

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL SESSION CASE NO. 86 OF 2015

REPUBLIC

VERSUS

ALLEN HABIBU ALLY

JUDGEMENT

28th April & 18th June 2021

AK. Rwizile, J

The accused stands charged on one count of trafficking in Narcotic Drugs. This is contrary to section 16(1)(b) of the Drugs and Prevention of Illicit Traffic in Drugs Act [Cap 95 R.E 2002] as amended by Written Laws (Misc. Amendment) (No.2) Act No.6 of 2012. Facts, the culmination of which, is this case, can be clearly stated thus; that, the accused person had a trip to Japan. He set for the journey on 6th February 2013.

He was to travel from Dar- es salaam, at Julius Nyerere International Airport (JNIA) through Doha by Qatar Airways. At JNIA, upon checking in he went to the international departures lounge. The police officer, casually dressed, approached him upon suspicion. He was interrogated and hence arrested on allegation of trafficking in narcotic drugs.

It was alleged that upon his arrest, he was held at the JNIA police post for investigation. It was alleged he had swallowed pills-like objects containing narcotic drugs (pellets).

For three days, he was held at the Airport. It is said, he excreted 69 pellets of narcotic drugs. The same were taken to the Government Chemist Laboratory. It was reported, the same substance was cocaine hydrochloride weighing 903.27 grams, worth 54,196,200/=. He was therefore charged.

To prove the charge, prosecution called in a total of 13 witnesses, namely, Robert Jones Mrindoko(Pw1), SSP Neema Andrew Mwakageni (Pw2), A/Insp. Makole (Pw3), Lunganyi Chongo (Pw4), Zainabu Duwa (Pw5), Herman Gervas (Pw6), Deogratius Nyashile (Pw7) Salmin Shelimoh (Pw8), E 2926 SSGT Dacto (Pw9), Gloria Machuve (Pw10), Machibya ziliwa (Pw11), Ramadhan Msoba (Pw12) and Kenneth James Kaseke (Pw13), while the accused made his defence without calling witnesses. The prosecution was led by a team of six Attorneys namely Veronica Matikila, Apimaki Mabrouk, Annunciata Leopold and Chivanenda Luwongo Senior State Attorneys, Clara Charwe and Estazia Wilson State Attorneys, and Mr. Hamza Jabir appeared for the accused.

In summary, prosecution evidence is as follows; **Robert Jones Mrindoko** (Pw1). In 2013 worked as the police officer working at the JNIA police post. He told this court that, on 6th February 2013 around 5:00pm when Qatar Airways passengers were preparing to embark, he received a call from Cpl.Victoria, telling him there were two people leaving the lounge but seem were in troubled. As he arrived at the departures' gate, he found the accused person by the name of Allen Habibu Ally. He started interrogating him, and was asked to let him talk to Cpl. Victoria first. After a while, he was told by Victoria that, the accused confessed to have swallowed drugs and that, he needed help. Pw1 arrested him, seized his passport and ticket, and cancelled his safari. He said, the accused was

sweating profusely. He then told this court that, he handed the accused, his ticket and passport to his superior, one ASP Salmin. The accused's passport and air ticket were admitted as exhibit P1 and P2 respectively.

After the arrest, the accused was interrogated by **Salmin Shelimoh** (Pw8), on 6th February 2013 and recorded his caution statement. According to him, he recorded an additional statement on 10th February 2012. He alleged the accused admitted to have committed the offence charged. The statement was read in court showed the same was record twice, on 6th and 10th February when the additional notes on how the pellets were defeated.

E 2926 SSGT Dacto (Pw9), now retired police officer. His evidence was that, on 7th February, 2013 was at JNIA. The accused was under his arrest. It was around 9:20 pm when the accused was taken to the toilet. In the presence of Frank and Nyashile, the accused, emitted from his stomach 7 pellets at about 9.30 Pm and 14 pellets at about 10.12pm, but this second time was witnessed by Lunganyi as an independent witness.

At around 12:36am, on 8th February, 2013, the accused, again excreted 17 pellets in the presence of Lunganyi and Nyashile as independent witnesses. Around 2:40pm accused asked again to be sent to the toilet, it was done and he excreted 11 pellets. Finally, it was around 6:08am when the accused was sent to toilet and excreted 11 pellets. These facts were corroborated by Pw6 and Pw4 who testified to have witnessed the accused defecate a total of 53 pellets in different intervals on 7th February, 2013.

