

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF ARUSHA)**

**AT ARUSHA**

**CRIMINAL SESSION NO. 17 OF 2018**

*(Originating from Arusha Resident Magistrates Court PI No. 27/2014)*

**THE REPUBLIC**

**VERSUS**

**1. ISMAIL MUSTAPHA**

**2. KASSIM JAMAL**

**JUDGMENT**

11<sup>th</sup> & 1<sup>st</sup> October, 2021

**MZUNA, J.:**

The two accused persons namely, Ismail Mustapha and Kassim Jamal, herein after referred to as the 1<sup>st</sup> and 2<sup>nd</sup> accused person respectively, stands charged with the offence of Trafficking narcotic drugs, Contrary to section 16 (1) (b) of the Drugs and Prevention of Illicit Trafficking in Drugs Act, Cap 95 RE 2002, as amended by Section 31 of the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2012.

It is alleged that on 9<sup>th</sup> March, 2014 at Sekei area within the City, District and Region of Arusha, the said accused persons were found jointly and together unlawfully Trafficking Narcotic Drugs namely Khat (Catha Edulis) Mirungi weighing 50 kilograms valued at Tanzania shillings two million five hundred thousand (Tshs

2,500,000/-) only, in a motor vehicle make Coaster with Registration No. T. 965 CBH. The accused persons pleaded not guilty.

The prosecution which was marshalled by Ms. Alice Mtenga, Rose sule and Mr. Hatibu Ahmed, the learned State Attorneys' called a total of seven witnesses to prove their case. On the other hand, the defence counsels Mr. John Mseu and Ipanga s/o Kimaay, the learned advocates appeared for the first and second accused person respectively. They called two witnesses, being the accused persons.

Brief facts of this case is that on 09/03/2014 Policemen were notified by an informer about a Coaster motor vehicle Reg. No. T. 765 CBH suspected of carrying mirungi drugs heading from Moshi to Arusha. PW1 No. E 9435 Det Cpl Kaleb, acting on such information, notified his bosses at the Anti-Drugs Unit. Thereafter, PW1 and Flora together with other three Policemen CPL John, NO. F. 6643 Det Cpl Fulgence (PW5) and Mathew, after instructions, went to Philips area while in the pick-up police motor vehicle.

They saw a min bus with a board labelled TBL staff. They made a follow up, up to Mount Meru Hotel where it stopped and then went to Sekei. In front of it there was a Saloon car, which according to the cautioned statement of the second accused (exhibit P2) is a Corolla motor vehicle registration no. T780 AUS. Its owner is Mr. Abuu. This car went in front of Coaster leading it to a particular

destination, which turned out to be Sekei ya Juu. They followed it up to there. Their plan was Coaster min bus. So, they made sure that those who were inside could not disembark. By then there were two people only a driver and the conductor who introduced themselves as Ismail Mustapha and Kassim Jamal respectively. They are the accused persons.

They found a free agent one Joseph Laizer, the neighbour who witnessed during the search. They noted that under the passenger's back seat there was a box in which there were 16 parcels "vifurushi" stored in a cubic (specially made back seat). It had a special iron bar designed to carry narcotic drugs and the like. They had to tore off a board, a plastic made, so as to have access of what was inside.

Then they signed the search order that is, PW1 who conducted the search ~~together with the driver, first accused and a civilian Joseph Laizer.~~ The record of search was received, admitted and marked as Exhibit P.1.

The accused persons were taken to the police station where they were interrogated. The first accused denied. PW1 recorded a cautioned statement of Kassim Jamal, 2<sup>nd</sup> accused. The same was received as exhibit P2 after trial within trial which implicates all two accused. The Motor Vehicle Reg. No. T 765 CBH Make Coaster was admitted as Exh P3 (with copy of the Motor Vehicle Card). In that cautioned statement he said how 16 parcels of mirungi were found in the Coaster

motor vehicle. That other three parcels of mirungi were offloaded into a Corolla motor vehicle Registration No. T780 AUS. Its owner Mr. Abuu, ran away after their arrest, though at first he was in the Coaster motor vehicle.

