IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL SESSION NO. 17 OF 2018

(Originating from Arusha Resident Magistrates Court PI No. 27/2014, Criminal Session No 17 of 2018 and the Court of Appeal Order emanating from Criminal Appeal No 558 of 2021)

REPUBLIC

VERSUS

ISMAIL MUSTAPHA ..... 1st ACCUSED

KASSIM JAMAL ..... 2ND ACCUSED

JUDGMENT

04/07/2023 ***&*** *11/08/2023*

BADE, J.

The two accused persons namely, Ismail Mustapha who is in Court being previously convicted by this Court, and Kassim Jamal, who is not in the Court after he was previously acquitted of the offences charged, are now standing charged and being retried with the offence of Trafficking Narcotic Drugs, Contrary to section 16 (1) (b) of the Drugs and Prevention of Illicit Trafficking in Drugs Act, Cap 95 RE 2002, as amended by Section 31 of the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2012. (They shall both hereinafter referred to as the 1st and 2nd accused person respectively) The accused persons are standing a retrial after the Court of Appeal had ordered the duo be retried,

in consequence of irregularities found in the trial particularly during the summing up of the case to the gentlemen assessors, and the judgment be re composed basing on the outcome of the assessors' opinion.

The facts of this case are gathered as such that on 9th March, 2014 at Sekei area within the City, District and Region of Arusha, the said accused persons were found jointly and together unlawfully Trafficking Narcotic Drugs namely Khat (Catha Edulis) popularly known as Mirungi weighing 50 kilograms valued at Tanzania Shillings Two Million Five Hundred Thousand (TZS 2, 500,000) in a motor vehicle make Coaster with Registration No T 965 CBH. Both the Accused persons pleaded not guilty. The prosecution side was fended by Ms. Eunice Makalla, learned State Attorney, while the defence side was fended by counsel Mr. Hamisi Mkindi, learned advocate who appeared for the first accused person. The case when it was tried before his lordship Mzuna, J. heard a total of 9 witnesses, 7 from the prosecution and 2 from the defence side.

Brief facts of this case are that on 09/03/2014 the Police were notified by an informer about a Coaster motor vehicle Reg. No. T 765 CBH suspected of carrying mirungi drugs heading to Arusha from Moshi. PW1 was a Police Detective D/C No. E 9435 Kaleb, who after receiving some informer's tip and acting on such information, notified his bosses at the Anti-Drugs Unit. Thereafter, PW1 and WP

Flora together with three other Policemen CPL John, NO. F6643 Det Cpl Fulgence (PW5) and Mathew, on being instructed, went to Philips area to wait and waylay on the informed motor vehicle.

They saw a mini-bus with a board labeled TBL staff. They followed it up to Mount Meru Hotel where it stopped, and then took a turn to Sekei. In front of it there was a Saloon car, which according to the cautioned statement of the 2nd Accused (exhibit P2) was a Corolla motor vehicle registration no. T780 AUS. Its owner was one Mr. Abuu. This car went in front of the Coaster, seemingly leading it to a particular destination, which turned out to be Sekei ya Juu. They followed it up there. Their plan was to follow and stop the Coaster minibus while they made sure that those who were inside would not disembark. By then there were only two persons; the driver and the conductor who introduced themselves as Ismail Mustapha and Kassim Jamal respectively. They are the accused persons here.

PW1 found a free agent one Joseph Laizer, a neighbor who witnessed the search. They noted that under the passenger's back seat, there was a box in which there were 16 parcels of "vifurushi vya mirungi" stored in a cubic (specially made at the back seat). It had a special iron bar designed to carry narcotic drugs and the like. They had to tear off a board, and a plastic sheet made specifically, so as to access what was inside.

Then they signed the search order that is, PW1 who conducted the search together with the driver, first accused herein, and a civilian Joseph Laizer who volunteered to be a free agent. The record of the search was received, admitted, and marked as Exhibit P1.