Pw9 continued to testify that, on 9th February, 2013 accused asked to be sent to the toilet, it was around 6:00am he was sent and he excreted a total of 5 pellets. These facts were collaborated by Pw12 who was the

witness on that day, and he testified that, he saw the accused person at the toilet excreting 5 pellets. He said it was around 6:00 am.

Pw3 **A/Insp. Makole**, testified also that on 8th February 2013 was in his shift at JNIA, when the accused was handed to him for observation, it was around 11:45pm when he asked to go to the toilet. Makole said, he had to send Majinji, a fellow police officer to look for independent witness. He said, he got Pw6 from TRA and Edwin Kalago from Immigration.

According to him, their offices are nearby within JNIA. The same came and together escorted the accused to the special toilet. He said he saw the accused excreted 4 pellets suspected to be narcotic drugs. He said, when they got back to the office, they all filled the observation form.

Pw6, **Herman Gervas** said on 8th February 2013 around 11:45pm he was called by police officer called Majinji to witness the accused defecate pellets. He told this court that, at the office he found the accused and Pw3 and escorted the accused to the toilet. He said he witnessed the accused excrete 4 pellets.

Pw7, testified that on 7th February 2013, when on evening shift at JNIA where he worked in the customs department, he was called by one police officer called Dacto from ADU airport.

Among other people he witnessed the accused evacuate 7 pellets in the special toilet assigned for that purpose. It was at about 9.30 Pm, when that was done, he signed in the observation form and left Dacto with the accused as well as pellets. He went on testifying that 12.00am, on 8th February 2013, he was called again and witnessed through the same process the accused defecate 17 pellets, the exercise according to him was completed at 12.30 am. The same also happened at 2.40 am where

he emitted 11 pellets. In all transactions witnessed, they signed the observation form upon completion of the exercise. He identified the observation form and pellets.

Pw2, **Neema Mwakagenda** is a police officer working with DCEA. She said, in 2013 she was working with Ant Drugs Unit (ADU) as an exhibit keeper. Her evidence was that, on 8th February 2013, she received 60 pellets suspected to be narcotic drugs from one Dacto. She said, she registered the same with special identification number as JNIA/IR/26/2013. She parked the same by putting them in the envelope. She kept the same in the strong room which she said, it has three doors in the same exit. While she keeps two of the keys of the two inner doors, her boss, the head of ADU kept the other key which opens the outer door.

On 9th February 2013, she went on testifying, that she received other 9 pellets from Dacto. The same, according to her were registered with the same number as she did the previous day. In the same transaction, she said, she received as well, the accused's passport, observation form and an electronic air ticket all in the name of the accused Allen Habib Ally. She kept the same.

She testified further that, on 10th February 2013, she parked 69 pellets with number JNIA/IR/26/2013 in the khaki envelopes and sealed the same. She said the same was sealed in the presence of ten cell leader, Pw5, the head of ADU, the accused and some policemen of ADU. The exhibit was identified and tendered in court as exhibit P4. To corroborate the same, Pw5, told this court that, on 10th February 2013 at ADU offices, she witnessed 69 pellets suspected to be narcotic drugs being sealed in a khaki envelope done by Neema. She said, the same was done in the

presence of the accused who refused to sign on the envelope. She said after parking and sealing the same, she signed on the envelope with the exhibit. She identified her signature on the envelope, the pellets exh P4.

Pw2, continue to testify that, on 11th February 2013, she took 69 pellets to the Chief Government Chemist for examination. She was in the company of Dacto and Shaban, who were her fellow officers from ADU. At the CGC's office, the same were assigned a Lab No. 110/2013. The preliminary test done by Gloria Machuve (Pw10) found out that the same were cocaine drugs. The preliminary test was done on the same day in her presence, as well as the two officers she went with. There was also one Machibya another chemist in the CGC's office.

Gloria Cuthbert Omary@ Machuve (Pw10) said in 2013, worked at the Chief Government Chemist Laboratory as the chemist. She testified that, on 11th February 2013 she received an envelope containing 69 pellets suspected to be narcotic drugs from SSP. Neema. She said, her job was to determine its weight and if the same were narcotic drugs.

