

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

CRIMINAL SESSION NO. 06 OF 2021

REPUBLIC

VERSUS

MOHAMED SEIF @ MOHAMED

JUDGMENT

29th November & 14th December, 2022

MASSAM, J.

The accused person Mohamed Seif @ Mohamed stands charged with two offences to namely; **trafficking in narcotic drugs contrary to section 15(1) (b) (2) of the Drugs Control and Enforcement Act No. 5 of 2015** being the first count and **unlawful possession of narcotic drugs Contrary to section 15(I) (a) (b) of the Drugs Control and Enforcement Act No. 5 of 2015**, being the second count.

It is alleged that on 16th April 2016, at Kahama bus stand, within Kahama District, in Shinyanga Region accused Person was found in possession and trafficking in narcotic drug namely heroine from Dar es salaam to Kahama through Leina Bus.

When the information of the charge was read to the accused person during Plea taking and Preliminary hearing, he pleaded not guilty to the charges. Further, on 18th November, 2022 when the case came up for trial, the two charges were reminded to the accused, again he pleaded not guilty thereto in respect of both counts.

At the trial, Ms. Edith Tuka, Ms. Caroline, Mushi and Jukael Jairo learned State Attorneys represented the Republic, while Mr. Simba Ngwilimi, with assistance of Gervas Genea learned Advocates, represented the accused person.

In order to prove the case against the accused person, the prosecution side called eight (8) witnesses to testify, namely, Rwige Ogunya, (PW1), Madata Adam Shaban, (PW2), F. 1689 D/SGT Steven (PW3), E. 8295 D/SGT Wilson (PW4), ACP George Simba Kyando (PW5), SSP George Wilbert Bagyemu (PW6), F.2298 A/Inspector Mariam Makala (PW7) and W.P 5557 CPL Neema (PW8). They also tendered a total of six

(6) exhibits, which were admitted, thus: Chemist Analyst Report (Exhibit P1), narcotic drugs namely Heroine 460 grams (exhibit P2), Certificate of seizure dated 16/4/2016 (exhibit P3), Caution statement of the accused person (exhibit P4), Declaration statement of Maugo Musyangi (exhibit 5) and Report Book (RB) (exhibit 6). On the other hand, accused person defended himself as DW1 and tendered a total of two (2) exhibits namely Declaration statement of 5th prosecution witness ACP George Simba Kyando (exhibit D1) and ticket of the accused person from Burundi to Kobero, ticket from Kabanga to Kahama and passport as (exhibit D2).

The prosecution case started by **PW1:** Rwige Ogunya a government Chemist Officer who from 2007 to 2017 was stationed at Mwanza. He testified that, on 3/5/2017, he was at his office. While there, he received an exhibit which suspected to be heroine from A/Inspector Maugo Msyangi from Kahama. He said that the said exhibit had with its cover was brought to him for investigate to prove if it is narcotic drug which he gave it **lab.No.620/2017.**

He went on telling the court that he weighed it and finds out to be 470.07, grams, after that when he was weighing the drugs, he separated the drugs and its cover. He weighed drugs alone then weighed its cover

the result was that drugs had 460 grams and the cover had 10 grams. He said he saw the drugs had had brown in colour and another one was powder and crystals all were brown colour. His investigation came out that the said exhibit was heroine (narcotic drugs).

PW1 continued to narrate that he prepared investigation report, on the said exhibit, he said he filled by writing the lab No, his signature and office seal then he handled the exhibit and Investigation report to A/Inspector Maugo Msyangi. He tendered the said exhibit which the court admitted as exhibit P1(lab no.620/2017) PW1 also tendered the heroine (narcotic drugs and its specifications) the court admitted as exhibit P "2"

When cross examined, PW1 responded that, he received the said exhibit on 3/5/2017 on a working day and working hours and he started investigation on the same day until on 4/5/2017 he then prepared a report he said he did not remember the form which he received from A/Inspector Maugo Musyangi but after he received that exhibit, he lab it, weighed it first, later he put out its of cover. there after he investigated the sample by mix with acid, and gave him yellow colour, later he mixed it with another different acid, and came up with green colour. He said he found out that it was heroine, the said heroine can be in whitish or light brown.