The accused persons were then taken to the police station where they were interrogated. The 1st Accused denied that PW1 recorded a cautioned statement of Kassim Jamal, the 2nd Accused. The same was received as exhibit P2 after a trial within trial which implicated all the two accused. The Motor Vehicle Reg. No. T 765 CBH Make Coaster was admitted as Exh P3 (with a copy of the Motor Vehicle Card). In that cautioned statement he explained how 16 parcels of mirungi were found in the Coaster motor vehicle. The other three parcels of mirungi were offloaded into a Corolla motor vehicle Registration No. T 780 AUS. Its owner one Mr. Abuu, ran away after their arrest/ though at first he was in the Coaster motor vehicle.

The 16 parcels of mirungi which weighed 50 kgs, according to PW6 Joyce Njisya, are worth TZS 2,500,000 as the market value at that time, according to PW4 Kenneth James Kaseke, former Commissioner of Anti-Drugs Unit. They were labeled by PW6 Joyce Njisya and then taken to Dar es Salaam by PW7 Flora P. Matutu. The chemical analysis which was done by PW2 Elias Zacharia Mulima

revealed it has a substance called *cathilane* which cannot be found in other plants than mirungi as per the report, exhibit P4. Then they sent the report to the Arusha Zonal office. The said 16 parcels being perishable goods, were destroyed as per the inventory form Exhibit P5.

The accused were then charged in court. That is briefly the prosecution case. In their defence, the accused persons denied having committed this offence. DW1 Ismail Mustapha Ismail apart from admitting that he is a driver by occupation denied the allegation that the coaster motor vehicle carried the alleged mirungi. That his arrest on 09/03/2014 was after he had failed to show to the police a suspected person alleged to be one of the passengers whom they were looking for. That he was together with a bus conductor, one Said who is not the 2nd Accused. He totally denied the allegation by PW1 that he was arrested at Sekei ya Juu together with the 2nd Accused whom he never knew before and instead says he was arrested at Mount Menu Hotel together with other suspects. That he saw the 2nd Accused for the first time on 17/03/2014 when they were taken at Arusha RM's Court.

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

city. He explained that he was arrested at Makao Mapya while supervising offloading of passengers' luggage at 10:00 a.m. when there occurred a misunderstanding between a lady passenger and a turn boy, with the former saying her bag was missing. He was arrested simply because that lady passenger never saw her bag in the boot. He was put under arrest and later taken to the Central Police Station. He was locked up and then charged in Court on 17/03/2014.

To the best of his understanding, at the Police station, he was accused to have caused the loss of passengers' items and using abusive language as opposed to the current charge he is facing on illegal transportation of the Narcotic drugs "mirungi", which he strongly denies. He also denied to have made a cautioned statement exhibit P2 let alone to know Mr. Ismail Mustapha, the 1st Accused.

Based on the above evidence, this Court is now duty bound to determine the following main issues, **First** whether the accused persons were found in unlawful possession of narcotic substances; **Second**, whether the leaves contained in the vifurushi /bags were in fact retrieved from the motor vehicle with registration number T 965 CBH make Toyota Coaster, and if they were narcotic substance; **Third** were the accused in the course of trafficking the same; **Fourth** whether the chain of custody was maintained; **Fifth** whether the charge had been proved

against the accused persons to the required standard of proof, and **lastly** whether as per the opinions of the assessors, this Court is persuaded to maintain the conviction of the Accused Persons.

I propose to address the first and second issues jointly, which is whether the accused persons were found in unlawful possession of narcotic substances and whether the leaves found in the parcels were retrieved from the motor vehicle Exh P3. I have read the evidence as recorded by the court. PW1 was the key witness, he explained how he received information, acted on such information, and then managed to seize what was alleged to be the narcotic substance in the back seat of the coaster minibus which was being driven by the 1st Accused. The 1st Accused is said to have been there as well with the 2nd Accused as the bus conductor. The 1st Accused signed the seizure certificate, but the 2nd Accused was a 'day worker' who knew nothing about what was in the motor vehicle.