She told this court, after the examination on all 69 pellets, it was found to be weighed 903.27 grams. She then conducted a preliminary test on each pellet and it was found that the same were cocaine drugs. The confirmatory test found the same pellets to be cocaine hydrochloride. The witness said, after the same was done she handed the exhibit to Machibya Ziliwa (Pw11) to seal the same. Upon doing so, the same were returned to Neema for her own police processes.

Pw10 further testified that, she later prepared a report which she sent to the requesting institution that is ADU offices at Kurasini in 2014. The report was identified and tendered. It was admitted as P6.

Machibya ziliwa (Pw11), testified to have sealed the exhibit received from Gloria Machuve. He said he placed those 69 pellets in an envelope and parked them with a sole tape, signed on the exhibit and stamp it with the Chief Government Chemist Office Seal and rubber stamp. He then handled the same to Pw2.

The last prosecution witness aimed at establishing the value of the drugs, exhibit P4. Pw13 told this court that, on 12th March 2015 he received a letter from ADU to determine the value of cocaine hydrochloride that weighed 903.27 grams. He said the said letter was accompanied with a report from the Government Chemist. He said the same was valued at 54,196,200/=. He testified that, he prepared a certificate of valuation and sent it to ADU. The said certificate was tendered and admitted as P9.

The accused Allen Habibu Ally (Dw1) was of the evidence that, he was indeed arrested on 6th February 2013. He said, he was on his way to Japan to attend the graduation of his relative.

He testified further that, upon arrest he was interrogated and found to have in possession of 12,000 dollars. In which, 9,000 dollars belong to his relative in Japan and 3,000 dollars was for his expenses for 10 days he intended to spent in Japan. He told this court that, the reasons for all of this, is because he refused to give the police who arrested him 6,000 dollars they wanted.

He said, when he refused to give it to them, a case was concocted against him. According to his evidence, he came to know what he was charged of when he appeared in court for the first time at the Resident Magistrate Court of Dar es Salaam at Kisutu. He said at Kisutu, he was informed to be charged with the offence of trafficking in narcotic drugs. The accused

therefore denied to either know the drugs alleged to be defecated by him at the airport or to have been to the toilet for that purpose. He therefore asked for acquittal.

Before delving into the merits of the case, it is important to note that it is a requirement of the law that the prosecution has to prove the case beyond reasonable doubt. In order to hold that the offence charged has been proved, the prosecution must show that it is none other but the accused who committed the offence.

In the case at hand, the prosecution must first prove that the pellets alleged found with the accused were narcotic drugs. And second, that the same were found in the possession of the accused. Third, that the chain of custody from the time the alleged drugs were found was not broken until they were tendered in evidence in court. The prosecution is enjoined to prove so by direct or circumstantial evidence or both. Direct evidence is therefore governed by section 62 of Evidence Act and so must be evidence of a witness who says he saw, or heard, if the issue refers to hearing, or if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived by that sense or in that manner. But by indirect evidence, it may be that which is circumstantial, in which case it should be interpreted with just one meaning. It should point as well directly to the guilty of the accused.

Having heard and examined the evidence, it is material to note, that the evidence for the prosecution can be categorized in four slots. **First**, the arresting stage. This was done by Pw1, whose role was to arrest the accused person and did preliminary interrogation, on 6th February 2013 at

JNIA. Pw1 upon arresting him, he handed the same to Pw8 and Pw9, his fellow police officers. Among things found with him are a Tanzania passport AB298024, with a 90 days Visa of Japan and an electronic air ticket to the same place by Qatar Airways. Both documents were admitted as P1 and P2 respectively.

Second, it follows evidence of Pw8, who interrogated the accused and recorded the confessional statement. His evidence was that on 6th February 2013, when in normal duties. He got a phone call from Pw1 to JNIA. He was with Pw9. At the JNIA, Pw8 went on testifying, he was handed with the accused who was alleged to have trafficked in narcotic drugs. He was also given his passport and an air ticket of the accused. The accused according to him, agreed to record the statement. It was at about 9.00pm to 10.15 pm when he started recording the caution statement. Where the accused admitted to have swallowed narcotic drugs was taking the same to Japan. He later on 10th February 2013 recorded the additional statement. He did it at ADU offices at Kurasini on the instructions received from Nzowa who was head of the unit. It was at 1.30 pm to 8.30 pm. The additional statement is about the way the accused defecated 69 pellets of drugs. It was admitted as P5.

