THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL SESSIONS CASE NO. 125 OF 2016

REPUBLIC

VERSUS

ELIZABETH SINKAMBA @ STEPHANO

JUDGMENT

Dated: 8th & 21st April, 2022

KARAYEMAHA, J

The accused person, namely, **Elizabeth Sinkamba @ Stephano** stands charged with the offence of trafficking in narcotic drugs contrary to section **15 (1)(b) of the Drugs Control and Enforcement Act No. 5 of 2015 [now Cap 95 of 2019] (the DCEA hereinafter).** The indictment is to the effect that on 26th day of May, 2016 at Tunduma area along Sumbawanga - Mbeya road in Momba District Songwe Region the accused did trafficking in Narcotic Drugs, to wit, Cannabis Sativa commonly known as bhang weighing 2.5 kilograms. She denied the charge at the commencement of the trial.

To prove the case against the accused person, the prosecution led by Ms. Scolastica Lugongo, learned Senior State Attorney and assisted

by Ms. Prosista Paul, learned State Attorney, fielded six (6) witnesses. Of these witnesses one was the professional Chemists from the Chief Government Chemists (CGC) office. The prosecution also relied on a statement tendered in evidence under section 34B of the Evidence Act 1967 (the Evidence Act) of DC Martin who could not testify because his current whereabouts is unknown and his attendance could not be procured without undue delay. A number of Exhibits, both documentary and real objects were also tendered in evidence. The defence being led by learned Counsel Mr. Chapa Alfredy did call one witness, the accused person and tendered no exhibit.

The prosecution case can be conveniently summarized as follows. Elizabeth Sinkamba @ Stephano was on 26/05/2016 travelling from Isanga village which is located in Momba District in Songwe Region to Mbeya. She travelled by car with registration number T567 DFF make Mazda Bongo Hiace. On the same date in the morning PW4 **ASP Goliam Rashid Ilomo** was tipped by his informer that a certain woman was carrying drugs in her bag. Given the description of the car, PW4 and DC Martin in a company of MG. Michael (militiaman) kept a watch. At about 11:50hours, they saw the said car at Tunduma Township and apprehended it and informed the driver in the presence of passengers

that it carried drugs. Having done so, PW4 ordered the driver to drive the car to Tunduma police station. At Police Station, PW4 ordered all passengers to disembark each with his/her luggage. It was the prosecution case that after each passenger had been told to disembark with his/her luggage, the accused was heard by PW2, PW4, and DC Martin confessing that she was the one in possession of drugs. She, therefore, pleaded PW4 to let the other passengers continue with their journey. Following that confession, her bag was searched by **WP 4347 D/Sgt Iren (**PW6) under the supervision of PW4 and witnessed by **David Mwalwanda** (PW5) and **Aminika Jeremiah** (the car driver) as independent witnesses and in the presence of DC Martin. According to these witnesses, when the accused person's bag was opened they found inside it bhang wrapped in 4 black plastic bags.

Following that discovery, PW4 prepared the certificate of seizure (**exhibit P6**) which was signed by the accused person, PW4, PW5 and Aminika Jeremiah. Upon being detained in police lock up, PW4 ordered PW6 to record the accused person's cautioned statement. PW6 testified that the accused confessed to traffic bhang to Mbeya. She tendered the cautioned statement in evidence as **exhibit P8**. The opinion of PW4, PW6 and DC Martin whose statement was tendered in evidence by PW4

as **exhibit P7** led to the arrest of the accused who admittedly owned a bag which was found with bhang and her indictment for trafficking in narcotic drugs.