The 1st Accused is held as the person who had control of the said motor vehicle and is imputed with knowledge and possession of the said narcotic substances. This is also given support by the record of the search, Exhibit P1 which was signed by PW1, allegedly the 1st Accused and a civilian one Laizer, as a free agent.

Meanwhile, the 1st Accused controverts that even though he signed exhibit P1,

he signed it without knowing its contents. This is not helped by the fact that the person who is supposedly the free agent did not come forth to testify on what transpired during the seizure and afterward. The prosecution had only put in evidence the statement of the free agent without him being apt for cross-examination. The court was informed about the failure to trace him despite all the concerted efforts made by the prosecution. Joseph Laizer, the alleged person who witnessed and signed a search and seizure certificate as a free agent civilian was not traced. Similarly, the investigator policeman who recorded his statement never turned up to testify for the reason that he no longer is an employee of the police force; thus he refused to cooperate despite the court being informed of his promise that he was to attend.

So I am not left with any facts to be able to corroborate or controvert the testimony of the 1st accused that he signed the document without knowing what it is he is signing. But does this exculpate the 1st Accused? How about the fact that the narcotics substance were found in the motor vehicle that he had control of? The Court of Appeal had laid down a principle in the case of **Moses Charles Deo vs Republic,** [1987] TLR 134 and confirmed in **Song Lei vs Director of Public Prosecution**, Consolidated Criminal Appeal No l6A of 2016 & 16 of 2017 when it categorically stated:

"for a person to be found to have had possession, actual or constructive, of goods, it must be proved either that he was aware of their presence and that he exercised control over them, or that the goods came albeit in his presence, at his invitation and arrangement."

There is no evidence adduced by the prosecution proving the facts from the investigator or the 1st accused person to ascertain knowledge actual or imputed of possession of the narcotics substance to him as the driver of the bus. In this case, the bus driver has disputed not just the knowledge, but the signing of the seizure notice itself alleging to not have known what he is signing off. This is what the independent witness could help this court establish, and the fact that he could not come forth draws a negative inference on the version of facts as presented by PW1 in so far as what happened at the search and seizure of the motor vehicle is concerned.

In the case of **Ndima Kashinje @ Joseph vs Republic**, Criminal Appeal No. 446 of 2017 the Court of Appeal in emphasizing the importance of having an independent witness, they remarked

"As if that was not enough, the certificate of seizure (exhibit P2) was signed by PW1, PW2 and PW4 who are the motorcycle owner, motorcyclist and the landlady of the searched premises respectively, as witnesses to the

search. In our view, all these had interest to serve, ***as such the absence of an independent witness has eroded the credence of the search conducted even if the search warrant would have been available****."*

(emphasis mine)

In an earlier decision, the Court of Appeal had guided in the case of **Selemani Abdallah and Others vs Republic,** Criminal Appeal No. 354 of 2008, (unreported) thus:

> *"The whole purpose of issuing receipt to the seized items and obtaining the signature of the witnesses is to make sure that the property seized came from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that the evidence arising from such search is fabricated will to a great extent be minimized."*

On the basis of the foregoing authorities, It is this court's finding that the first and second issues are found in the negative due to the pointed-out discrepancies. The prosecution did not address the issue of actual or imputed notice by proving that the motor vehicle does, in fact, belong to the bus driver, and thus leave another version of the explanation to chance that it is possible that the actual owner of the motor vehicle could have been the one who has the actual

knowledge of the narcotics drugs. Exhibit P3 was the actual motor vehicle, there was no establishment of its ownership to remove any doubts. Similarly, in my view, the missing testimony of the free agent Laizer and the person who is alleged to have taken the statement of the said free agent leave a doubt that the narcotic substances were found and retrieved from exhibit P3 since all the other persons who have signed the seizure report have an interest to serve.

The accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence as stated by the Court of Appeal in the case of **Mohamed Haruna @ Mtupeni vs Republic,** Criminal Appeal No. 25 of 2007.

By deduction, the third issue will fall through the same vein as the first and second ones. There are many gaps in the evidence adduced by the prosecution side, particularly in proving that the accused person is the culprit in the commission of the offence of trafficking in narcotic drugs.

The charge sheets which were substituted after the committal proceedings are at variance with the evidence on record**.** The evidence of PW1 and PW5 who participated in the arrest and seizure of the alleged drugs testified that the accused were found trafficking narcotic drugs in a motor vehicle make Coaster with registration No. T 765 CBH. In essence, Sekei Juu area is in Arumeru

District, thus the accused persons were arrested at Arumeru District in the Region of Arusha in a motor vehicle make Coaster with registration No. 765 CBH as per the charge sheet read over and explained to the accused persons on 17/3/2014 and 22/5/2018 respectively. In contrast, the accused persons were not arrested at Sekei area within the city, District and Region of Arusha in a motor vehicle make coaster with registration No. T 965 CBH as per charge read over and explained to the accused on 15/5/2019. This contradiction in the area where the accused persons were arrested and the motor vehicle registration number, as opposed to the testimony of PW1 and PW5, is unsettling. So which was the motor vehicle found trafficking the drugs; and where does the information that the accused were arrested at Sekei area within the city, district and region of Arusha in a motor vehicle make Coaster with registration No. T 965 CBH came from? Unfortunately, the Court was not availed with the details of the registration card which was handed in at the time of tendering the motor vehicle exh P3. That is contrary to charge sheet read over and explained to the accused persons on 17/3/2014 and 22/5/2018 respectively which stated that the accused were found in motor vehicle make Coaster with registration No. T 765 LBH. Further, the charge/ information read over and explained to the accused person on 15/5/2019 stated that the accused persons were arrested at Sekei area within the city, district and region of Arusha in a motor vehicle make Coaster with registration

The Court of Appeal of Tanzania in the case of **Credo Swalehe vs Republic** [2014] TLR 144 held that:

> *"The irregularity in convicting the Appellant on a charge which carries particulars diametrically opposed to the evidence on record alone is so glaring that it has resulted in miscarriage of justice."*

Now turning to consider the 4th issue of whether the chain of custody was maintained. In the present case, with due respect to the State Attorney, there had been a cut of the chain of custody specifically the chronological documentation showing the transfer of the Exhibit where there should have been a clear linkage as to how the exhibit was transferred, admitted, dealt with and finally how it was stored and packed before being returned to the source. I suppose there happened a failure on the part of the prosecution to properly document from the arrest, seizure, to the time of analysis and issuance of the certificate of value as well as during the destruction. It was held in the case of **Paulo Maduka and 4 others vs Republic,** Criminal Appeal No. 110 of 2007, CAT (unreported) cited also in the case of **Silahi Maulid Jumanne vs Republic,** Criminal Appeal No. 292 of 2016 that:

"...the chronological documentation and /or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic... The idea behind recording the chain of custody ...is to establish that the alleged evidence is in fact related to the alleged crime; rather than for instance, having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected, its very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it..."

Reading from the evidence, there is a gap in prosecution's case between seizure, analysis, custody, control and disposition of the exhibit as demonstrated below.

For this I refer to the evidence of PW1-PW7. They said that the 16 parcels of mirungi (vifurushi) was weighed by PW6 Joyce Njisya on 10/03/2014 after receiving a phone call from Kaleb (PW1). She was picked by WP Flora and then they went to the RCO Office Arusha where she was shown the said leaves contained in the 16 parcels suspected to be narcotic substances. She established they weigh 50 Kg, Then she took samples from each parcel and stored them in 16 labeled envelopes MAR1-MAR16. They were taken to Dar es salaam on 26/3/2019 by PW7 Flora Paulo Matutu who works with Arusha Government

Chemist Office.

