

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 95 OF 2018

REPUBLIC

VERSUS

HUSSEIN MUSSA ABDALLAH

JUDGMENT

15/12/2022 & 22/02/2023

BWEGOGGE, J.

One Hussein Mussa Abdallah, the accused person herein, stands charged with two counts under the Drugs Control and Enforcement Act No. 5 of 2015 namely, trafficking in narcotic drugs contrary to section 15(1)(b) of the Act, in the 1st count and unlawful transportation of prohibited plants, contrary to section 11(1)(d) of the same Act in the 2nd count.

The particulars of the offence in respect of the 1st count vehemently allege that on 3rd January 2016, at Maili Moja area, along Morogoro/Dare Es Salaam road within Kibaha District, Coast Region, the accused person

trafficked in narcotic drugs namely, cannabis sativa, commonly known as bhangi weighing 100.7 kg.

And, the particulars of the offence in respect of the 2nd count allege that on the same date and place mentioned above, the accused unlawfully transported prohibited plants namely, cannabis sativa commonly known as bhangi weighing 100.7 kg by using the motor vehicle with the registration number T619 AUP make TOYOTA RAV 4.

The accused person protested his innocence when he was arraigned in this court. And, the prosecution herein, in a bid to substantiate the charge procured seven witnesses to testify against the accused person. Briefly, the prosecution case is as follows: On the fateful day of 03rd January, 2016, the law enforcement agents (the policemen, customs and immigration officers) under the supervision of Inspector Selemani Athumani Puma (PW7) were on patrol at Maili moja police barrier. Later on, around 11:00 pm, PW7 received information from the anonymous informer to the effect that there was a vehicle emanating from Morogoro heading to DAR es salaam, make Toyota RAV 4 with registration No. T.619 AUP which was suspected to be carrying prohibited plants known as bhangi.

Upon receipt of the information, PW7 alerted the law enforcement agents under his supervision at the barrier (G. 3446 Corporal Ayubu Mnyamizi Chiyo (PW1) and Angela Ndami Kagaruki (PW2) inclusive) to be prepared for the arrest of the suspect. At 11:30 pm, the vehicle identified above approached the barrier. The law enforcement agents signalled the vehicle to stop but the driver refused to comply and made a U-turn, attempting to escape. Under the order of PW7, the vehicle was forced to halt by gunshots which punctured the front tires. The driver of the vehicle who identified himself as Hussein Mussa Abdallah, the accused herein, was arrested and the vehicle was searched. Allegedly, the vehicle was found with four and a half sulphate bags packed with dry leaves suspected to be bhangi (exhibit P5). PW7 executed the emergency certificate of seizure (Exhibit P5) and later escorted the suspect (accused herein) to Kibaha Police Station. The accused and the exhibits were put under the custody of a policewoman one Hadija Bakari (PW4) who was on duty at the charge room on that fateful night. The following morning, on 04th March, 2016 the exhibits were left under the custody of a policeman namely, Constantine Lucas Munena (PW3).

Later on, the exhibits were handed to Corporal Mokili, for safe custody having been registered and labelled by Detective Sergeant Ombeni (PW6)

who was the investigator of this case. On 06/01/2016 PW6 procured the sulphate bags containing suspicious leaves from the custodian of exhibits, filled the special form (DCEA 001) and remitted the same to the Government Chemist Office herein Dar es salaam for laboratory test. The government chemist, one Elias Mulima (PW5), weighed the suspicious leaves and found the same to be 100.7 Kg. Both the preliminary and confirmatory tests on the exhibits led to the finding that the suspicious leaves were cannabis sativa. On the basis of the above facts, the accused person was charged on two counts aforementioned and arraigned in this court. Upon closure of the prosecution case, the accused person was found with a case to answer on both counts.

In defence, the accused came up with a diametrically opposed version of what had transpired at the crime scene on that fateful night. His defence is to the effect that he is a motor vehicle mechanic. On 30/12/2015 he received a phone call from his client known as Mohamed Mkali, who informed him that he had encountered a mechanical problem while driving along Morogoro-Dar Es Salaam road, at Darajani area, and he needed his services. The accused mounted a bus at Msamvu Bus Stand. He dismounted the bus at Kibaha and hired a motorcycle to reach the identified area where his services were required. The hired motorcyclist

was halted by the law enforcement agents at Mailimoja barrier and asked to show his driving license. Then the same was asked to explain why he was not wearing a helmet; being intimidated, he fled away, leaving the accused under the custody of the law enforcement agents. Having been interrogated for a while, the accused was suspected to be a criminal involved in motorcycle stealing. Later on, allegedly, the accused was beaten being forced to admit the allegation of theft then escorted to Tumbi Police Station where he was kept in custody for 11 days and later charged in court for the offences herein. In substance, the accused vehemently refuted the charges levelled against him, alleging the charges were concocted against him without an iota of evidence.