The defence is not that much different from the prosecution case. **Elizabeth Stephano Sinkamba (DW1)** explained at length on how she travelled from Isanga Village heading to Mbeya by a Hiace with a bag containing clothes, parcel of charcoal, flour and potatoes. She gave evidence on how she talked to the driver and left her luggage with him and the conductor who loaded it in the car after she ascended in the car. The accused explained further that when they got at Tunduma a certain young man riding a motor cycle stopped the car and talked to the driver that there was luggage to be unloaded there from. At the same time PW4 emerged riding a motor cycle and ordered the car to be taken to Tunduma police station and PW4 got in and when they got at the police station all passengers were ordered to disembark with their luggage. According to her, she disembarked with a porch she had but didn't know where her other luggage were. On getting off the car she found all luggage unloaded already by a person she didn't know. She stood by her luggage after all passengers were ordered to do so and when the same was searched, they first removed clothes and then

removed a black plastic bag. She denied knowing the contents of the plastic bag. Shortly after, she was told to get inside the Police Station. In there, PW4 made her to sign on papers by force and sometimes on promise that she would be set free. She denied knowing what was written on those papers. She also denied confessing before PW6 and accused her of writing a statement and forcing her to sign. Responding to cross-examination questions, DW1 admitted that the black plastic bag was found in her bag but didn't see what was in it. She also admitted that the bag was hers but not drugs. She responded further that her cautioned statement was not objected because it bears her name and signature. She denied making a statement that *"mimi ndio mwenye makosa"*. Responding to the question whether she had misunderstandings with prosecution witnesses, DW1 said she had none with them. The accused unequivocally denied having trafficked narcotic drugs or knowing who planted them in her bag.

Having summarized evidence from either party, I find apposite to reiterate that this is a criminal case. The burden is on the prosecution to prove beyond reasonable doubt that the Accused did trafficking in narcotic drugs. It is not upon her to prove her innocence unless the law expressly requires her to do so. It is the law of our land that in cases of

this nature the accused can only be convicted of the offence on the basis of the strength of the prosecution case and not on the basis of the weakness of the defence case. Even suspicions, however ingenious or strong can never be a basis of a criminal conviction or a substitute for proof beyond reasonable doubt. This is equally true even where an accused person is proved to have told lies either in Court or prior to that in connection with the facts in issue. This is because there are many circumstances which can lead an accused to tell lies even when she/he is innocent. When an accused, therefore, is charged with an offence his/her guilt is not established or proved if the explanation he/she offers is one which is reasonable and might possibly be true even if the Court is not convinced that it is in fact true. This is a universally accepted principle of law which needs no authority to prop it up.

Of course it has been submitted by the Republic in this case that the accused gave false or incredible statements in her defence. Ms. Lugongo seems to argue that those statements given by way of explanation, inculpated the accused. Sadly, she didn't cite any authority. I entirely agree with this submission. Nevertheless, I am also aware that the important fact to ponder is that they can never become proof of guilt beyond reasonable doubt. They only tend to implicate or

incriminate her or subject her to suspicion and may cause cases needing corroboration be successfully used as such. On this observation, the High Court gained inspiration in the case of ***Elizabeth Shomari v. Republic***, Criminal Appeal No. 64 of 1990 in ***Republic v Kerstin Cameroon*** [2003] TLR 85 and emphasized that:

> *"Even if for the sake of argument the appellant had told lies that alone could not be a basis of a conviction."*

In this case, therefore, the prosecution has to prove to the required standard not only that the bhang was found in the accused's bag, but also that it belonged to her. Having observed so, I think, there are two major issues.

(i) Whether exhibit P4 was found in the accused's bag.

(ii) If issue one is answered in affirmative, whether exhibit P4 belonged to the accused person.

In principle it is not disputed here that there was bhang in the accused person's bag. There is direct evidence on this from PW2, PW4, PW5 and PW6 and I am inspired and agree with Ms. Lugongo's submission on contention that they deserve credence. The accused on her side admits that bhang was found in her bag but disagreed with the proposition that it was hers. The question that comes to the fore at this

juncture is who was the owner of that bhang (exhibit P4)? The evidence on record does not give me many options. It points unerringly to only one individual, the accused person who is said was trafficking it to Mbeya having been sent by her in law whom she declined to expose.