Prior, PW3 after receiving it, she registered it by Laboratory number NZ36/2014, She then stored them in the cabinet up to 26/03/2014 when she handed it to her co-worker so that she takes them to Dar-es-Salaam.

Upon reaching Dar es Salaam, PW2 Elias Zacharia Mulima, who is the Government Chemist stationed at Dar-es-Salaam received it on the same date 26/03/2014. The handing over to him was by signing in the register of handing over/dispatch. The said parcels had marks MAR1-MAR 16 and were registered as 264/2014. He put them in the freezer pending analysis. A freezer has a key that he possessed and keeps. He then conducted Laboratory analysis using organic solvent for all enveloped samples.

PW2 testified that the result of the chemical analysis all were positive; that they had a substance called *cathilane.* Exh P4 was a report on the said analysis dated 28 July, 2014 Reg. No. 95/XXXXII/01/3/5. The witness further stated that mirungi has a chemical substance called *cathilane* which is only found in these plants. They then sent the report back to the Arusha Zonal office.

On his part, PW3 Det CPL Raymond said that on 10/03/2014 he prepared an inventory for unclaimed properties i.e. form No. PF12 after the Government Chemist had already measured its weight and took samples. The said PF12 was

signed by Insp. Petro who was the in-charge of the Anti Drugs Unit. There was issued a destruction order by a Magistrate stationed at Arumeru District Court, and the said destruction was witnessed by CPL Kaleb and Government Chemist Joyce Njisya (PW6), done at the Central Police Headquarters in Arusha. The inventory of unclaimed property Ref. No. 1R/IR/270/2014 (PF12) was received in evidence admitted as Exhibit P5.

PW3 then communicated with the Government chemist who turned up and witnessed when they were destroying the mirungi by burning them. Thereafter PW3 handled the document and file to the investigative policeman Det CPL Kaleb PW1. The document Exhibit P6 shows the mirungi weighing 50 Kg and its value according to the certificate of value for the drugs exhibit P6 was issued by PW4 Kenneth James Kaseke, former Commissioner of Anti-Drugs Unit who supervised illegal business of Narcotic Drugs assigning a value of TZS 2, 500,000/- as the market value at the time. The valuation was done after receiving a letter from the RCO Arusha on 18/06/2015 requesting him to value the Narcotic substance which was seized by the Police. There was also annexed to it a report from the Government Chemist showing that the substance for valuation was "mirungi" weighing 50 kg as weighed by PW6.

A close scrutiny of the chain of custody shows a breakup immediately after the

seizure where it is not stated in evidence who had been handed the suspected narcotic substance. PW1 when testifying before the court stated that, after arresting the accused persons they took them to Police Station and interrogated them. He then took the exhibits to the RCO office, and the Motor Vehicle was kept at the Police Station. No name of the person to whom he handed over the exhibits on 9/3/2014.

PW3 is the one who took the samples to court for destruction. When cross examined, PW3, 5 and 6 each had a different answer. PW3 stated that the exhibits were stored in the office of the Anti-Drug Unit at the RCO office where all three (including him) work. PW5 stated that the exhibits were handed to the officers attached to the Anti-Drug Unit while PW6 responded she found the exhibit "zimemwagwa chini".

On further analysis of the chain of custody, none of the witness between PW1, PW3, PW5 and PW6 had explained in their testimony to have sealed and labeled the 16 parcels of mirungi that were seized. The exhibit was kept or stored in the office of the Anti-Drug Unit at the RCO office where PW1 and PW2 work.

Similarly, the inventory form exhibit P5 does not show how the drugs were stored or officially sealed to avoid tampering. This is important as there is always a possibility of someone having tampered with the exhibit. And there is a plethora of authorities insisting on this stance.

In the case of **Zainabu D/O Nassoro @ Zena vs The Republic**, Criminal Appeal No. 348 of 2015 (unreported), the Court insisted on the importance of the Police to ensure proper custody of suspected substances to avoid tampering with other substances. The exhibit concerned must not only be properly handled but each stage of custody which the exhibit pass must be documented until they are tendered as evidence in court. The essence behind it is to make sure that, no one could tamper with the exhibit.