Third, is the evidence of Pw9. He too is the police officer. He was called by Pw1 to JNIA on 6th February 2013. At JNIA, Pw1 handed them the accused who was suspected to be dealing in narcotic drugs. The Passport exh. P1 and his ticket P2 were also handed to them.

Pw8 interrogated him and recorded a cautioned statement. After doing so, Pw8 handed the same to him for observation. He said, apart from other documents given to him was observation forms which are exhibit

P3. He retained him at JNIA. This third batch of evidence conglomerates, the whole transaction of events of defecation of pellets from 6th to 9th February 2013 when an additional cautioned statement was recorded. The same apart from Pw9, included Pw3, Pw4, Pw6, Pw7 and Pw12.

The last slot of evidence is for those who kept the pellets, that is Pw2, Pw5 an independent witness who witnessed the parking of pellets at ADU before the same were taken to Pw10 and 11 for examination and analysis while Pw13 valued the same. It can be said therefore that keeping, parking, transporting, examining and valuating was done by this set of evidence.

During the closing submission, it was submitted by Mr. Jabir that, the case was not proved to the required standard. He argued, there were inconsistency among the prosecution witnesses. He cited exhibit P3 which is an observation form. He said it did not only contain different dates of arrest as on 6th February 2013 and 6th February 2012. This exhibit being material, he was of the view that the same showed and proved contradictions which should be resolved in the favour of the accused person. He said further that, pellets stated to be defecated by the accused were not identified by the witnesses, that no witness was specific on the pellets he saw. He added that, witnesses simply made general identification of 69 pellets.

My observation on exh. P3, confirms what Mr. Jabir submitted for the accused in that respect. The first sheet is dated 6th February 2013 while the second is dated 6th February 2012.

I have taken time to compare the two forms. It seems, they bear the same common signature alleged made by the accused person. But as well,

the first one has shown 64 pellets were obtained and signed by all independent witnesses as I have shown before on 7th and 8th February 2013. The prosecution was of the evidence that P3 was issued by Pw8. Pw8, testified that it is the one who gave them to the Pw9 and that all forms were issued on the same date. That is on 6th February 2013. On this part, the prosecution submitted P3 indeed poses a conflict.

I agree with the prosecution that the same was minor and cannot be taken to have affected the whole of exhibit P3 as per the case of **Deus Josias Kilala vs R**, Criminal Appeal No. 191 of 2018. My reason is that, by comparison, the signature of the accused is the same in both papers. Only five pellets were alleged defecated on 9th February 2013. The explanation given by Pw8 as other suspicion such as being with erased were cleared.

As said before, the prosecution has to prove that it is the accused who was arrested with pellets. To prove this, Pw1, Pw8 and Pw9 have shown so. Their evidence is clear on the aspect. The accused on his part did not dispute to have been arrested on the same date. His version of evidence that the case was fabricated is I think not sounding. I am saying so because he did not mention the person he was going to visit in Japan. He said he was arrested with 12,000 dollars which he was taking to Japan to the unnamed person. He also did not name the person who gave that money to him, to be taken to a fellow in Japan. If that was true it means he could have called that person to testify on his behalf. I do not think that his story presented the truth of the matter. I am convinced that the accused was arrested at JNIA on his way to Japan.

It was submitted by Mr. Jabir for the accused that the PGO states that exhibits should be marked and numbered for purpose of identification which was not done. He referred this court to exhibit P4 where SSP. Neema did not fill in PF-16. He supported his finding in the case of **Alberto Mendes vs Republic**, Criminal Appeal No. 473 of 2017 and PGO 229. He therefore said, the evidence did not clearly show the chain of events. This, according to him leads to an inference that the same were tempered with. Furthermore, the learned counsel cited the case of **Mustapha Darajani vs Republic**, Criminal Appeal No. 242 of 2008 to support the finding that the prosecution witnesses did not at any point in time prove the accused was taken from JNIA to ADU. And that witnesses from the Chief Government Chemist did not prove anything material.

As said, PGO provides for marking of exhibits. It is categorial in it that when exhibits are recovered, for the purposes of identification the same should be marked by the investigator. In this case, Pw9 did not say he marked pellets with any unique mark. What he testified extensively is that at the time they were evacuated he kept them upon filling the observation form P3. They were then given to Pw2. Pw2 said, she upon receiving 60 pellets from Pw9, 8th February and 9 on 9th February 2013, she registered the same in the register book. She assigned it JNIA/IR/26/2013. This is the number she kept when parking them for examination by CGC.