As alluded to above and as submitted by Ms. Lugongo, there is direct evidence in this case showing that the accused person was found with bhang in her bag. This direct evidence, to repeat myself, came from PW2, PW4, PW5 and PW6. Indeed as correctly submitted by Ms. Lugongo these were eye witnesses. Their evidence is supported by documentary evidence, to wit, exhibits P6, P7 and P8 and gains corroboration from the defence evidence. Ms. Lugongo beseeched this court to believe them and she relied on the cases of ***Goodluck Kyando v Republic***, [2006] T.L.R 363 and ***Vuyo Jack v The DPP***, Criminal Appeal No. 334 of 2016 (unreported). As I said earlier on, I also agree with her that after considering the prosecution oral evidence, I must confess that the same is water tight. On the basis and on the totality of the evidence before me, I must confess that there is tight and overwhelming evidence indicating that the accused person was found with bhang in her bag and all witnesses are credible.

The issue which has considerably exercised my mind is whether what was seized from the accused person's bag was the one taken to PW1, **Jansen Stanslaus Bilao**? This question relates to the chain of custody. As far as this issue is concerned, Ms. Lugongo argued that the chain of custody was ably explained by PW3 (D/CPL Joseph). She recounted his testimony that after the drugs were seized was handed over to him as an exhibits keeper. He then handed them to DC Martin to be taken to the Chief Government Chemistry Laboratory (CGCL) and later was returned to him. From then, he continued to store it until when it was finally brought to court and tendered as exhibit. PW3 tendered **exhibit P5** being Court Exhibit Register to prove chain of custody.

Arguing in respect of chain of custody, Mr. Chapa responded that PW3 was given the exhibit on 26/5/2016 but didn't register it anywhere till 27/05/2016 when he registered it in exhibit P5. He doubted whether the exhibit was seized on 26/05/2016 or 27/05/2016. He was convinced that there could be a mix up of exhibits and prayed this court not to take this issue for granted. He referred to the case of ***DPP v Shiraz Mohammed Sharifu*** [2006] T.L.R 70 to illustrate his position.

Mr. Chapa seems to submit that the chain of custody must be proved by a paper trail. It is digested from his submission that PW3

failed to document and establish that he was given the exhibit on 26/05/2016. He also observed that PW3 failed to tender in evidence the Occurrence Book (OB) in which he claimed to have documented that he was given the exhibit on 26/05/2016. According to Mr. Chapa registering it in exhibit P5 (Court Exhibit Register "the CER") on 27/05/2016 is an indication that the chain of custody was broken.

The looming truth is that in our jurisprudence, law is developing and growing faster to cater for the needs and surrounding circumstances. By 2007 or so, it was the requirement of the law that chain of custody must be proved by a paper trail as per the case of ***Paulo Maduka and 4 Others v Republic***, Criminal Appeal No. 110 of 2007 (unreported). Short of that the chain of custody was broken. The superior Court of Tanzania was, nevertheless, encountering circumstances which made it impossible to document everything. In its prudent meditations, it developed a new principle by 2017 which culminated into drastic changes. From that year, **Oral evidence** in proving chain of custody was accepted. Currently, the principle is that not all the times oral evidence must be supported by written evidence. This was stated in the decision of the Court of Appeal in the cases of ***Khamis Said Bakari v Republic***, Criminal Appeal No 359 of 2017 and

Marceline Koivogui v Republic, Criminal Appeal No. 469 of 2017 (both unreported).

Adverting to this case, since PW3 gave an oral account on how the exhibit came into his hands, where he registered it and eventually produced exhibit P5 in court, in my view, he is entitled to credence as par the case of ***Goodluck Kyando*** (supra). Circumstances of this case and considering the lapse of time, I think, oral evidence suffices to explain the chain of custody. It is my conclusion that, the chain of custody was unbroken up to that stage.