In **Meshaki Abel Ezekiel vs Republic** [2014] TLR 473 the Court had insisted on the importance of chain of custody holding that:

> *"Chronological documentation and/or paper trail, shows the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime."*

Exhibit P5 is wanting in showing the chronological documentation and/or paper trail from the seizure, custody, control, transfer, analysis, and disposition of the seized drugs. It is trite law that, all persons who handled the seized drugs at different stages from the point of seizure to the point when it was tendered and exhibited at the trial appear before the court and adduce evidence on how the seized drugs were handled, controlled, and changed hands before it was admitted

in evidence. See **Moses Mwakasindile vs Republic** [2019] TLR 528 and **Onesmo s/o Mlwilo vs Republic,** Criminal Appeal No. 213 of 2010 (unreported)

In **Iluminatus Mkoka vs Republic** [2003] TLR 245, the Court of Appeal further guided that a trial court should know in whose custody those exhibits were kept, emphasizing that:

> *"..... in view of those missing links in the instant case, we are of the considered opinion that the improper or absence of a proper account of the chain of custody of Exhibits P3 and P4 leaves open the possibility of those exhibits being concocted or planted in the house of the Appellant.'*

On the foregoing authorities and the evidence as analyzed, It is my considered view that the chain of custody was not maintained and I thus find the fourth issue is answered in the negative.

Turning to the issue of whether the case was proved against the accused persons to the required standard of proof, I am guided by the provisions of Section 3 (2) (a) of the Evidence Act , Cap 6 RE 2019 stating the cardinal principle of criminal law that the prosecution has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. The accused on the other hand, only needs to raise some reasonable doubt on the prosecution case, without

having to prove his innocence. On the same vein, the Court cannot convict on the weakness of the defence but rather on the strength of the prosecution case. Explaining the beyond reasonable doubt test, the Court stated in **Magendo Paul & Another vs Republic** [1993] TLR 219 that:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favor which can easily be dismissed."*

On the instant case, the prosecution's case has several doubts which this court finds unsettling including inconsistencies in the testimonies, and the same as tritely enunciated time and again, if found, have to be resolved in favor of the Accused. PW1 testified that, on 09/03/2014 while in his office he received information from the informer that there was a coaster Motor vehicle with registration No. T 765 CBH heading to Arusha from Moshi carrying mirungi which is a narcotic substance. On the other hand, PW5 testified that, on the said date while at patrol at Mount Meru Hotel together with Detective CPL Kaleb, Detective CPL John, and WP Flora, they received a tip from their informer that, there was a motor vehicle coaster with registration No. T 765 CBH from Moshi heading to Arusha with a board labeled on the front of it 'staff TBL.'

This means that the search was not conducted as an emergency, and it has not been testified as such by any of the witnesses. The Police Officers had ample

time to decide and act within the dictates of the law, but still, it appears the search was made in contravention of the law without obtaining authorization for it. The was no written authority of an officer in charge of a Police Station. As required by sections 38 (1) and (3) of the Criminal Procedure Act, Cap. 20 that a search be conducted by or under the written authority of an officer in charge of a police station. On the contrary, the search at the scene was conducted by PW1 and PW5 who were not officers in charge of a police station, neither did they have any written authority to execute the search, nor were the accused persons issued with any receipt in relation to seizure as provided under section 38 (3) of the CPA. The whole purpose of issuing receipts to the seized items and obtaining the signature of the witnesses is to make sure that the property seized came from no place other than the one shown therein. And in essence, this would have provided the missing piece of evidence to corroborate the testimony of the search and seizure and the ultimate disposal of the exhibit. But the flout of procedure creates doubts that this court finds hard to ignore, without any evidence to show that the said non-compliance with the law had to be dispensed with.

