He was in doubt as to why did they rush to sign it without independent witnesses at the crime scene. It seems therefore, the accused was not present at the scene.

**Second**, the owner of the motor vehicle was not called to testify. In his view, it could have shown who was given that motor vehicle and under which terms. This implies that, perhaps, he is the owner of the bhang or if called could have testified against the interest of the prosecution.

**Third**, according to him, the chain of custody of cannabis, from Chalinze to Kibaha, then to Chief Government Chemist and later to court, had no documentation to prove so.

There are mere words from the prosecution witnesses, he submitted. The PGO No. 229 is clear on the movement of exhibits. The chain was not therefore proved, he commented.

**Fourth**, submitting on the cautioned statement, the learned counsel again was in serious doubt. The accused said he does not know how to read and write. The 2<sup>nd</sup> accused told the one who recorded the statement about not knowing to read and write, but it is funny that he is alleged to sign it. How could that happen. Further, the learned advocate said, the statement was recorded out of time. In his view, even though it was admitted, still, it may not be given weight, because it contradicted section 51 of the CPA. It should be excluded under section 169 of CPA.

In conclusion, Mr. Nkwera submitted that, the case was not proved against the second accused, he should therefore be acquitted. Reference was made to the case of **Said Hemed v. R** [1987] TLR 117 and **Edward Mwalemula v R** [1987] TLR 112.

Mr. James Palangyo for the Republic, submitted that the prosecution has the duty of proving the case as under section 110 of Evidence Act. The duty which has been discharged by the prosecution against the accused persons. The learned Attorney advanced the following reasons; that the chain of custody has been proved unbroken, and the prosecution witnesses proved how the 2<sup>nd</sup> accused was arrested by Pw4 and how exhibit P6 was executed even though it was on an emergency situation.

According to him, Pw4, told the court how he arrested the accused persons. He handed exhibits to Pw8. Pw8 and Pw6 took exhibits to Pw2 at Kibaha. From Kibaha, Pw8 and Pw6 testified how it was ferried to the Chief Government Chemist- exhibit P3. P3 was proved to be cannabis and it was proved by Pw5. Pw5 brought P4 which is a report and the same was approved by Pw3. It was also given to Pw2, who kept it and later brought it to court. This means, the chain was not broken. According to the learned State Attorney, the case was proved, even if there is no documentary proof of the chain of custody. He further submitted, the prosecution brought evidence under section 62 of Evidence Act.

The other evidence according to the prosecution, is the certificate of seizure or seizure note which was on emergency situation. He submitted that it is not a requirement of the law that on emergency cases, search should be accompanied with such a note. But Pw4, in the view of Mr. Palangyo, executed it under such conditions and it was difficult to trace independent witnesses. In the similar scenario, the learned Attorney asked this court to follow the case of **Jibril Okash Ahmed v R**, Criminal Appeal No.331 of 2017 at page 29 – 36. On his part, it was proved that the accused had knowledge that they were in possession of cannabis. He then said, the fact that the 1<sup>st</sup> accused was not arrested at the crime scene does not exonerate him from committing the offence.

He submitted as well, that the accused persons admitted to transport the same and not the owner. He said, even though they did not admit to own the same, but they admitted to have transported it. The prosecution, he submitted, has proved by Pw4 and exhibit P7 and P8 which are cautioned statements of the accused persons.

It is his belief, that the conducts of the accused before and after commission of the offence, corroborates the prosecution case because that is constructive possession. He asked this court to refer to the case of **Yanga Omary Yanga v R**, Criminal Appeal. No. 132 of 2021. It was submitted that the prosecution evidence was clear and did not conflict. Even if there is a conflict, he said, it should be noted that, it did not go to the root of the matter as in the case **Deus Kilala v R**, Criminal Appeal No. 191 of 2018 at Page 9,10 & 11. The accused totally denied and that total denial proves and corroborates

the prosecution case as it was held in the case of **Lemond Joseph Nyanda v R**, Criminal Appeal No. 186 of 2017 at page 16.

In another stance, Mr. Palangyo said, the prosecution witnesses were of good demeanor, which lacked on party of the defence for having denied participation in everything. Here I was asked to refer to the case of **Nkanga Daud Nkanga v R**, Criminal Appeal No. 316 of 2013. Their cautioned statements should be taken and considered as the best evidence. The cautioned statements prove how the offences were committed and the case of **Nyerere Nyangue v R**, Criminal Appeal No. 67 of 2010 is in support of the position, that the case was proved beyond reasonable doubt.