He continued to respond that in this case, he did not receive any exhibit in vim bottle, he found that chemical compound, in that bottle covered with light plastic bag. On 11/07/2017 A/Insp Musyangi went to collect the said exhibit and his report.

PW2: Madata Adam Shaban he a resident of Kahama his evidence is to the effect that on 2016, he was working at Buswagi at CID department. He said on 16/4/2016 he was at Kahama stand he was receiving his guest from Dar es Salaam who was coming there with a bus called Red belt. He told that when he was at Kahama bus stand he is met George Kyando and George Bagiano the policemen, he greeted them and went on with his business.

He narrated that, later on he was called by the said Policemen he was asked to help them to arrest as they were arresting a person. He said he found them already arrest that person, so they told him to help them in the search. After that search, he said he saw a Colgate. rungu spray, rungu soap, toothbrush, one bottle of vim. While he was there, he said he witnessed them opening the bottle of vim, inside, he saw whitish powder, which was inside that bottle. At the bus stand of Kahama had a lot of light, so identification was easy from the place where he was standing and place

of search was like three metres. He said he filled the form which it had his name and signature. He prayed the court to tender the said form (Certificate of seizure dated on 16/4/2016) the court admitted the certificate of seizure as exhibit P "3".

When cross examined, he stated that he did not see the said accused person dropping from the Leina bus and when he was searched. He responded that he was concentrating in picking his relative from Redbelt bus and not Leina. What he saw in that bottle, there are two small bags, one bag had a salt, and another bag had powder, that salt was white colour that bags were separate, the one who told him to sign was George Bagyemu, he just signed it.

He again said that he signed it at 11:00pm night hours, he did not see accused person signing the said document, at the bus stand, there was no weighing scale.

PW3: F. 1689 D/SGT Steve a police officer at Usheti-Kahama, on 2016, he was at Kahama as investigator of criminal cases, his duties were to arrest, investigate, interrogate the suspects and take them to court.

His weight of evidence was that on 17/4/2016, at 9:00 am, he was in his office, he was assigned a file to investigate concerning a case of unlawful possession of narcotic drugs, and the suspect was Mohamed Seif,

(accused person). He informed the court that he was told that the accused person was arrested at Kahama bus stand at about 11:45 pm night. He said, he collected the narcotic drug search warrant, two toothpaste called Colgate, rung soap, rungu spray, one powder of the vim that narcotic drugs were all taken to the Government chemist.

He went on saying that after the report came from the Government Chemist, the results revealed that the said exhibit was heroine which he managed to identify in the court as it was in brown colour, it was a powder in nature, packed in container with 470grams, but drugs itself had 460 grams.

When cross examined, he responded that he got the statement of accused person he was given also the said exhibit from George Bagyemu. The drugs were inside the bottle of vim in that day he received the drugs from Bagyemu who took the said drugs to the exhibit room, he was the one who took vim, Colgate, rungu spray, to the exhibit room, but the drugs were taken to the strong in the OCD's strong room.

He again responded that he had no exhibit register, at that time, OCD was one George Kyando he did not remember when he received a letter from Government chemist Mwanza, he just remember it was the year was 2017).

In other issues, he responded he was the one who prepared the chain of custody, the said chain of custody had problems, does not have a place of signature, in order for exhibit to move from one place to another the form No. 145 must be filled. He responded that he was told by state Attorney that, chain of custody had problem, so thus why he did not tender it. He prepared it when accused person was arrested, on 16/4/2016, he is the one who said that he was given that file for investigation on 17/4/2016 but he did not go to the bus stand for arrest.

Lastly PW3 answered the question from the defence counsel that when he was preparing chain of custody, he was given a search warrant and certificate of seizure, he was given them while it was already signed, and it was written on 16/4/2017. He said he did not know PW2, but he saw his statement and it was well written and the said exhibits were signed at bus stand, accused person did not brought to him (PW3), but he went to lockup to see if he was at the lockup, he did not know if this case was withdrawn and the chain of custody was among the exhibit.

