IN THE HIGH COURT OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIME DIVISION

AT MOSHI SUB REGISTRY

ECONOMIC CASE NO. 9 OF 2022

REPUBLIC

VERSUS

1. ABDALAH HALFAN MKWIZU

2. SAMWEL ELIUD LYAKURYA

JUDGMENT

17th to 29th May, 2024

E.B. LUVANDA, J

Abdalah Halfan Mkwizu (First Accused) and Samwel Eliud Lyakurwa (Second Accused) are indicted for trafficking in narcotic drugs contrary to section 15(1)(a) of the Drugs Control and Enforcement Act No. 5 of 2015 as amended by section 8 of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017, read together with paragraph 23 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002], as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

According to the particulars of offence, it is alleged that on 6/12/2017 at Marangu-Kitowo area within Rombo District in Kilimanjaro Region the duo

were found trafficking in 690.767 kilograms of narcotic drugs namely cath edulis (khat) commonly known as *mirungi*. The First and Second Accused dispelled this fact.

Briefly it was the prosecution evidence that on 6/12/2017 at around 06.00 hours at Maskini Hamlet Kitowo Village, Dionis Happymark Shirima (PW7) who is a welder formerly Councilor at Marangu Ward Kitowo, saw the First and Second Accused at a verge of pushing a car T656 BYA Toyota Mark Two brand exhibit P5 which was drowned in mud due to heavy rain. When the duo Accused were under astonishment and intimating a need for help from PW7 who in fact ferried police officers there vide his motor cycle, they were restrained by police officers where according to PW7 one of the suspect escaped. Shortly thereafter ASP Deogras Mushi (PW2) who formerly worked as Offcer-Commanding of Station (OCS) at Mashati Rombo Police, resurfaced and interviewed the duo who confessed to had carried khat. It is when a motor vehicle T656BYA which loaded cargo was towed vide a Defender of Police and driven to Mkuu Rombo Police, where PW2 conducted search and revealed it loaded 96 bundles in the following breakdown: 52 bundle were contained in sulphate bags and 44 bundle were contained in sisal sacks all containing fresh leaves which were wrapped by banana leaves, which were later packed in eight sulphate bags exhibit P6. Exhibit P5 along its key exhibit

P4 and P6 were seized by PW2 vide a certificate of search cum seizure certificate exhibit P7. Joyce Njisya the chemist, draw sample from exhibit P6, conducted analysis and concluded that inside those leaves there are chemicals of cathinone and cathine which is only found in kath, as per a report exhibit P13.

On defence, the First Accused (DW1) who is a peasant, defended that he was on his way to attend casual labour at Tangwa area where upon arriving at Kitowo area saw a motor vehicle parked by the road side, where one person who was pushing it, summoned and asked him to help pushing it. it was the defence of DW1 that in the course of pushing, it is when three people resurfaced vide a motor cycle, on approaching there the owner of a car escaped leaving them alone. DW1 pleaded to had no knowledge as to what was going on there.

The Second Accused (DW2) who is an assist technician (mason), also defended to have been merely invited to assist to push a motor vehicle which was stuck by the road side (off road), then was arrested in the due course, while the one who invited him run away upon seeing police officers.

In view of the above, my duty is to assess whether the evidence tendered by prosecution is sufficient to mount a conviction of the economic offence levelled to the Accused persons.

As per the preface above, the evidence of PW2 and PW7 was a direct evidence. PW7 saw the First and Second Accused pushing a motor vehicle exhibit P5 which upon search by PW2 was found to had loaded fresh leaves exhibit P6. A defence by DW1 and DW2 that they were mere passerby and invitees to assist to push a car which was drowned in mud, is suspect. This is because, PW7 explained on a detailed account on how they kept trailing the Accused persons who were suspected smuggling goods from Kenya, explained from the moment the car exhibit P5 was seen reversing in scrub bush (a point initially suspect to be a hide out of criminals), moving towards PW7's direction, before diverting and heading towards Kenya border, then resumed via Lower Road from Tarakea, on approaching at a murrum or gravel road, it is when a motor vehicle stuck in the mud, where PW2 directed PW7 to ferry police over there. According to PW7 the whole scenario was visible, only that they were unable to identify people pushing a car due to a distance which was a bit afar. In view of above facts, there is no room under which the defence by the DW1 and DW2 can be said to had shaded any doubt on the prosecution evidence regarding their involvement in that car

as per detailed narration by PW7. There is no way it can be said that the moment when PW7 was ferrying police officers at a scene, the First and Second Accused arrived in between. My argument if grounded on a fact that PW7 asserted that the whole area and scenario was visible. This is because on cross examination by Mr. Rashid Shaban learned Counsel for First Accused, PW7 asserted that at a scene there is village farm, like plain area visible everywhere, and people are not allowed to cultivate permanent crops or build houses. Importantly, the defence by DW1 and D2 suggest each one arrived and was invited independently.

