

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT BUKOBA - SUB REGISTRY

ECONOMIC CASE NO. 02 OF 2023

REPUBLIC

VERSUS

BAHATI MELITANO

JUDGMENT

12th and 24th July, 2023

BANZI, J.:

The accused person Bahati Melitano stands charged with the offence of trafficking in narcotic drugs contrary to section 15 (1) (a) (3) (iii) of the Drug Control and Enforcement Act [Cap. 95 R.E. 2019] ("the Drugs Act"), read together with paragraph 23 of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2019] ("the EOCCA"). The particulars of offence indicate that, on 23rd April, 2022 at Mtundu Village - Lusahunga Ward within Biharamulo District, in Kagera Region, the accused person trafficked in narcotic drugs namely, *Cannabis Sativa* commonly known as *Bhangi* weighing 199.9 kilograms. The accused person pleaded not guilty to the information.

The prosecution under the representation of Ms. Tully Helela, Mr. Erick Mabagala, Ms. Mgeni Mdee, Ms. Matilda Assey, Ms. Gloria Lugeye and Ms. Agness Awino, learned State Attorneys called in nine witnesses and produced seven exhibits. On the other hand, Mr. Abel Rugambwa, learned Advocate represented the first accused person who was the sole witness for the defence. Sincerely, I must thank learned Counsel of both sides and everyone who took part in these proceedings for their tireless efforts towards assisting this Court in the determination of this case.

In the main, the prosecution evidence presents a case that, on 22nd April, 2022, F.5034 SSGT Ignas (PW1) was with his colleagues conducting foot patrol. In the course of patrolling, he received a tip for an informant that, in the house of Bahati Melitano, there is *cannabis sativa*. Following such information, he informed his superior the Officer Commanding Station (OCS) of Nyakanazi police station one ASP Mayala who told him to proceed by surrounding the house in question in order prevent the drugs to be taken out while he was preparing the search order. While they were waiting for search order, PW1 called the hamlet chairman, Richard Paschal (PW2) who after joining them and being informed about their mission, they went to the

house in question. On arrival, PW2 knocked the door which was opened by the accused person accompanied by his wife. After opening, they made introduction and informed him about the intended search. Under the instructions of PW1, PW2 called the neighbours, Mateso Kaha, Sadick Charles and Gerard Nyambebe to witness the search.

Thereafter, the accused person searched them on their bodies and the search began in the sitting room where, nothing suspicious was found. They proceeded to the bedroom where they found ten and a half sacks of polythene material commonly known as "sulphate bags" containing leaves suspected to be cannabis sativa (Exhibit P2). PW1 seized them through certificate of seizure (Exhibit P1) that was signed by himself, PW2, the three neighbours and the accused person. Upon signing, PW1 called the vehicle and when it arrived, they took accused person together with seized exhibit and went to Nyakanazi police station. On 23rd April, 2022, PW1 handed Exhibit P2 and the accused to F. 5433 D/SGT Pastory (PW9), the investigator of the case, who took them to Biharamulo Police Station where he handed over Exhibit P2 to H. 4131 PC Mohamed (PW5), the custodian of exhibits. PW5 recorded them in the Court Exhibits Register at entry number 21/2022.

and labelled the sulphate bags with number 1 to 11 and case reference number BI/IR/368/2022 before storing them in exhibits room.