In reexamination, PW3 clarified that Chain of custody was not well conducted thus why it was not tendered to the court that form No. 145 was not filled, the drugs were taken to the Government chemist, because accused was charged with unlawful possession of drugs. The drugs were

received and taken to the strong room of OCD, but other exhibits were taken by exhibits keeper, register stayed for three years before destroyed, the A/Inspector Maugo was the one handed over that exhibits to the exhibit keeper.

PW4: E. 8295 D/SGT Wilson, a Police investigation Officer at Kahama police station. His testimony is to the effect that on 16/4/2016 at night hours, he was at police station, he was assigned by the OC-CID to write a statement of an accused person, the accused was at CRO who was alleged with the offence unlawful possession of narcotic drugs.

He said that he took the accused to write the statement. Accused told him that he was tired, so he asked him to write his statement the next day. on 17/4/2016, at 8:30 he was called and told to write accused person's statement as accused person was okay. He said he informed the accused person that he was charged with offence of unlawful possession of narcotic drugs, being given his rights, accused person was seen comfortable started to write his statement at about 8:40am and got finished up at 10:00am. He tendered the caution statement which the court admitted as exhibit P4.

When PW4 cross examined, he testified that, he recorded the statement of accused person, he did not arrest accused person, that day he was told to write accused person's statement. Accused person was arrested and he took him to the justice of peace. He wrote his statement and saw him signing that statement. He took him to the interrogation room, where they were only two persons.

PW5: ACP George Simba Kyando, on April/2017, was Officer Commanding District (OCD). His testimony was to the effect that on 16/4/2016 he was at his office. He said he got information informing that one passenger at Leina tours bus had narcotic drugs, after got the said information he shared it with one OC-CID George Bagyemu, who prepared task force. He said that the task force went to the bus stand to make a follow up. At 11:00pm, they told him that the said bus is arrived, so he went there to the scene. Then the said policeman went to the bus, some entered the bus and some did not enter, the ones who entered the bus they came out with one person with a plastic bag (Rambo).

He said after accused arrested, he returned to his office, and left the issue with OC-CID and the team. Later on, they went to his office to keep that exhibit, because the said exhibit was suspected to be drugs. He said

on 2/5/2015 the investigators informed him that they wanted the exhibit to be taken to the Government chemist for further investigation. One Maugo took the said exhibit from that strong room, but before the said exhibit handled to Maugo, he (PW5) was promoted his position and transferred to Rukwa as Regional Policer Commander (RPC).

On the other hand, he said he could not recall the name of the exhibit keeper by that time but the procedure of keeping exhibits kept by exhibit keeper, but due to sensitivity of that exhibit, the OCD was the one who kept it. He said he saw that exhibit, it was inside the vim bottle, and the drugs had in brown colour, it was not white. He identified exhibit P2.

He was cross examined, he testified he did not identify accused person at the scene, but after arrested he came to know him. he saw only the drugs which he was told to keep. It had mosquito spray, names rungu, toothbrush and toothpaste all of them he managed to see them.

He went on answering the question by stating that in his statement, he did not write the issue of exhibit keeping but they had exhibit room and exhibit keeper, who had exhibit register, in the register the exhibit keeper

must sign before giving and receiving the exhibit. He thus said he did not have his own register; the exhibit register is only one.

On the issue of how the accused was arrested, PW5 stated that, he did not see the bus conductor and a bus driver and they were not given manifest, as manifest always stay the place where the motor vehicle starts the journey. The manifest has a place of registration number, address, name of owner, date of journey, name of passenger and seat No. the name of driver/drivers, signature of driver, name of conductor and his mobile phone number, accused person started a journey where the motor vehicle started the journey.

PW6: SSP George Wilbert Bagyemu, testified to the effect that on the arresting date he was OC-CID at Kahama within Kahama District. The length of his evidence is that, on 16/4/2016 night hours, he was told by one SSP Simba Kyando (PW5) that there is a person having narcotic drugs, and the said person was travelling from Dar es Salaam with Leina bus. At 11:10 pm one Majaliwa, told him that the said motor vehicle is nearby to arrive. He said on that day he was with No. G.9346 D/C Hussein, G.8581 D/C Shaban, that the said Majaliwa told him that the suspect is in the seat No.3 he was weard a cap.