Let me now recall the issue I posed hereinabove, that is, whether what was seized from the accused person's bag was the one taken to PW1, **Jansen Stanslaus Bilao**? The evidence before me is that when the accused person's bag was searched, inside it there were retrieved black plastic bags containing what PW1 established to be bhang. After seizing it, PW4 handed the exhibit which was in the box to PW3. The bag was handed over to him (PW3) separately. This means the seized bhang's carriage was changed. I think it will be best if the witness (PW3) picks a tale in his own words:

> *"On 26/5/2016 in the evening I was at Tunduma police station. Insp. Ilomo, who was in the charge room, called*

me. He told me that bhang was seized. Therefore, he ordered me to keep it in the exhibit room. He showed me the bhang which was in three plastic bags. Together with the box, he handed over to me a bag with different clothes. He said the bhang was found therein."

That was stated in examination in chief. Responding to cross-examination questions PW3 testified that:

"When the exhibit was handed over to me, I didn't know who put it in the box and its prior condition. The exhibit was in the charge room and I was not shown the person found with it ... the bag I was given is herein court. Insp. Ilomo told me he found bhang in that bag. May be Insp. Ilomo ordered the separation of the bhang and clothes."

I have carefully read the evidence of PW5 and PW6. None of these led the evidence that he saw PW4 putting the bhang found in the accused person's bag in the box. PW4 as well did not explain how and why he changed the carriage. Worse still, the bag in which the bhang was found, was not tendered in court as an exhibit. PW4, PW5 and PW6 ended at describing it. In my view that was not enough. DW1 as well didn't witness the change of carriage. What were tendered in court by PW1 were the box (exhibit P3) and the bhang taken to him for

examination (exhibit P4). These were the two objects PW1 received from DC Martin. The bag isn't in the list. I think that is why PW4 hesitated to show the contents of exhibit P3 and hesitated further to identify exhibit P4. This hesitation raises doubts which in principle are resolved in favour of the accused person. Having this anomaly at my disposal, it is my considered opinion that even if the accused confessed, it means he confessed to the drugs she had in her bag. Not the one brought to court. The prosecution was duty bound to tender in court drugs found in her bag and lawfully seized and more importantly the bag exhibit P4 was retrieved.

True to these pieces of testimonies, it can't be safely said that the chain of custody was not interfered. What is obviously depended on by the prosecution is the direct evidence of all its witnesses in proving all the sequence of events into showing that the accused person was found trafficking narcotic drugs. In a case like the instant one, the law requires that prosecution must prove that a chain of custody was not broken at any given time i.e., there was no interference at all. Prosecution has relied heavily on the oral testimonies of their witnesses to prove chain of custody which in my considered opinion was interfered. In this I find concurrence with the opinion of the lady and gentlemen assessors.

Connected to this shortcoming was the prosecution failure to list during the committal proceedings the certificate of seizure as one of the documentary evidence to be relied upon by the same during the trial. Therefore, it was not among the intended exhibits which were read over to the accused person. Mr. Chapa submitted that such a failure was in total contravention with the provisions of section 246 (2) of the Criminal Procedure Act, Cap 20 R.E. 2019. This provision is left to speak as follows:

> *"246-(2) Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial."*

In view of the foregoing provision, it is the requirement of the law that when the accused appears before the subordinate court for committal proceedings, statements containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial and documents containing the substance of the evidence must be read to him or her.

I have anxiously gone through the subordinate Court's committal proceedings at page 8. I am enlightened that the listed prosecution exhibits were the following: **one,** Arrest warrant/ search warrant, **two,** the accused person's cautioned statement, **three,** the transportation permit, **four,** the accused person's extra-judicial statement and **five,** the report of examination from government chemist. It goes without saying, therefore, that the seizure certificate was not among the listed exhibits. Its substance was, needless to say, not read over to the accused. Since it is the dictate of the law that it should be listed and its substance read over to the accused person, the failure is fatal and leads to one consequence of being expunged from the record of the trial.