The 16 parcels of mirungi (vifurushi) which measured 50 kgs, according to PW6: Joyce Njisy, is worth Tshs. 2, 500,000/- as the market value at that time, according to PW4: Kenneth James Kaseke, former Commissioner of Anti-Drugs Unit. They were labelled by PW6: Joyce Njisy and then taken to Dar es salaam by PW7 Flora P. Matutu. The chemical analysis which was done by PW2: Elias Zacharia Mulima revealed it has a substance called *cathilane* which cannot be found in other plants than mirungi as per report, exhibit P4. Then they sent the report to the Arusha Zonal office. The said 16 parcels being perishable goods, were destroyed as per the inventory form Exhibit P5.

The accused were then charged in court. That is briefly the prosecution case.

In their defence case, the accused persons denied to have committed this offence. DW1: Ismail Mustapha Ismail apart from admitting that he is a driver by occupation denied the allegation that the coaster motor vehicle carried the alleged mirungi. That his arrest on 09/03/2014 was after he had failed to show to the police a suspected person alleged to be one of the passengers whom they were looking for. That he was together with a bus conductor, one Said who is not the

second accused. He totally denied the allegation by PW1 that he was arrested at Sekei ya Juu together with the 2<sup>nd</sup> accused whom he never knew before instead says he was arrested at Mount Meru Hotel together with other suspects. That he saw the second accused for the first time on 17/03/2014 when they were taken at Rms court.

On his part, DW2: Kassim Jamal Hatibu, said that he is a bus conductor in a bus heading to Simanjiro, called Simanjiro Bus which has a route from Simanjiro to Arusha and back to Simanjiro, the same day. Its stand is at Makao Mapya, Arusha city.

He said that he was arrested at Makao Mapya while supervising when the passengers were taking their luggage at 10:00 a.m. There occurred a misunderstanding between a lady and a turn boy. The former said, her bag was missing. He was arrested simply because that lady passenger never saw her bag in the boot. He was then put under arrest and then taken to the Police station, central police. He was then locked in the lock up and then charged in Court on 17/03/2014.

To the best of his understanding, at the Police station he was accused to have caused loss of passenger's items and using abusive language as opposed to the current charge he is facing on illegal transportation of Narcotic drugs "mirungi", which he strongly denies.

He denied to have made a cautioned statement exhibit P.2 let alone to know Mr. Ismail Mustapha, the 1<sup>st</sup> accused.

This court based on the above evidence, is now to determine on three main issues, first whether the accused persons were found in unlawful possession of the said narcotic substances. If the first issue is answered in affirmative, whether they were trafficking same. Lastly whether the charge had been proved against the accused persons to the required standard of proof.

Let me start with the first issue, whether the accused persons were found in unlawful possession of the said narcotic substances. Reading from the evidence of PW1, the key witness, said how he received information, acted on such information and then managed to seize the said narcotic substance in the back seat of the coaster min bus which was driven by the first accused. The second accused was also together with the first accused as a conductor. The first accused signed in the seizure certificate but said the second accused who was a 'day waka' knew nothing about it.

In other words, the first accused as a controller of the said motor vehicle had possession of the said narcotic substances. This is also given support by the record of search, Exhibit P.1 which was signed by PW1, the first accused and a civilian one Laizer.

The allegation by the first accused that he signed exhibit P1 without knowing its contents is with due respect unfounded. He knew about it. He signed freely. The absence of the civilian as a witness cannot weaken the legality of exhibit P1 because the court was informed about the failure to trace him despite all the concerted efforts made by the prosecution. Joseph Laizer the said civilian was not traced. Similarly, even the policeman who recorded his statement never turned up for reasons well stated that he was no longer an employee of the police. That he never showed co-operation despite promising that he was to attend.