PW6 went on telling the court that from the police station, to bus stand is like 100 metres, he went to the Leina he saw the accused person Mohamed Seif Mohamed was the first person to get out from the bus. He said they arrested him carrying a small beg and searched the said bag and found a bottle of vim, with some grams 480. On that search also he found two toothpaste, one spray rungu, one piece of cigarette.

He went on testifying that he filled the certificate of seizure on 16/4/201. The certificate of seizure filled the name of accused person, the name of witness (Madata Shabani), the date which that certificate was filled. Thereafter they took a narcotic drug known as heroine, also the vim powder and took the accused person to the police station. At police station they opened the file with No KAH/IR/196/2016 of unlawful possession of narcotic drugs.

On the other hand, he said he took the said exhibit to the exhibit keeper who filed it to the exhibit register. He mentioned the exhibit keeper to be known as SGT Geofrey who is a deceased now, the said exhibit was kept to the strong room, in OCD office. D/CPL Wilson was told him to interrogate the accused person, when interrogated, accuse person told him (PW6) that, it is true that he was possessing that narcotic drugs and the

said drugs is having 480gram thereafter accused person asked him (PW6) to give him (arosto) a small amount of drug to use.

Furthermore, PW6 testified that he told the bus driver and conductor, to come to the police station for further investigation, he did not understand the accused person on his word of arosto, but later on he came to understood that, he wanted him to give the accused a small amount of drug, but they did not agree with him for giving accused person a small amount of drugs. He said the said drug was in the vim bottle which is white, and it had a crake with words 480gms written by pen. when they arrested accused person the said drugs had a whitish colour but during the hearing it changed to brown.

He said that, investigators were CPL Wilson and D/CPL Steven, Wilson was told to write a statement of accused person and he directed one Maugo Musyangi to take the said drugs to Government chemist. He said he told him to go on 2/5/2016, because on 1/5/2016 was a May Day. At the Government chemist they found out that the weight of that drugs was 470.7gms with a container without container was 460gms and Government chemist proved that the said drugs was heroine drugs. Maugo went to Government chemist to collect the exhibit and on 13/7/2016 he

wrote the statement of Maugo Musyangi, who is at Nyahanga-Kahama now is sick, he tendered the statement Maugo which the court admitted as exhibit P "5"

When cross examined, he responded that the said the bottle had a word 480, accused person told him that, the weight of the said drugs was 480gms, the drugs had in the plastic bag, he did not weigh the said drugs, at the bus stand but filled the certificate of seizure.

PW7: PF.2298 A/Insepector Mariam Makala, she is a Police Officer at Kahama Police station attending the general duty. She said that on 16/4/20216 at 9:45pm she was on night shift hours, OC-CID Bagyemu and other policemen, handled to her a file to open a case against the accused person namely Mohamed Seif. She said she wrote SSP Kyando as a complainant, as he was a most senior, that accused person was brought before her and she filled the R.B No. SY 2016 to be 3021, and IR 1961. She then wrote in report book No. 5/2016 she filled it on 1:00am which was already 17/4/2016.PW7 tendered the report book which the court admitted as exhibit P "6"

The last Prosecution witness was**PW8:** W.P 5557 CPL Neema the Woman Police at Kahama Police Station. Her evidence is to the effect she

was a deputy exhibit keeper to No. D.7838 S/SGT Geoffrey, who is died on 17/5/2020. She narrated that on 18/11/2022 she was in the duty, one Bagyemu who was OC-CID, went to her office to take the narcotic drugs, the said drugs were kept in the OCD strong room, the said exhibit was sealed from office of Government chemist.

When cross examined, she responded that she was not around when the exhibit kept in the office of OCD therefore, she did not know who received it, but after Geoffrey died, she took it from the OCD who kept in the room. She said, she did not come with handling register as exhibit as she did not told to come with the said register before the court.