Closely related to the foregoing flaw was an illegal search. Ms. Lugongo admitted right away that the search warrant was not tendered before this court. She, nevertheless, argued that such failure is not fatal to the prosecution case because the prosecution evidence and defence evidence prove that the accused was searched and bhang found in her bag which belonged to her and she confessed. To cement that position she referred to the case of ***Jamali Msombe and Nicholaus Bilali Muyovela v Republic***, Criminal Appeal No. 28 of 2020 (unreported). I pose here to throw one observation. To hummer home what I said

earlier in this judgment, the bag referred to by the learned republic counsel, was not tendered as an exhibit. Therefore, this court cannot, in my view, act on the guesswork.

On the other hand, Mr. Chapa argued that the search was illegal as it contravened the law. The contravened law according to him was **section 38 (1) of the Criminal Procedure Act, [Cap 20 RE 2019] (hereinafter the CPA) read together with paragraph 2 (a), (b), (c) and (d) of the PGO No. 226** which makes it mandatory that there should be in place a search warrant before the search is conducted. He also submitted that there should be a permission of the Magistrate to conduct a search. To reinforce his argument he cited the case of ***Joseph Charles Bundala v Republic,*** Criminal Appeal No. 15 of 2020 (unreported) which insisted that where the search is illegal the court has no right to act on the seizure certificate.

As far as the issue of search warrant is concerned the law under section 38 (1) of the CPA is very clear. It provides as follows:

> *"38.-(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place-*

(a) anything with respect to which an offence has been committed;

(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence,

and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel carriage, box, receptacle or place as the case may be."

Briefly, what section 38 (1) of the CPA entails is that it is the police officer in charge of a police station who can search or issue a written authority to police to search the premises but it is only when he is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property. In order to have a sounding search, the searching officer must abide to procedures stipulated under

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paragraph 2 (a), (c) and (d) of the Police General Order ("the PGO") **No. 226**

"2. (a) Whenever an O/C. [Officer In charge) Station, O/C. C.I.D. [Officer In Charge Criminal Investigation of the District], Unit or investigating officer considers it necessary to enter private premises in order to take possession of any article or thing by which, or in respect of which, an offence has been committed, or anything which is necessary to the conduct of an investigation into any offence, he shall make application to a Court for a warrant of search under Section 38 of the Criminal Procedure Act, Cap. 20 R.E. 2002. The person named in the warrant will conduct the search.

(c) Where an officer referred to in (a) above receives information or has reasons to believe that a person wanted in connection with the commission of a criminal offence is in any building, he shall apply to the local Magistrate for a Warrant of Arrest.

(d) Where anything is seized in pursuance of search the officer seizing the thing shall Issue a receipt acknowledging the seizure of that thing, bearing the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."

The letter and spirit of section 38 of the CPA appears to have been captured by paragraphs 1 (a), (b) and (c) and 2 (a) and (d) of the PGO made by the Inspector General of Police in exercise of his powers under section 7 (2) of the Police Force Auxiliary Services Act, Cap. 322 of the Revised Edition, 2002. For clarity, I reproduce the two paragraphs thus:

> *"1-The entry and search of premises shall only be effected, either: -*
>
> *(a)* ***on the authority of a warrant of search****; or*
>
> *(b) in exercise of specific powers conferred by law on certain Police Officers to enter and search without warrant.*
>
> *(c)* ***Under no circumstances may police enter private premises unless they either hold a warrant or are empowered to enter under specific authority contained in the various laws of Tanzania****.*
>
> *2. (a) Whenever an O/C (Officer in Charge) Station, O/C. C.I.D. [Officer in Charge Criminal Investigation of the District], Unit or investigating 13 officer considers it necessary to enter private premises in order to take possession of any article or thing by which, or in respect of which, an offence has been committed, or anything which is necessary to the conduct of an investigation into any offence, he shall make application to a Court for a warrant of search under Section 38 of the Criminal Procedure Act,*

Cap, 20 R.B. 2002. The person named in the warrant will conduct the search." [Emphasis supplied]

In order to have a common understanding, the search in this case was conducted in the accused person's bag (carriage, box and receptacle). This is captured under section 38 (1) of the CPA. Therefore, to have a valid search in the accused person's bag the provisions of law cited herein above were to be strictly complied with.