On 25th April, 2022 Exhibit P2 was taken to Weights and Measures Agency Bukoba (WMA), where Victor Lenard Maganga (PW3) weighed it in the presence of the accused person and got total weight of 199.9 kilograms. He then drew sample from bag No. 1. Five months later, after being instructed to collect sample from each bag, on 27th September, 2022, G.6190 D/CPL Ngalula (PW7) took Exhibit P2 to WMA where Neema Christin Uronu (PW6) drew eleven samples from each bag in the presence of the accused person, put in envelopes, labelled them A1 to A10 and then PW7 sealed them. The eleven sealed envelopes with samples (Exhibit P6) were kept by PW5 until on 18th October, 2022, when F.203 D/SGT Bonaventure (PW8) submitted them to Chief Government Chemist where they were analysed by Sane Mayaya Lyochi (PW4) and confirmed to contain *Tetrahydrocannabinol* chemical which is only found in *cannabis sativa*. After analysis, PW4 prepared a report and the same was admitted in court as Exhibit P4. In the course of testimony of PW4 and PW9, the defence tendered their previous recorded statements in a bid to impeach their credibility which were admitted as

Exhibit D1 and D2, respectively.

In his defence, the accused person testified under oath as DW1. He categorically denied to have committed the offence of trafficking in narcotic drugs. He was also denied to have been found with those sulphate bags of cannabis sativa within his bedroom. It was his testimony that, on the night of 23rd April, 2022, while he was at his home sleeping with his wife and a child, around 00:00 hours, his door was knocked by persons who introduced themselves as police officers. After opening the door, he found three police officers and one militiaman who handcuffed him and put him under restraint. Then, he was shown sulphate bags which were outside his house. He also a motor vehicle parked about 20 to 25 paces away. Thereafter, the hamlet chairman was called who on arrival, he called the neighbours. After that, they searched his house starting from the sitting room to the bedroom, but they found nothing. After that, others persons signed in a document but he did not sign. After signing, the neighbours and militiaman were ordered to board the bags in the motor vehicle.

Thereafter, he was taken to the motor vehicle and they drove up to Nyakanazi Police Station. On arrival, he was put in the lock up until the next

day when he was transferred to Biharamulo Police Station. While he was at Nyakanazi Police station, he was forced to sign on a ready-made statement. On 25th April, 2022 he was taken out of lock up and went to Bukoba to weigh those sulphate bags. However, he did not witness the weighing because he was a bit far from them. Thereafter, they returned to Biharamulo and on 27th April, 2022 he was arraigned to Biharamulo District Court and the charge of narcotic drugs was read over to him. He was then taken to prison until September 2022 when he was taken out by PW7 to go to Bukoba to take samples. Then, he was taken back to prison. The accused person denied about the sulphate bags in question to be retrieved from his bedroom and claimed that, he found the same outside his house. He blamed PW2 to have planted those sulphate bags outside his house due to grudges between them because in 2019, he contested for hamlet chairmanship via CHADEMA Party but PW2 won and since then they were not in good terms. At the end, he prayed to be acquitted.

In a nutshell, that was the evidence of the prosecution and defence sides. Having considered the evidence on record, the main issue for determination is whether the prosecution has proved the case beyond

reasonable doubt. However, determination of this issue depends on two specific issues that; *whether the search was legally conducted* and *whether the chain of custody was maintained*.

It is worthwhile noting here that, search in a dwelling house can be conducted either under section 38 or 42 of Criminal Procedure Act [Cap. 20 R.E. 2022] ("the CPA"). The difference between these sections is that unlike section 42 which concerns search under emergence situation, section 38 requires **one**; search warrant, **two**; the presence of the owner of the premises, occupier or his near relative at the search premises, **three**; the presence of an independent witness who is required to sign to verify his presence and **four**; issuance of a receipt acknowledging seizure of property. Likewise, search under the Drugs Act requires search order (Form DCEA 003A) issued either by Commissioner General or OCS pursuant to section 32A as added by section 14 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2022. The requirement of search order existed even before section 32 was repealed in October, 2022 because sub-sections (4) and (5) of the Drugs Act had already been interpreted by the Court of Appeal of Tanzania through the case of **Shabani Said Kindamba v.**

Republic (Criminal Appeal No. 390 of 2019) [2021] TZCA 221 TanzLII

where it was held that:

"In our conclusion on the two related issues, there is no justification for the learned Senior State Attorney arguing that the search and seizure was under the DCEA and therefore a search warrant was not required. This is because sub sections (4) and (5) of section 32 of the DCEA cited above, require that arrests and seizures be conducted in accordance with the law in force, specifically in this case, the CPA."