When the defence case commenced, Accused Person one Mohamed Seif Mohamed appeared as **DW1**: he defended that he is a resident of Tabata Mawenzi named his wife as Ndikumana Fabiola. He fended that he was charged with unlawful possession of narcotic drugs and trafficking in the same. he stated that he object the charges because he did not arrested with that drugs, he wondered why he was connected with that offence. He complained that he was arrested on 9/4/2016 while he was from Burundi he was arrest at Phantom Road, (Kahama). He said his arrest was because he had a misunderstanding in business with Bagyemu (OC-CID) PW6 as

when he arrived from Burundi he dropped at Sasi engineering where he conducts his business at Camel oil Petrol Station.

He moved on saying that he used to take petrol there as he had cars from Japan he had a passport which showing him that the said date he was on transit from Burundi to Tanzania. He testified that it shows that the exit from Burundi and entry to Tanzania, and the ticket from Bunjumbura to Kobelo and from Kabanga to Kahama. he said he paid Tshs 2,000/= kabanga to Kahama then paid Tshs 18,000/= he identified his passport with No. AB 337162, in page No. 34 and 35, shows entry and exist and the amount he paid. Accused person tendered the passport with No. AB337162 the court admitted as exhibit D "2"

He went on defending that page 34 and 35, there was exit and entry of 9/4/2016 exit from Republic of Burundi, and entry of Republic Tanzania used to go to Burundi always because of his business and his mother living there. On 9/4/2016 at evening hours, after he reached at camel oil, he was called by two people who came and told him that, he was called to the m/v called progress in black colour. He went to that car where he saw George Bagyemu, who told him that "ujanja wako uko mfukoni" "sasa hivi umekwisha"

He notified that on 2015 May, he was arrested at those cars, he was arrested with OCD –Kahama with the charge of failing to pay VAT. He told that after arrest they sit together and agreed that because that business is continuation, every car will take 200 dollars, so they started the business and its where he started to know him. He informed that they did it for like three times, after seeing 15 cars he complained and wanted to add him instead of giving him 200 dollars to be added 500 dollars. He said he responded to him that, to give him (DW1) time to talk to owners at Japan, the owner did not agree with that deal, he said he tried to see the other.

He said,he continued with that business, the said Bagyemu was not happy. On 9/4/2016 he arrested and he was taken to Kahama police station, he was told to sit down and they started discussion, was ordered to give him 50,000 dollars, he told him that he don't have that cash, Bagyemu did not understand him, so he started to beat him and insult him, he was locked up. He communicated with his mother who communicated with Japan to help him. His mother talked to him and told him that, the said amount it too big.

DW1 went on complaining that he was not arrested on that day and the said Police Wilson did not prove that he was connected with the charge against him, Wilson forced him to confess before him, but did not write a

statement and it's not true because he did not prove that he was arrested with that drug. He challenged that no ticket, copy of ticket book, manifest was brought before that court, also no check point from the owner of the car that show how many passengers were in the car, No. of ticket and seat No.

Another issue faulted by the DW1 is the evidence of Geoffrey which shown the chain of custody, the prosecution was supposed to bring exhibit keeper or his statement and if that person (exhibit keeper) was died at least were required to bring a proof on it. He said Maugo told the court that he took the said drugs to the Government chemist on 2/5/2017, no witness was brought from the office which weigh the said drugs, the Government chemist received it from the office which weighed the said exhibit.

In a nutshell, that was the evidence of both prosecution and defense side. Having considered the evidence of both prosecution and the defense side, there is only one issue for determination that is ***whether the prosecution side has managed to prove the case beyond reasonable doubts.***

Before determination the issue at hand, it is important to note that, according to section 3(2) (a) of The Evidence Act [Cap. 6 R.E. 2022] in criminal matters, a fact is said to be proved when the court is satisfied by the prosecution beyond reasonable doubt that such fact exists. That is to say, the guilt of the accused person must be established beyond reasonable doubt as it was stated in the case of **Mohamed Said Matula Vs Republic (1995) TLR 3**. Generally, and always such duty lies upon the prosecution side except where any other law expressly provides otherwise. Also, in the case of **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda v Republic [2006] TLR 395** Court of Appeal held that as we known in the criminal trial the burden of proof always lies on the prosecution and insisted that there must be credible evidence.