Mr. Chapa referred me to the case of ***Joseph Charles Bundala* (supra)** to highlight the purpose of these procedures. This case lucidly elaborated the purpose of complying with the procedures as follows:

"We think that procedure was purposely set out to avoid abuse of authority on the part o f police officers for; it controls unauthorized and arbitrary searches in premises that may be conducted by unscrupulous police officers and therefore avoid the possibility of fabrication of evidence by planting things subject of a criminal charge."

Similar position was expressed in the case ***Ayubu Mfaume Kiboko and another v Republic***, Criminal Appeal No. 694 of 2020 CAT (unreported) in which the Court recalled what it stated in ***Director of Public Prosecutions v Doreen John Mlemba,*** Criminal Appeal No.

359 of 2019; citing its earlier decision in ***Badiru Mussa Hanogi v Republic***, Criminal Appeal No. 118 of 2020 (both unreported) stressing the rationale for the controls on powers of search and seizure thus:

> *"In our view, the meticulous controls provided for under the CPA and a dear prohibition of search without warrant in the PGO is to provide safeguards against unchecked abuse by investigatory agencies seeking to protect individual citizens' rights to privacy and dignity enshrined in Article 16 of the Constitution of the United Republic of Tanzania. It is also an attempt to ensure that unscrupulous officers charged with the mandate to investigate crimes do not plant items relating to criminal acts in people's private premises in fulfilling their undisclosed ill-motives."*

Adverting to the present case, as Mr. Chapa persistently submitted, procedures envisaged above by statutory law and stressed in case laws were not adhered to. The evidence of PW4, PW5 and PW6 and exhibit P7 are very clear that the search in the accused' bag was not preceded with the issuance of the search warrant. As per the facts of this case the search was not of emergence one. So, I am contrary to any contention raised in that the search was emergence. DW1 too informed this court that she didn't sign on any document before a search was executed. Apart from admitting this fact, Ms. Lugong held

the view that the anomaly was not fatal. She sought an aid of the decision in the case of ***Jamali Msombe and Nicholaus Bilali Muyovela*** (supra) and explained at length that failure to tender a search warrant was not fatal. I have read this case and compared it with the case of ***Joseph Charles Bundala*** (supra). In my view, the latter case has similar material facts compared to the former. While in ***Jamali Msombe*** case the accused persons were charged of being found in unlawful possession of Government trophies and facts were narrated to that effect, in ***Joseph Charles Bundala*** case the accused person was charged for being in unlawful possession of cannabis sativa. I am therefore, constrained to be guided by the decision in the latter case. In this case the Court of Appeal of Tanzania speaking through Sehel, JA observed that searching a house without a search order or warrant was contrary to the dictates of the provisions of section 38 of the CPA and the P.G.O No. 226. It was concluded that the search was illegal.

In this case similar events took place. In view of the foregoing analysis, I find merit in Mr. Chapa's arguments that the search was conducted illegally and the seizure certificate was wrongly admitted in evidence. Accordingly, I am constrained to expunge the illegally obtained evidence, which included the box (exhibit P3), cannabis sativa

(bhang) (exhibit P4) and certificate of seizure (Exhibit P6). The attendant outcome of discounting the evidence as aforesaid is that the remaining evidence on record is too thin on its own to support the charge the accused person is facing. As such the case against the accused person has not been proved beyond reasonable doubt as required by law. This conclusion draws a concurrence with all gentlemen and lady assessors who were all of the settled opinion that the accused person was not guilty of the charged offence of trafficking in narcotic drugs. Consequently, I find the accused not guilty. She is henceforth acquitted.

DATED at **MBEYA** this **21st** day of **April, 2022**

J.M. KARAYEMAHA
JUDGE