This position has also been discussed in the cases of **Joseph Charles Bundala v. Republic** (Criminal appeal No. 15 of 2020) [2021] TZCA 3532, **Remina Omary Abdul v. Republic** (Criminal Appeal No. 189 of 2020) [2022] TZCA 118 and **Ayubu Mfaume Kiboko and Another v. Republic** (Criminal Appeal No. 694 of 2020) [2022] TZCA 121, all reported at TanzLII.

Reverting to the matter at hand, it is undisputed that, the search in the house of the accused person was conducted at night without search order or warrant. PW1 in his testimony claimed that, the said search was conducted in the emergence situation. Section 42 (1) of the CPA provides that:

"(1) A police officer may—

(a) search a person suspected by him to be carrying anything concerned with an offence; or

(b) enter upon any land, or into any premises, vessel or vehicle, on or in which he believes on reasonable grounds that anything connected with an offence is situated,

and may seize any such thing that he finds in the course of that search, or upon the land or in the premises, vessel or vehicle as the case may be—

(i) if the police officer believes on reasonable grounds that it is necessary to do so in order to prevent the loss or destruction of anything connected with an offence; and

***(ii) the search or entry is made under circumstances of such seriousness and urgency as to require and justify immediate search or entry** without the authority of an order of a court or of a warrant issued under this Part."*

(Emphasis supplied).

The provision above empowers a police officer under seriousness and urgency circumstances which justify the immediate search, to enter upon

any premises, search and seize anything connected with an offence. Also, such search must be necessary in order to prevent the loss or destruction of anything connected with an offence. Now the next question to be answered is whether the search in our case falls under the emergence situation. In answering this question, I will consider the testimony of PW1 and PW2.

PW1 in his testimony stated that, while they were conducting foot patrol, he received information for his informant that, at the house of the accused person, there is *cannabis sativa*. Upon receiving such information, he called his OCS who asked him to proceed with surrounding the house in question while he was preparing the search order. PW1 also stated that, after they arrived at the house of the accused person, they waited for the said search order for 45 minutes before they decided to execute the search. He further stated that, within those 45 minutes, he called his boss three times without success and upon completion of search, he called for the motor vehicle which it arrived within 30 minutes.

On the other hand, it was the testimony of PW2 that, on 23rd April, 2022 around 00:05 am, he received a call from PW1 who was with his colleagues informing him their mission to search in the house of the accused

person whom they suspected to have *cannabis sativa*. After he arrived near the house of the accused person, he found the police officers and they went close to the house. After reaching there, he knocked the door and the accused person came out. PW1 asked him to call neighbours and after he returned with three neighbours, they entered inside where the search began. It was also his testimony that, after completion of search and since the police came with the motor vehicle, one of them went to the vehicle and drove it closer to the house. Then they put the sulphate bags and the accused in the vehicle and left. During cross-examination, he admitted that from the house of the accused person to Nyakanazi police station is less than a kilometer which is approximately 20 to 25 minutes walking distance.

Looking closely at the testimony of these witnesses, it is apparent that, the emergence situation that was invented by PW1 is not backed up by evidence on record. It is undisputed that, PW1 upon receiving the tip from the informer, he called his OCS who told him that, he should proceed to the crime scene while he was preparing search order. This alone is a clear proof that, PW1 was aware of the requirement of having search order before searching the accused person's house at that night hours but he decided to

proceed with search without such order. He claimed to wait for the said search order for 45 minutes while one of them could have managed to go to the station to take the search order and return only for 20 minutes considering the fact that, according to PW2, it is just 20 to 25 minutes walking distance from the crime scene to Nyakanazi police station. Apart from that, although PW1 claimed to be in foot patrol, PW2 said that, the police came to the crime scene with motor vehicle. It means that, by using a car, the time to get the said search order at the station could be shorter than 20 to 25 minutes if they would have opted to walk. Since PW1 and his colleagues had already surrounded the house and since it was not much far from the crime scene to the station, diligent efforts could be taken to secure the search order before conducting the search. However, PW1 and his colleagues without any tangible reasons decided to proceed with the said search without having search order or search warrant. Besides, it is very strange for them to wait for the said search order for more than 40 minutes while there was possibility of getting the same much earlier before searching.