Furthermore, **section 110 and 111 of the Evidence Act, Cap. 6, R.E 2022** provides that, the burden of proof lies on the prosecution and the standard of such proof is beyond reasonable doubt. See also; **Sylvester Stephano v. R. Criminal Appeal No.527 of 2016** (unreported) and **DPP V. Peter Kibatala, Criminal, Appeal No. 4 of 2015** (CAT) Dar es salaam(unreported) at page 18 when the Court held that;

"In criminal cases, the duty to prove the charge beyond doubts rests on the prosecution and the court is enjoined to dismiss the charge and acquit the accused if that duty is not discharged to the hilt.

On the other hand, the accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defense. See the case of **Mohamed Haruna @ Mtupeni v. Republic, Criminal Appeal No. 25 of 2007** Court of Appeal (unreported). And it is the duty bound to the prosecution to prove its case beyond reasonable doubt.

In the case at hand, there are so many questions which needs answers. The prosecution alleged to arrest the accused person in the car called Leina Bus from Dar Es Salaam to Kahama and was arrested at Kahama bus stand and found with narcotic drugs namely heroine. Unfortunately, no any exhibit such as ticket, travel manifest or any exhibit tendered before the court to prove that the accused person was the passenger of the said car. The conductor and Driver of the said bus were not called during hearing in order to prove that on the material date they had a passenger namely **Mohamed seif Mohamed**(Accused Person). In

cross examination PW5 when he was asked if he asked the accused person if he had his ticket, he said that he asked him but he told him that he don't have. no any exhibit such as ticket, travel manifest or any exhibit tendered before the court to prove that the accused person was the passenger of the said car. To me, Conductor or Driver was an important witness for the prosecution but they did not call them and there was no any explanation. Again, the issue of ticket, the prosecution failed even to take incentives to go to the office of the said bus at kahama to ask the same or to inquire it through the owner of the bus to be given that ticket.

More Also, PW8 testified that she was an assistant of Geoffrey but she knew nothing about the exhibit P2, she took over the office after the death of GEOFREY she did not know who received the said exhibit, so in her side there are some missing information which would convince this court find that the said witness was the important as she could be the one to bring the exhibit register to prove that the said exhibit was registered in that register.

Another important witness which the prosecution failed to call is the witness from the office which weigh the said drug, the said witness was very important as an expert of weighing substance who could tell the court

the exhibit which he received after weight the exhibit had how many grams. PW1 as government chemist testifying that he weighed the exhibit which he is not an expert on it, this court finds that PW1 was not a right person to testify the same. In the case of **Samwel Japhet Kahaya v. Republic, Criminal Appeal No. 40 of 2017**, the Court of Appeal of Tanzania at Arusha held;

*"Be that as it may, the failure of the prosecution to summon some of the important witnesses would have prompted the trial court to draw adverse inference since **if a party to a case opts not to summon a very important witness he does so at his detriment and the prosecution cannot take refuge under section 143 of the Evidence Act**."*

According to quotation above, the adverse inference is drawn against the Prosecution for failure to call an important and material witness and exhibit which could prove that accused person travelled in that bus in the said date. The defense side denied to be arrested on 16/4/2017 at kahama bus stand but he agreed to be arrested on 9/4/2017 and in his side he brought they tickets and passport to support the same.

Not only that but also there are some contradictions between the witnesses such as PW1 and PW2 every witness saw an exhibit in a different

way. PW1 testified that he received an exhibit which suspected to be heroine with brown in colour. PW2 stated that he saw the Colgate, rungu spray, rungu soap, toothbrush, one bottle of vim and inside he saw whitish powder and not brown as stated by PW1 as we saw their testimony was contradictory about colour of the said drugs even though PW1 when he was cross examined, he said that the drugs some times change depends with time but this witness saw the said exhibit in the same day and date but identified it in different colour. This court finds some contradiction in form of that exhibit, some of the prosecution witness said that the said exhibit was in powder form but other said it was in costal form, In the case of ***Jeremiah Shemweta versus Republic, (1985) TLR 228***, it was held that,

"the discrepancies in various accounts of the story by the prosecution witnesses give rise to some reasonable doubts about the guilty of the appellant."