In augmenting the prosecution case, Mr. Emmanuel Maleko, Senior State Attorney, filed the written submission. Briefly, it is submitted that the prosecution has proved its case through the testimonies of procured witnesses and exhibits tendered. That it has been proved that the accused was found in possession of four and a half sulphate bags packed with suspicious leaves of which it has been established that it is cannabis sativa. That the prosecution has likewise succeeded to prove the chain of custody in this case.

In the same vein, the defence counsel herein, Mr. Ludovick Nickson, filed the final written submission to augment the defence case. Briefly, the counsel contended as follows: It is the duty of the prosecution to prove its case beyond reasonable doubts whereas doubts, if any, arising from the prosecution case should be resolved in favour of the accused person. The counsel referred the case of **Amos Mwita Chacha vs. the Republic**, Criminal Appeal No. 118 of 2013 CA (unreported), among others, to make his point. That the accused is not required to prove his innocence. The counsel referred the cases of **Kilamei Ramadhani versus Republic**, Criminal appeal No. 128 of 2004 (unreported) and **John Makolobela and Two Others vs. Republic** [2002] TLR 296 to buttress his point.

Further, the counsel contended that the second count herein is misplaced on the ground that there is variance between what is stated in the charge sheet and the evidence adduced by the prosecution witnesses in this court. That, while the second count alleges that the accused was found transporting prohibited plants, the evidence procured by the prosecution tends to prove that the accused was found in possession of cannabis sativa leaves. The counsel asserted that the term "plant" literally meant a living thing/organism growing on the earth with stem, leaves and roots, if

any. The case of **Gabriel Aloyce Mbena versus Republic**, Criminal Appeal No. 86 of 2021 HC (unreported) was cited to bring the point home.

In tandem with the above, the counsel contended that the first count alleges that the accused was found trafficking in narcotic drugs. However, the evidence procured by the prosecution tends to prove that the accused was found with dried leaves of cannabis sativa. That, in law, narcotic drugs refer to pharmaceutical manufactured drugs such as heroin, and morphine, among others, not leaves of cannabis sativa.

Therefore, the defence counsel opined that the particulars of the offence differ materially from the statement of offence and evidence tendered in court, hence, contravening the provision of s. 132 of the Criminal Procedure Act [Cap. 20 R.E. 2022]. Thus, the accused was denied his right to be supplied with reasonable information for him to prepare an informed defence. The counsel cited the case of **Hamis Mohamed Mtou versus Republic** (Criminal Appeal No. 228 of 2019) [2021] TZCA 478 and **Hadija Mwishehe Tingisha @ Mama Zakia vs. the Republic**, Criminal Appeal No. 213 of 2021 to validate his opinion.

On the above premises, the defence counsel concluded that the prosecution has failed to prove its case beyond a reasonable doubt to

ground conviction in this case. Hence, the counsel prayed for the accused to be found not guilty and acquitted.

The issue before this court is whether the accused person trafficked narcotic drugs and, or unlawfully transported prohibited plants.

From the outset, I subscribe to the submission made by the defence counsel in that it is the prosecution side which has the burden to prove the charge preferred against the accused person beyond reasonable doubt [**Simon Edson @ Makindi vs Republic** Criminal Appeal No. 05 of 2017 (2020) TZCA 1730]. In the same vein, subscribe to the submission by the defence counsel in that it is not the duty of the Accused person to prove his innocence; it suffices that he raises reasonable doubt on the prosecution case. Likewise, I join hands with the defence counsel in the assertion that the accused person may only be convicted on the strength of the prosecution case, not on basis of the weakness of his defence. See the case of **Mohamed Haruna Mtupeni and Another vs Republic** (Criminal Appeal No. 259 of 2007) TZCA 147. And, it is an operating principle of law that doubts arising from the prosecution case should be resolved in favour of the accused person.

In tandem with the above, I subscribe to the defence counsel's argument in that the provision of s. 132 of the Criminal Procedure Act commands that the charge must contain statement of the specific offence and such particulars as may be necessary for giving reasonable information to the accused as to the nature of the offence charged so that he can properly marshal his defence [**Hamis Mohamed Mtou vs Republic** (supra)].

However, I refuse to purchase the argument made by the defence counsel that, in law, narcotic drugs refer to pharmaceutical manufactured drugs such as heroin, and morphine, among others, not leaves of cannabis sativa. To my understanding, cannabis sativa is specified in the first schedule under the Drugs Control and Enforcement Act (No. 05) of 2015 as a narcotic drug. Hence, the charge in respect of the first count is proper in the circumstances of this case.