It was held in the case of **Sophia Seif Kingazi v The Republic**, Criminal Appeal No. 273/2016 CAT at Arusha (unreported) at page 34 that, absence of independent witness cannot invalidate a seizure though his presence is "a desirable thing to do".

~~The said exhibits never changed hands because they were properly~~ documented from the arrest, seizure, to the time of analysis and issuance of certificate of value as well as during the destruction. It was held in the case of **Paulo Maduka and 4 others v. Republic**, Criminal Appeal No. 110 of 2007, CAT (unreported) cited also in the case of **Silahi Maulid Jumanne vs. The Republic**, Criminal Appeal No. 292 of 2016 at page 21, CAT (unreported), that:-

***"...the chronological documentation and /or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of***

***evidence, be it physical or electronic ...The idea behind is recording the chain of custody ...is to establish that the alleged evidence is in fact related to the alleged crime-rather than, for instance, having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected, its very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it..."*** [Emphasis original]

Reading from the evidence, the prosecution has proved seizure, analysis, custody, control and disposition of the exhibit.

To this I refer to the evidence of PW1-PW7. They said that the 16 parcels of mirungi (vifurushi) was measured by PW6: Joyce Njisyia on 10/03/2014 after receiving a phone call from Kareb (PW1). She was picked by WP Flora and then they went to the RCO Office Arusha where she met the said leaves (16 parcels) suspected to be narcotic substance. After weighing them, it measured 50 Kgs. Then she took samples from each parcel and stored them in 16 labelled envelopes MAR1-MAR16. It was taken to Dar es salaam on 26/3/2019 by PW7 Flora Paulo Matutu working at Arusha Government Chemist Office. Prior, PW3 after receiving it, she registered it by Laboratory number NZ36/2014. She then stored them in the cabinet up to 26/03/2014 when she handed it to her co-worker so that she takes it to Dar-es-Salaam.

PW2: Elias Zacharia Mulima, who is the Government Chemist stationed at Head Quarters Dar-es-Salaam received it on the same date 26/03/2014. The



handing over to him was by signing in the register of handing over/dispatch. The said parcels had marks MR1-MR 16 were registered as 264/2014. He put them in the freezer pending analysis. A freezer has a key which he possessed and kept it himself. He then conducted Laboratory analysis using organic solvent for all envelopes (samples).

The chemical analysis, according to PW2 all the 16 samples gave a positive result that they had a substance called *cathilane*. The report dated 28 July, 2014 Reg. No. 95/XXXXII/01/3/5 was admitted and marked Exhibit P.4. The witness further said, mirungi has a substance called *cathilane* which cannot be found in other plants than mirungi. Then they sent the report to the Arusha Zonal office.

PW3 NO. F.2233 Det CPL Raymond said that on 10/03/2014 he prepared an inventory for unclaimed properties i.e. form No. PF12 after the Government Chemist had already measured its weight and took sample. The said PF12 was signed by Insp. Petro who was the in-charge of Ant- Drugs Unit. There was issued a destruction order by a Magistrate stationed at Arumeru District court. A destruction was witnessed by CPL Kaleb and Government chemist Joyce Njisyia (PW6). The destruction was done at the central Police Headquarters Arusha. The inventory of unclaimed property Ref. No. 1R/IR/270/2014 (PF12) was received, admitted and marked as Exhibit P.5.

PW3 then communicated with the Government chemist who turned up and witnessed when they were destroying the mirungi by burning them. Thereafter PW3 handled the document and file to the investigative policeman Det CPL Kaleb PW1. The document Exhibit P5 shows the mirungi measures 50 Kgs.

Its value according to the certificate of value for the drugs (exhibit P6) issued by PW4: Kenneth James Kaseke, former Commissioner of Anti-Drugs Unit who supervised the use and illegal business of Narcotic Drugs said, was Tshs. 2, 500,000/- as the market value at that time. The valuation was done after receiving a letter from the RCO Arusha on 18/06/2015 requesting him to value the Narcotic substance which was seized by the Police. There was also annexed to it a report from the Government Chemist. It showed that the substance for valuation was "mirungi" weighing 50 kgs as per the measurement done by PW6: Joyce Njisyia, a chemist from the Government Chemist Department.