In the instant case, the discrepancies cannot be ignored and they are hereby registered in favor of the accused person.

However, the record is silent on whether exhibit P"2" was retrieved from accused person. I will consider the evidence of PW2, PW5 and PW6. It

is the evidence of PW5 that on the fatefully date on 16/4/2016 he got an information that accused person was in possession of narcotic drugs while traveling to Kahama from Dar es salaam by using motor vehicle namely Leina tours bus, after he got the said information he shared it with OC-CID PW6 who prepared task force, and he went to the bus stand to make a follow up of the said information, PW6 in his testimonies stated that after being informed by PW5 and went to the bus stand he successfully arrested the accused person with a bag, he searched the said bag and found a bottle of vim, also he found two toothpaste, one spray rungu, one piece of cigarette and narcotic drug. He then filled the certificate of seizure in the presence of accused person and PW2 thereafter he took accused person and the exhibits to the police station where he handed over to the Exhibit Keeper SGT Geoffrey (the deceased). PW2 stated that he is working at Buswagi at CID department, he was called to assist the arrest of the accused person, then he went to the crime scene and found accused already arrested thus he witnessed search and seizure, thus he signed Exhibit P"3".The question raised by this court is where exactly the certificate of seizure was filled (exhibit P3) at police or at bus stand as there was contradiction of evidence PW6 testified that he was the one who created the IR NO at the office and not at the bus stand. PW5 said that he

was the one who reported the matter at CRO then RB number was first entered the IR number. I get difficult to believe if the certificate of seizure was completed at police station and not at the bus stand the act which is opposite with the position of law and principle guiding. The position of law as to how filling of certificate of seizure, is well elaborated in the case of **David Atanas@ Makasi and Another vs the Republic, Criminal Appeal No. 168 of 2017**, CAT at Dodoma (unreported), the Court of Appeal held that,

"...the certificate of seizure ought to have been signed at the place where the search was conducted and in the presence of an independent witness..."

The court notes that the independent witness who signed Exhibit P"3" PW2 told this court he was not around so he did not know accused person, also he did witness the search nor the arrest but he was called only to sign it. Also, he is the one who saw the said exhibit (drug) to be in whitish color.

Furthermore, the chain of custody of exhibit P"2" was not maintained, search and seizure are the first step in the process of establishing the chain of custody in narcotic drug cases. In that regard, whenever there are

irregularities at the stage of search and seizure as in the issue above, the same shall go to the root of the case and the whole prosecution case will be broken to a pieces. So, the court may decide not to determine the remaining issue, however for best interest of justice I will proceed to determine the remaining issues as raised in the case at hand.

In the present case, PW6 stated that he seized Exhibit P"2" from the accused person on 16/04/2016 and later he took the same to the PW5's office where it was handed over to the D.7838 S/SGT Geoffrey (the deceased). The person namely Maugo Musyangi on 02/05/2016 took Exhibit P"2"to PW1 for analysis. After weigh and analysis PW1 gave back the exhibit to the said Maugo Musyangi.

From the facts above, it is observed that there is no evidence of two people namely Maugo Musyangi and D.7838 S/SGT Geoffrey on how each of them dealt with exhibit P"2". There is evidence that D.7838 S/SGT Geoffrey passes away (May his Soul Rest in Peace) however the law is quite clear that there is requirement of producing a statement of person or witness who is nowhere to be found, ***See section 34B of the Evidence Act [Cap 6 RE 2022]***. In the present case the said witness statement was not produced as evidence to show that the said deceased dealt with

exhibit P2. Again the evidence of PW1 and PW5 was different on when the said exhibit was handed over to the Government Chemist, according to PW5 he handed over the exhibit to Maugo Musyangi on 2/5/2016, but in record it show that Inspector Maugo took the said exhibit to Mwanza on 2/5/2017 and the office of Government Chemist received on 3/5/2017, bad luck is that no witness from the office of weight and measures Agency was called to testify on it, that could make it easier that when did they receive that exhibit and when did they hand over to the office of Government chemist, the facts are silent on where was exhibit P"2" was after Maugo took it on 02/05/2016 and where did he take after being handed over by PW1 after analysis. That make this court to find out that the chain of custody was broken from the beginning as there was no whereabouts of exhibit "P2" for more than one year from May 2016 to May 2017 when the same was taken to the Government Chemist.