That said, I revert to canvass the issue for determination in this case. It is apparent that the key witnesses in this case, namely PW1, PW2 and PW7 are eyewitnesses who gave direct evidence of what had transpired at the scene of the crime and their involvement in arresting the accused herein and impounding the exhibits tendered herein. PW7 had deponed in this court how he had received a clue from his anonymous informer about the suspicious vehicle that was well identified and was heading to

Dar es Salaam from Morogoro that fateful night. PW7 who supervised the law enforcement agents at the roadblock at Kibaha Mailimoja had alerted his subordinates, PW1 and PW2 inclusive, to be alert to halt the vehicle when it would approach the barrier for further necessary action, including search exercise. PW1 had in so many words testified in this court how they identified the vehicle and signalled the driver to stop whereas the said driver had manoeuvred the vehicle in an attempt to turn back and escape the arrest, forcing them to shoot at the tires to force the suspect to stop. The narration made by PW1 was corroborated by PW2, the immigration officer who was an eye witness at the scene though she didn't participate directly in the arrest and search exercise. I had an opportunity to inspect the vehicle (exhibit P6) and witnessed bullet holes in the rear left door and the windscreen, apart from punctured front tires.

It is a settled rule of law that witnesses are entitled to credence and their testimonies must be believed unless there are cogent reasons for not believing a witness. And cogent reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses [**Goodluck Kyando vs Republic (2006) TLR 363** and **Khamis Said Bakari vs. Republic**, Criminal Appeal No. 359 of 2017 CA

(unreported)]. I find no cogent ground(s) to impeach the credibility of PW1, PW2 and PW7.

It has been proved by the forensic report (exhibit P1) that the dry leaves packed into the four and a half sulphate bags, weighing 100.7 kg, are narcotic drugs, specifically, cannabis sativa. Cannabis sativa is specified in the first schedule under the Drugs Control and Enforcement Act (No. 05) of 2015 as a narcotic drug. Mere possession of cannabis sativa amounts to trafficking in narcotic drugs within the meaning of the law from which the charge facing the accused herein was coached.

As aforesaid, the accused person came up with a different version of what had transpired at the crime scene. He purported to establish that he was arrested for the commission of the traffic offence. Later on, the charge herein was concocted against him. He failed to establish why the law enforcement agents concocted the charge against him. It is obvious that the accused lied to this court. It is needless to state that the defence marshalled by the accused person failed to controvert the prosecution case. It is my considered opinion that the evidence brought to the attention of this court by the prosecution outweighs the defence case.

Likewise, I am of the considered opinion that the prosecution has established the chain of custody in this case. It is now settled law that

both oral and documentary evidence have similar weight in proving the chain of custody of narcotic drugs. See the cases of **Marceline Koivogui vs. Republic**, Criminal Appeal No. 469 of 2017, CA (unreported) and **Joseph Leonard Manyota vs. Republic**, Criminal Appeal No. 485 of 2015 CA (unreported), among others.

It is in the record of this case that PW7 having arrested the accused herein, searched his vehicle and discovered four and a half sulphate bags packed with suspicious dry leaves (which were later confirmed to be cannabis sativa), had executed an emergency search warrant (exhibit P2). Then he handed the exhibits (the four and a half sulphate bags of suspicious dry leaves and motor vehicle) to the police officer (PW4) on duty at the charge room on that fateful night of 03rd January, 2016. PW4 had submitted the exhibit to her colleague (PW3) who was on duty the following day. Later on, the investigator (PW6) registered the exhibit vide No. KBA/39/2016, sealed the same and handed over to Corporal Mokili, the custodian of exhibits, for safe custody. On 06th January, 2016, PW6 filled Form No. DCEA 001 (exhibit P 4) and submitted the exhibit to the government chemist (PW5) who had registered the same as "Laboratory No. 12 of 2016." Then PW5 measured the exhibit, analysed the same, took samples for further confirmatory tests, sealed the bags, and returned

the same to PW6. Lastly, PW6 had returned the exhibit to the custodian.

The four and a half bags

During the trial, PW5, PW6 and PW7 identified the contents of exhibit P5 as the item they had handled or observed at various stages from arrest, seizure, transfer to the custodian and government chemist, and finally to the tendering of the same in court. It suffices to point out that the oral account of prosecution witnesses has proved the chain of custody in this case. This court lacks cogent ground to conclude that the key exhibit (exhibit P5) had been mishandled or tampered with.

The provision of s. 28 of the Drugs Control and Enforcement Act (No. 05) of 2015 imposes a burden on the accused person to prove that the possession of the narcotic drugs was authorized and, or otherwise, considering all surrounding circumstances, was conscionable. He failed to discharge this burden.