In my view, marking of the exhibit as per PGO is for identification purposes. In this case, it based on the evidence of Pw2, Pw8 and Pw9, on one hand and the evidence of Pw5 who saw Pw2 park the same.

I am convinced that the marking of the exhibit was proper and did not affect the process of investigation. This point should also be connected with the fact whether, the chain of custody was broken or not.

In the case of **Abuhi Omari Abdallah and Three Others v. R**, [CAT] Criminal Appeal No. 28 of 2010 (unreported), it was held that failure to lead evidence providing a "fool proof chain of custody" of potential exhibits is fatal to the prosecution case

In this case Pw1 arrested the accused person. He handed the same to Pw8 and Pw9. Pw9 coordinated indecencies witnessing defecation of pellets from 6th to 9th February 2013. It is clear also that Pw9 kept and transferred pellets recovered to Pw2 who showed how she kept the same and transferred for analysis with CGC.

In the case of **Paulo Maduka and 4 others vs Republic**, Criminal Appeal No. 110 of 2007 (unreported) The Court of Appeal had this to say;

"...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...”

The present record shows all evidence was adduced to prove the movement from one point to another. Pw10 and Pw11 also proved that the received for analysis of the exh.P from Pw2 and Pw9 among others. The same upon preliminary test, it was handed to Pw2. She kept the same until, she tendered them in evidence. I therefore agree with prosecution submission that the chain of custody was proved by oral evidence of Pw2,3,5,6,7,9,10,11 and Pw12 and the documentary evidence of Exhibit P3. After all, not all cases where chain of custody must be proved by documentation. Documentation in my view is one way to prove it. But the other way may be oral. In all cases, the prosecution must procure credible evidence to prove the case. 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...”

The CAT was dismissing the fact submitted that the ratio in **Paulo Maduka** (supra) must be followed to the letter.

Another dispute was on the cautioned statement, it was argued by Mr. Jabir, that the same was recorded in contravention of the law. He asked this court to take reference in the case of **Maulid Jumanne vs Republic**, Criminal Appeal No. 292 of 2010. He submitted that under section 169 of Criminal Procedure Act, [Cap 20 RE 2019] evidence illegally obtained should be excluded from the record.

It may be recalled that caution statement was admitted as P5. The same was admitted even though the defence showed that the same was recorded after 4 hours upon arrest of the accused person. In the case of **Chacha Murimi and others vs R**, Criminal Appeal No. 51 of 2015 at Page 16. The CAT allowed exclusion of time through which investigation was underway. In this case, there was an agreement on part of the prosecution and defence that the caution statement was recorded some few hours after four hours following his arrest. The point here is that the accused did not say, the statement was not recorded at all or it contains untrue information. Therefore, the fact that it was recorded late does not defeat its truthfulness. But still, the time according to prosecution witnesses was on investigation. From when he was arrested and the time Pw8 came to record his statement cannot be said the accused was simply held.

From the caution statement it was clearly stated by the accused that he obtained drugs from someone and was transporting them to Japan. The details in it are a true confirmation that the same were reflected the truth. Section 169 of the CPA deals with evidence that were for instance

obtained by torture which is not the case here. Since obtaining evidence by torture conflicts section 27(3) of Evidence Act and so section 169 of CPA applies. In my view, it was not the case in this case at hand.

The last thing to consider is whether there is proof that the pellets found were indeed narcotic drugs. Here, the evidence of Pw10 is good to that effect. She told this court that upon doing preliminary test, she found the 69 pellets to be cocaine. The preliminary test was done in the day the same were taken to her. She was in the presence of Pw11 a fellow government chemist and Pw9. Later, he did confirmatory test done by using machines. It was proved that the same was cocaine hydrochloride. This was however, approved by the Chief Government Chemist as accurate results on 12 September 2014. The report P6 is clear and leaved no doubt about it. From the same, exhibit P9 was executed. It was valued at the amount of 54,196,200/= on 13th March 2015 by Pw13.

From the evidence, can it be said that the case was proved against the accused. This question was put to ladies' assessors. In all and based on their own analysis they were of they were of the unanimous opinion that the prosecution proved the case beyond reason doubt. They asked this court to convict the accused. Even though, there opinion is not binding on me, I share the same. The accused is found guilty and convicted of the offence charged, under section 16(1)(b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs Act


AK. Rwizile
Judge
18.06.2021