Apart from that, things did not end there, even after searching, PW1 contends that, they called for the motor vehicle which arrived after 30

minutes. If it was easier for them to use 30 minutes to arrive at the crime scene after search, then why it wasn't easier for them to bring the search order before they searched the house in question? The fact about the motor vehicle to arrive after 30 minutes upon completion of the search is nothing but a blatant lie because PW2 said the motor vehicle was right there from the beginning. This in itself establishes that, PW1 and their colleagues intentionally acted in contravention of the law and they are now trying to invent the emergence circumstances to justify their illegal search. Moreover, PW1 did not explain if there was imminent danger, commotion or likelihood of interference with or destruction of anything connected with the alleged offence considering that he did not state if the house intended to be searched has more than one entrance. In the absence of exceptional reason, the emergence situation ended up the moment he began to process for search order and thus the issue of an emergency search does not arise at all. Under these circumstances, the search in question was supposed to be preceded by search order as required by law. The importance of requirement of search order or warrant is geared to safeguard the constitutional right to dignity and privacy of a person as it was stated in the case of **Samweli**

Kibundali Mgaya v. Republic (Criminal Appeal No. 180 of 2020) [2022]

TZCA 342 TanzLII. In another case of **Director of Public Prosecutions v.**

Doreen John Mlemba (Criminal Appeal No. 359 of 2019) [2021] TZCA 482

TanzLII it was held that:

*"In our view, the meticulous controls provided for under the CPA and a **clear prohibition of search without warrant in the PGO is to provide safeguards against unchecked abuse by investigatory agencies seeking to protect individual citizens' right 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 peoples' private premises in fulfilling their undisclosed ill motives.**"*
(Emphasis supplied).

Since in the particular circumstances where it would not have been difficult for PW1 to procure search order from the OCS in order to comply with the law, what transpired on the particular night was completely breach of the law. In that regard, the said search was nothing but illegal. From that finding, no weight can be accorded to Exhibits P2 and P6 which were

retrieved following the illegal search. Likewise, the certificate of seizure (Exhibit P1) which was a result of illegal search lost its evidential and probative value and cannot accorded any weight. Thus, the first issue specific issue is negatively answered. In the absence of Exhibit P1, P2 and P6, there is nothing to connect the accused person with the alleged offence considering the fact that, the accused person denied to be found with Exhibit P2. Since the first specific issue is negatively answered, the second one dies automatically.

That being said, it is the findings of this Court that, the prosecution side has failed to prove the case against the accused person beyond reasonable doubt. Thus, the main issue is also negatively answered. Consequently, the accused person Bahati Melitano is accordingly acquitted of the charged offence of trafficking in narcotic drugs and is hereby set free.

It is accordingly ordered.

I. K. BANZI
JUDGE
24/07/2023

Delivered in open court in the presence of Mr. Erick Mabagala, learned State Attorney, Mr. Abel Rugambwa, learned Advocate and the accused person. Right of Appeal duly explained.



I. K. BANZI
JUDGE
24/07/2023

ORDER

Exhibits P2 and P6 are hereby confiscated to the government of the United Republic of Tanzania and the same shall be destroyed in accordance with the provisions of Drugs Control and Enforcement Act [Cap. 95 R.E. 2019] with its Regulations.



I. K. BANZI
JUDGE
24/07/2023