Before penning down, I find myself obliged to attend one contention raised by the defence counsel in his final written submission. It is uncontroverted fact that the evidence procured by the prosecution to establish an alternative (second) count tends to prove that the accused person was found with suspicious dry leaves which were letter confirmed

PW5 to be cannabis sativa. The defence counsel alleged that there is variance between what is stated in the charge sheet and the evidence adduced by the prosecution witnesses on the ground that though the second count alleges that the accused was found transporting prohibited plants, yet the evidence procured by the prosecution tends to prove that the accused was found in possession of cannabis sativa leaves. The defence counsel employed the holding in the case of **Gabriel Aloyce Mbena versus Republic (supra)** in asserting that the term "plant" literally meant a living thing/organism growing on the earth with stem, leaves and roots, if any. Hence, opined the counsel, the proof that the accused was found in possession of leaves confirmed to be cannabis sativa cannot prove the charge of transportation of prohibited plant.

I have gone through the decision of the case cited above which the counsel relied on to buttress his assertion. It is self-evident that in the quest to find the meaning of the term "plant" the court referred *the Collins Dictionary and Thesaurus* whereas the respective term is assigned meaning as thus:

"a plant is a living thing that grows in the earth and has a stem, leaves and roots"

Further, the court expounded:

*"As from the above definition the term "plant" is defined to be a living thing or organism with its parts, I am therefore of the firm view that, for the purposes of this appeal the term "**prohibited plant**" as referred in the charge facing the appellant meant to refer nothing other than **cannabis plant or living organism/thing** that grows on earth, together with its parts be it stem, leaves and roots but which contains Tetrahydrocannabinol chemical (THC). In other words, the **prohibited plant** must be a living thing /organism growing on earth with stem, leaves and roots, if any. "*

With due respect, I would prefer to differ from the above reasoning. The plain meaning rule commands that when the language is unambiguous and clear on its face, the meaning of the statute must be determined from the language of the statute. Likewise, the plain meaning rule is amplified as thus:

"..... when a provision is in specific language that admits no doubt or ambiguity in its application, it should be applied strictly as it is, without interpolation." See the cases of **Shana General Store Ltd vs. The Commissioner General Tanzania Revenue Authority** (Civil Appeal No. 392 of 2020) [2021] TZCA 633.

And, in the case of **Edward Yusuph @ Gao vs Republic** (Criminal Appeal No. 496 of 2020) TZCA 22 it is further expounded that:

".....in the familiar canons of statutory construction of plain language, when the word of the statute are unambiguous, judicial inquiry is complete because the courts must presume that a legislature says in a statute what it means and means in a statute what it says there. As such, there is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation."

See also in this respect the cases of **Republic vs. Mwesige Geofrey and Another**, Criminal Appeal No. 355 of 2014 (unreported); **Barnabas Msabi Nyamonge vs Assistant Registrar of Titles, Shufaa Jambo Awadhi** (Civil Appeal No. 176 of 2018) [2019] TZCA 279 and **DPP vs Julieth Simon Peleka** (Criminal Appeal No. 04 of 2019) [2020] TZCA 350, among others.

Having revisited the canons of statutory interpretation, I now revert to the statutory meaning of the term under scrutiny herein. The term "**prohibited plant**" is defined under section 2 of the Drugs Control Enforcement Act, as thus:

".....Cannabis plant, khat plant, coca plant, papaver somniferum or opium poppy and papaver setigerum."

Further, the provision above defines the term "cannabis plant" to mean:

*"...a plant of genus cannabis by whatever name called and **includes any part of that plant** containing tetrahydro – cannabinol" (emphasis mine).*

The statutory interpretation afore reproduced is clear in that the prohibited plant encompasses the **cannabis plant**, among others, of genus cannabis and includes **any part of that plant** which contains tetrahydrocannabinol chemical known by its acronym (THC). Therefore, it amounts to the transportation of the prohibited plant if one is found transporting any part of the cannabis plant be it leaves and, or stem. I find no ambiguity and, or absurdity in the plain meaning of the provision reproduced above to require further interpolation. The rationale of the wording of the provision revisited above is not far to see. The parliament in its wisdom aimed to spare the law enforcement agents from the predicament they would likely face in bringing the offenders to justice in cases the prohibited plants being transported were merely leaves and, or stems.

Notwithstanding my opinion above, the offence of transportation of prohibited plant levelled against the accused herein in the second count is an alternative to the first count. And since the main offence has been proved, I need not pronounce myself in respect of the alternative count.

In the event, this court hereby finds that the prosecution has succeeded to prove the main charge levelled against the accused person beyond reasonable doubt. The accused person is hereby found guilty of the offence of trafficking in narcotic drugs c/s 15 (1) (b) of the Drugs Control and Enforcement Act (No. 05) of 2015 and convicted forthwith.

DATED at **DAR ES SALAAM** this 22nd February, 2022



A handwritten signature in blue ink, appearing to read "O. F. Bwego", with a long horizontal flourish extending to the right.

O. F. BWEGOGUE

JUDGE