Having heard the evidence of both parties and their submission, it is important to note that the accused persons are charged of trafficking of cannabis sativa. Under section 2(1) of the Act, as listed in the third Schedule, cannabis is a prohibited plant. The prosecution has to inter alia prove that the accused persons were found with cannabis. The prosecution must prove that leaves, branches and seeds brought as exhibit P4 is cannabis or bhang. In this respect there is ample evidence proving so. First, is the evidence of Pw4, who said he arrested the accused persons on 26<sup>th</sup> January 2013. It was the prosecution case, supported by the report from the chief government chemist that the same exhibit was cannabis sativa. The report date 21<sup>st</sup> March 2013 as prepared by one Isaka E.L.J is clear on this point. It is unfortunate that the author of this report is now deceased. His statement was admitted in evidence. But Pw3 and Pw5 were of the evidence that the same was examined by him. Pw3 verified the report to contain true and accurate information. Pw5 was present when the samples were taken and actually assisted in taking the samples. Convincingly, it has been proved that exh. P4 is cannabis sativa which in law is a prohibited plant. This means, if one is found in possession of such a plant or found trafficking it, commits an offence.

The above conclusion is leading me to another issue the prosecution must prove. This is whether, there is evidence proving that the accused persons were indeed found in possession of the same plants. This issue poses a great deal of analysis. Going by evidence, the whole saga started with police information from Morogoro to Pw4.

Pw4, as shown before, was a police officer who worked in the Coast Region stationed at Mdaula police out post. He alleged upon receiving information that the motor vehicle, a silver Noah with registration No. T 856 BZC was suspected to have carried cannabis. He started patrolling along the Morogoro -Dar es salaam road. When at Bwawani where he set a road block, he saw the described motor vehicle.

Because they failed to stop the same, he and his fellow policemen Steven and Tumwidike started pursuing it. It could not be found until they reached Chalinze where another road block was set. They could not get it. They retreated now tracing it along the road on the way back to where they came from. They successfully found it and arrested the second accused at Kibiki where the same car and bhangi were hidden in the bushes.

He tendered exhibit P6, a paper he alleged was recorded at the crime scene. The paper according to him, represents a seizure note done in the emergency situations. This paper purports to comply with section 38 of the CPA and is alleged to have put a paper trail in respect of the chain of custody of exhibit P4, in motion. The prosecution alleged, it was proper for him to do so given the circumstances of the case. But still, it was submitted that the same under obtaining circumstances, was not even needed. The situation as stated by Pw4 is that when the 2<sup>nd</sup> accused was arrested, it was at about 3.00am. It was in the bushes, a bit distant from the Morogoro -Dar es salaam road. The situation was not conducive, I think, for the same to have the seizure or search certificate prepared before.

I am saying so, because Pw4 received the information at night and it was also to be acted upon quickly. The information to him, was clear that the suspects were in motor vehicle in a very high speed towards Dar es salaam. Upon arresting the same, it was as I said in the bushes. It was not expected to find an independent witness in such situation. They could not, in my view trace the local leader to assist in the same due to the circumstances stated.

In such a situation, section 38 of CPA could not be complied in terms of issuance of search order as it could have been in the normal case.

The same requires a search warrant to be issued as under section 38(1). But under subsection 3 of section 38, the certificate has to be issued by the searching officer upon seizure of the exhibit. This was complied with as exh. P6 shows. The law does not as far as I am aware prescribe the format through which the certificate of seizure should be like. Again, the same requires signatures of the witnesses if any. This could not be practicable in the circumstances of this case.

The defence stated that the same is alleged signed by the 2<sup>nd</sup> accused. The same it has been said does not know how to read and write. There is no evidence clearly showing so. But if we were to go to the evidence of the accused persons. They have all admitted to have been to Chalinze at the time of arrest. They are admitted to have gone there a day before. When the first accused said he went there to buying goats at the market, he admits to have been arrested at the place stated by the prosecution and at the time stated by the prosecution. He was arrested early in the morning. He said, he was alone on the way to the market. For the second accused, he too said was arrested there but in the evening. He too claimed to have gone there a day before for his chicken business.