In the case of ***Abas Kondo Gede vs Republic, Criminal Appeal No. 472 of 2017*** (Unreported) Court of Appeal at Dar es Salaam. The court of appeal stated that;

".....documentation will not always be the only requirement in dealing with exhibits. Thus, the authenticity of exhibit and its handling will not

fail the test merely because there was no documentation. It follows that depending on the circumstances of every particular case, especially where the tempering of exhibits is not easy oral evidence will be taken to be credible in establishing the chain of custody concerning the handling of exhibits"

In the case at hand, there is no any documentation regarding the chain of custody of exhibit "P2" this make this court to support the submission from defense that the chain of custody regarding the exhibit was broken in the beginning. I subscribe the case of **Abuhi Omari Abdallah and 3 Others Vs Republic, Criminal Appeal No. 28 of 2010**, CAT at Dar es Salaam (Unreported) held that,

"The absence of the evidence of Kenyela, Linus, the undisclosed cleaners, tester and the post office man, totally destroyed the essential chain of custody of the said pellets. This leads to a strong and irresistible suspicion that those pellets might have been tampered with. It was not for the defense to justify the suspicion. It was for the prosecution to bring cogent evidence to dispel or rule out these lingering reasonable doubts or suspicions. Settled law is to the effect that in such a situation, an accused

person is entitled as a matter of right, to the benefit of the doubt or doubts."

In the case at hand there is missing evidence of D.7838 S/SGT Geoffrey who was the exhibit keeper thus this creates doubts on the integrity of chain of custody of Exhibit P2. Thus, the answer to this issue is negative.

Again, contradiction persisted, on the evidence of PW2, PW6 and PW5 regarding the distance from the place where the PW5 was standing at the bus stand witnessing the arrest and search, PW5 and PW6 said that PW5 was 20 meters from the scene but PW2 who was their independent said that PW5 was standing only three meters from the scene, so this court is confused who is saying the truth.

Another big contradiction was the weight of the exhibit P2, the arresting officer who was PW 6 said that he arrested accused person with the narcotic drugs weigh to 480, grams this also supported with the evidence of PW5 the complainant. In the report book revealed that the charge against accused person was unlawfully possession of narcotic drugs namely heroine weighting 480grams, but this is different with Chemist report exhibit P '2' which was tendered by PW1 Rwige Ogunya who said

that after given the exhibit P2 for analysis he lab it no 620 /2017 weighed it with its cover and found out that the said exhibit was narcotic drug namely heroine with weight of 470 grams and he weigh it alone without cover and found out that the said exhibit was 460 grams, this court is asked itself where did the PW6 and PW5 weigh the said exhibit and got that weight? are they expert of that exhibits? PW6 told this court that he arrested accused person with the narcotic drugs which was in the vim bottle which written the word 480grams in cross examination when he was asked about the weight of exhibit P2, PW6 told this court that accused person was the one who told him that the said exhibit had 480 grams. This court is wondering why PW6 believed the accused person about the weight without taking some incentives of weighing it before taking the matter to court.

Having addressed all issues raised in this case, this court finds the prosecution evidence has failed to prove the case beyond reasonable doubt against the accused person for both counts of trafficking in narcotic drugs contrary to section 15(1) (b) (2) of the Drugs Control and Enforcement Act No. 5 of 2015 being the first count and unlawful possession of narcotic


drugs Contrary to section 15(I) (a) (b) of the Drugs Control and Enforcement Act No. 5 of 2015, being the second count.

Consequently, I find the accused person not guilty and I hereby acquit him from the charged offences. He is hereby set free.

It is so ordered.

DATED at **SHINYANGA** this 14th day of December, 2022




R.B. Massam
JUDGE
14/12/2022