Having answered the first issue positively, the question which follows is, whether he was trafficking same. Section 16 (1) (b) of the Drugs and Prevention of Illicit Trafficking in Drugs Act, Cap 95 RE 2002, as amended by Section 31 of the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2012 to which this charge relates, provides that:-

*16 (1) Any person who-*

*(a) ....(N/A)*

***(b) trafficking in any narcotic drug or psychotropic substance commits and offence...***

Section 2 of the Principal Act defines the word "trafficking" to mean:-

*"The importation, exportation, manufacture, buying, sale, giving, supplying storing, administering, conveyance, delivery or distribution, by any person of narcotic drug or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance ..."*

Reading from the prosecution evidence the first accused as the driver and therefore controller of the motor vehicle, transported the narcotic substance from Moshi to Arusha. He therefore engaged in **"conveyance, delivery or distribution"** of narcotic drug or psychotropic substance. He committed the offence charged. The allegation that he never committed it does not cast doubt on the prosecution case.

Lastly, whether the charge had been proved against the accused persons to the required standard of proof. The Honourable Assessors, for reasons best known to themselves were divided. One of the assessors said they are answerable while two of them said they are not. They pointed an accusing finger on the failure to arrest the owner of the Saloon car and the said motor vehicle.

This court is of the different view, definitely, the second accused though the cautioned statement implicates him, still he was a mere conductor. Above all it

says there were three persons in the min bus while PW1 said they were two only. Being a retracted or repudiated cautioned statement, it does not correlate to the truth and therefore I hesitate to rely on it. To this I am fortified by the case of **Tuwamoi v Uganda** [1967] EA 84.

Similarly, PW1 being the arresting officer as well as the investigative officer ought not to have recorded a cautioned statement of the second accused, I am fortified to this view by the case of **Njuguna s/o Kimani & 3 Others v. Reginam** [1954] EACA 316 where it was held that:-

*"It is inadvisable if not improper, for the Police Officer who is conducting the investigation of a case to charge and record the cautioned statement of a suspect."*

The motor vehicle had a special place to keep such item which had to be broken first. The driver is the one who knew better about it. The min bus had one entrance door (not back door). The said narcotic drugs could not have passed in another door without his knowledge. Even its quantity, 50 kilograms could not have been parked there without the driver's blessings. So one cannot say it was a normal carrier. The first accused placed the TBL staff board which was not the case, to hood-wink the Policemen.

The defence by the first accused that he never carried the said mirungi is not true. Similarly, the allegation by the second accused that he was not at the

seen is not true. I rule out the defence of alibi of the second accused, though there was no notice which was issued under section 194 of the CPA. His arrest was on 09/03/2014 not on 12/03/2014 as alleged. The weaknesses of the defence, I am aware, cannot be used to find him guilty. I would agree as well said by the Honourable Assessors that the second accused never signed the record of search (exhibit P1) allegedly that the driver said he was a day waka. Impliedly, the prosecution agreed with the story given by the first accused. So charging him while he had never signed exhibit P1 is double standards. The charge has not been proved against the second accused **Kassim Jamal**. I acquit him under section 235 (1) of the CPA, Cap 20 RE 2002. He should be released forthwith unless otherwise legally detained.

As for the first accused merely because the owner of the Corolla car was not charged or that the said motor vehicle was not taken to the Police, cannot weaken his culpability. His charge is on Trafficking narcotic substance not merely unlawful possession and therefore a key person to the delivery of same.

For reasons above stated, I find the first accused **Ismail Mustapha** guilty as charged. I convict him accordingly.



**M. G. MZUNA,**  
**JUDGE.**

**October, 1<sup>st</sup>, 2021**