Their defence does not greatly bring the picture that their cautioned statement exhibits P7 and P8 contain false information. This is so because, as detailed as they are and the fact that they admitted to be transporting cannabis from Morogoro, it goes without saying that the same were found committing the offence. This corroborates, in my view, the evidence of Pw4. With this, I am tempted to agree with the prosecution that the accused persons were found in possession of the cannabis.

It is always the case that confessional statements of the accused persons are considered the best evidence if believed to be true. It has as well to be supported by other evidence from the prosecution witnesses if retracted as submitted by the defence counsel. In this case, the defence did not retract their confessions when they were tendered. Their objections centred on the fact that the same were recorded out of time. From what I know, the cautioned statement may be retracted or repudiated. That is to say, one says, he did not make any statement at all, or that it was obtained by illegal means, such as torture, coercion or promises leading to untrue confession.

In this case, this was not the allegation by the accused person when the same were tendered in evidence. The point raised was that they were not recorded in time of 4 hours prescribed by the law. In my view treatment of these confessions could be different, if they were otherwise repudiated or retracted. They should be considered illegal if contradicted section 27(3) of the Evidence Act. This is what even if admitted are subject of exclusion in evidence under section 169 of the CPA. In my considered opinion, and in actual fact, section 169(2) and (3) suited the admission of exhibits P6, P7 and P8. But all in all, there is evidence showing that there was consistency in key things that formed the case.

When Pw4 arrested the accused persons and exhibit P4. They were taken to Chalinze police post. Pw8 who is the exhibits' keeper at Chalinze handled the exhibits. He told the court that they were kept in the motor vehicle which was at the police station locked and the surrounding premises were protected to avoid tempering with the exhibits. They were kept there until the same were taken to Kibaha at the RCO's instruction. He did so and was on assistance of Pw6. The role of Pw6 was to unlock the vehicle with exhibits and pulled the same to Kibaha. As it arrived at Kibaha, it was received by Pw2. This man is the exhibits' keeper who kept the same at the police in the same motor vehicle all the time until, it was brought to court.

He is the one who took the same to the Chief Government Chemist for examination and analysis. He did it with Pw6. In exh. P4, it was stated by Isaka, the Chemist, that the same were brought there by him. This information sounds accurate as it was also confirmed by Pw5, who was present when the same was received at the laboratory and was examined in his presence by the late Isaka. Upon examination he took it back and kept it until he was called to bring it to court. It was also clearly stated that Pw2 obtained exhibit P2 from Pw1. It was Pw1 who was informed through the report, exh. P4 that the same were cannabis sativa. He did estimate its value at 39, 050, 000/=.

It cannot therefore be said that there is evidential discrepancies in the manner exhibit P5 was obtained and handled from its capture until it was brought to court.



To me, the chain of custody was not broken. The shortfalls in the evidence cannot be taken to have gone deep in the prosecution case. Further to that, Pw7 who recorded the cautioned statement of 2<sup>nd</sup> accused and Pw9 who recorded the cautioned statement of the 1<sup>st</sup> accused were clear on their evidence. I did not find fault in their statements and I am convinced that the same have complied with the law.

As to whether the case was proved, the assessors were of the unanimous view that since the owner of the motor vehicle did not come to testify, and basing on the fact that in all cases the accused persons were arrested in the absence of any independent witnesses, then the case has not been proved. They therefore suggested, that the same should be acquitted.

I have considered their opinion but with all due respect I beg to differ. I know I am not bound by their opinion, but in this case, I have to say, in my view, the obtaining circumstances which as I have shown before could not allow presence of independent witnesses. But still, the evidence that the owner of the car did not come to testify does not water down the prosecution evidence. It is so because what has been stated proved that the accused transported the cannabis from Morogoro and 2<sup>nd</sup> accused was arrested with the same, while 1<sup>st</sup> accused admitted to have been in the company of the 2<sup>nd</sup> accused in the whole transaction. Above all their confessions are held to be true confessions. With this I have no doubt that the same committed the offence and so deserve a conviction as I hereby do. They are convicted for the offence charged, that is under section 16(1)(b) of the Drugs and Prevention of Illicit Trafficking in Drugs Act [Cap 95 R.E 2002].

**A.K. RWIZILE**  
**JUDGE**  
**23.06.2021**



Recoverable Signature

X

Signed by: A.K.RWIZILE