So where does that leave the search report which lacks authority in its conduct, and has been obtained out of an illegal search? The dictates of the law would require it to be expunged from the record. Exhibit P1 is thus expunged from the

records as it has been illegally obtained without proper authorization. This is also true for exhibit P5, which was in manifest contravention of the law on how the destruction of a perishable exhibit should be accomplished, and thus lacks appropriate legal value and is subject to be expunged. The case of **Mohamed Juma @ Mpakama vs The Republic,** [2019] TLR 514 is in point as it states:

> *"Concerning the way, the Police are required to handle perishable exhibits when still at the stage of criminal investigation, paragraph 25 of PGO No. 229 (Investigation - Exhibits) applies, providing that '....perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner (if any) so that the magistrate may note the exhibits and order immediate disposal. Where possible, such an exhibit should be photographed before disposal.""*

In the instant case, the accused persons were not taken before the Magistrate and heard before the magistrate issued the disposal order. The accused person's right to be present before the Magistrate and heard was violated and there is no explanation as to why is that so, neither were any photographs taken.

Still, we have the testimony of the witnesses which deserves credence and, in all fairness, I am aware of the duty to analyze the same with deserving weight.

While PW1 testified that on 09/03/2014 **while in his office** he received information from the informer that there was a coaster Motor vehicle with registration No. T 765 CBH is heading to Arusha from Moshi carrying the narcotic substance mirungi; PW5 is recorded to have said on 09/03/2014 **while at patrol** at Mount Meru Hotel together with Detective CPL Kaleb, Detective CPL John, and WP Flora, had received information from their informer that, there was a motor vehicle coaster with registration No. T 765 CBH from Moshi heading to Arusha with a board labeled in front of it 'Staff TBL'. So one is left to wonder where were PW1 and PW5 when they received information from the informer. Is it at the Police Station where PW 1 was, or at patrol at Mount Meru Hotel together with Detective CPL Kaleb, Detective CPL John, and WP Flora as testified by PW5; and why such a discrepancy in this narration?

On another note, PW1 testified that there were 16 parcels (vifurushi) that were kept in a cubic (specially made in the back seat). PW5, on the contrary, testified that the box containing the drugs was found under the passenger's seat.
Similarly, PW1 testified on the issue of the motor vehicle Corolla with registration no. T 780 AUS, that he saw a saloon car white in color, which had actually gone in the front of the coaster motor vehicle. Meanwhile, PW5 testified that there was a Corolla motor vehicle in front of the coaster with reg, no. T 780 AUS, and that

3 people in the Corolla ran away and left the vehicle. Further, he stated that the Corolla motor vehicle remained with WP Petro for further investigation. This matter was also questioned by one of the assessors wanting to know its association with the case at hand, the result of the investigation, and pointing an accusing finger at the failure to arrest the owner of the Saloon car and the said motor vehicle.

On another note, the 2nd Accused person in his retracted cautioned statement stated, "mirungi belonged to Abuu who was in the Corolla, and that at the time of arrest, they had succeeded to offload 3 parcels."

PW2, PW4, and PW6 testified on the analysis of the narcotic substance, including the weighing of the drugs. The arrest happened on 9/3/2014 while the seized suspected drugs were taken to Chief Government Chemist on 26/3/2014. When cross-examined PW2 said the suspected leaves/drugs were still fresh and greenish "mabichi". There was no testimony from the prosecution to show that it is probable that the leaves would continue to be green and fresh after 17 days. He further stated that the Report was prepared on 28/7/2014 and signed on 11/8/2014 while the analysis takes about 4 days. PW4 testified on how he weighed the drugs to ascertain their weight. One cannot fail to wonder how a perishable item with a tendency to dry up would have the same weight despite

being weighed on the eighth day after it's been seized.

The gentlemen assessors brought this court's attention to a concern on the place where the seized drugs were destructed and the way they were destructed. While PW3 stated that he, Cpl Kaleb, and the Government Chemist went to the District Court of Arumeru to obtain a destruction order and destroyed the seized drugs, PW6 testified that she collected the samples from WP Flora where she weighed it, collected samples from it and handed over the drugs to WP Flora for further steps. She further testified that; the destruction of the seized drugs was done at Central Police Headquarters Arusha.

Lastly, I am minded to look at the retracted confession of the 2nd Accused person to see if it tilts the pendulum one way or the other. In the cautioned statement tendered and admitted as exhibit P2, the 2nd Accused confessed to have been found with the narcotic drug mirungi. In it, he admits to being a conductor in the minibus coaster motor vehicle registration No. T 765 CBH. He later retracted these confessions when testifying before the Court as DW2. It was also his defence that he was a conductor of quite a different bus that plies between Simanjiro and Arusha known as Simanjiro bus, that he was arrested following the complaints of one of the passengers who missed her luggage as he was supervising offloading of the Simanjiro Bus.

So if the initial confession of the 2nd accused person is taken into consideration that he was the one possessed with the narcotic drugs "mirungi" as he was a conductor in the minibus coaster motor vehicle with registration No. T 765 CBH, it becomes imperative that the person who should have been imputed with the knowledge, possession, and transporting of the narcotic substance is the said 2nd Accused.

I am alive to the position of law that it is dangerous for the court to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances is satisfied that the confession must be true. See **Hemed Abdallah vs Republic** [1995] TLR 172. This means in the absence of any material evidence to corroborate these facts or being satisfied with their truthfulness, I will leave it to my considered mind as being unproved as I deduce the facts into the proof of the prosecution case against both the accused persons in this case.

In any case, PW1 is the one who recorded the cautioned statement of the 2nd Accused. Him being the arresting officer as well as the investigative officer ought not to have recorded the said cautioned statement. I am fortified in this view as held by the erstwhile East African Court in **Njuguna s/o Kimani & 3 Others vs Reginam** [1954] EACA 316 where it was held that:

"It is inadvisable if not improper for the Police Officer who is conducting the

investigation of a case to charge and record the cautioned statement of a suspect."

Besides, if for the sake of argument, it is assumed that the 2nd Accused had confessed to the charged offence, what would have been the evidence for the prosecution side to controvert the assumed confession? Where is the other probable version of which person had possession/knowledge of the narcotics substance seized as the driver had never confessed to possessing or owning the narcotic substance?

In conclusion, I reiterate the legal principle that where it appears there is contradictions in the evidence, such contradictions should benefit the Accused person. In **Peter William vs Republic** [2009] TLR 327, this Court held:

"It is trite law that where there are contradictory accounts of the same incident, the resulting doubt must be resolved in favor of the accused."

In the final analysis, I find the case was not proven beyond the required standard of proof as the prosecution case was littered with doubts. This issue is resolved negatively.

Lastly, looking at whether as per the opinions of the assessors, this Court is persuaded to maintain the conviction of the accused persons. The analyzed evidence has resolved on its own accord to come to an agreement with the assessors' opinion, that the accused persons are not guilty of the charged

offences, even though I am not bound to agree with their opinion. I am inclined to hold that there have been doubts remaining in the prosecution case, despite not agreeing with the defence of the accused persons. Since there is a finding that the prosecution case has failed to prove its case beyond the shadow of doubt, I find it an academic exercise in futility to analyze the accused persons' defence as it will serve nothing at this point.

In the final analysis, I find both the accused persons not guilty, and I thus forthwith acquit them both on charged offences. While the 2nd accused is noted by this court to be at large, the 1st accused is hereby ordered to be released forthwith unless held for some other lawful causes.

It is so ordered.

DATED at **ARUSHA** this **11th** day of **August**, 2023

A. Z. Bade
Judge
11/08/2023

Judgment delivered in the presence of parties / their representatives on **11th** day of **August, 2023**

A. Z. Bade
Judge
11/08/2023