Therefore, a defence by the First and Second Accused that they were mere passerby, invitees or had no knowledge on what was contained in exhibit P5 is rejected for reasons stated above. Equally an argument by the learned defence Counsel in their joint closing submission that the Accused persons were not properly identified is without base. The evidence of PW7 is cogent that the Accused persons were apprehended at the verge of pushing a motor vehicle exhibit P5 which had stuck in the mud due to heavy rain.

The learned defence Counsel submitted that a certificate of seizure was recorded in the absence of an independent witness, arguing PW7 did not qualify to be an independence witness for reason that had interest in the whole exercise of arrest, search and seizure, citing section 48(2)(c)(vii) of

the Drugs Control and Enforcement Act, Cap 95 R.E. 2019, the **Director of Public prosecutions vs Mussa Hatibu Sembe**, Criminal Appeal No. 130 of 2021 C.A.T. To my view, the learned defence Counsel is overstretching for nothing. During cross examination by the learned Counsel for First Accused, PW7 asserted that he was an independent witness and that he reported to the police by virtue of being justice of peace. On further cross examination, PW7 stated that,

> *'It was the interest to my ward and citizen and not my personal interest'*

Even if PW7 could be said to be not an independent witness. But according to a certificate of search cum seizure exhibit P7, depict search and seizure was made under section 42(1), (2) and (3) of the Criminal Procedure Act, Cap 20 R.E. 2022, which do not impose a requirement of an independent witness.

In the case of **Papaa Olesikaladai @ Lendemu and Another vs Republic**, Criminal Appeal No. 47 of 2020, C.A.T. at Arusha, at page 9 the apex Cort ruled,

> *'We agree that no independent witness was fielded by the prosecution in support of its case. This is understandable, for PW2 testified that they waylaid the appellants at a place*

where no other people lived. In terms of section 106(1) of the WCA, the presence of an independent witness depends on the circumstances of each case. Where, like here, an offence is committed in a remote area, bush or forest where an independent witness cannot be procured, his presence can be dispensed with in terms of section 106(1) of the WCA'

The learned defence Counsel submitted that no search warrant and receipt was issued, arguing rendered the whole search and seizure illegal, citing section 38(1) and (3) Cap 20 (supra). Admittedly there was no search warrant prior search neither receipt issued post seizure. During trial, PW2 asserted that at the time when he conducted search on 6/12/2017 he was the Officer Commanding of the Station at Mashati Police Station. The law is clear that when a search is conducted by the OCS, there is no requirement of issuing a search warrant. It defies logic and common sense to say the OCS could be under obligation to issue a search warrant authorizing himself/herself to conduct search.

Section 38(1) Cap 20 (supra), provide, I bold pertinent portion,

*'If 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'

Regarding issuance of receipt. Arguably the provision of section 38(3) Cap 20 (supra) imposes a requirement of issuing a receipt after seizure as an acknowledging the seizure of that thing or object. To my understanding a receipt is meant for the Accused to acknowledge seized properties for purpose of assisting him/her to claim back post termination of proceedings. Herein, the Accused persons disowned both exhibit P5 and P6. I wonder a receipt could serve which purpose. Importantly the law both Cap 20 (supra) and Police General Orders do not prescribe a format for the so called receipt. Above, in recent development, the apex Court neutralized the question of a requirement of issuing a receipt as separate document after seizure. In the case of **Papaa Olesikaladai @ Lendemu and Another vs Republic**,

Criminal Appeal No. 47 of 2020, C.A.T. at Arusha at page 13, the apex Court ruled,

> *'We agree with Ms. Madikenya that the complaint for non-issuance of a receipt will have no place in cases where a certificate of seizure is issued. This stance is fairly settled in our jurisdiction. We discussed this position at some considerable length in Gitabeka Giyaya vs Republic, Criminal Appeal No. 44 of 2020 (unreported) a judgment we rendered on 28.12.2022. In that appeal, we relied on a number of previous decision including Ramadhan Idd Mchafu v. Republic, Criminal Appeal No. 328 of 2019...to underscore the point that where, like here, a certificate of seizure is issued and signed by the accused person, the same constitutes evidence even without a receipt'*

The learned defence Counsel submitted that Cpl. Andrew and DC Alfred who were material witnesses were not summoned by the prosecution. This argument is without substance. Indeed, the learned Counsel did not say why and how the said witness were material witness. This is because according to PW2, the substance of the evidence of the alleged Cpl. Andrew and DC Alfred was in respect to the fact that he appointed the duo to trail the Accused as for how long they will stay while at the Kenya border. There is no fact indicating that Cpl. Andrew and Dc Alfred went on trailing the Accused up to the destination or point where their motor vehicle stuck in the

mud. Indeed PW7's testimony is very clear that he was seeing the Accused persons from the destination they took a hide for a trap, by virtue of the fact that the whole area is a plain without vegetation of permanent crops, and were visible from that long distance only were unable to identify them. For another thing, if the so called Cpl. Andrew and DC Alfred were trailing all along the Accused persons, PW2 could not ask PW7 to ferry and deploy other two police officers vide a motorbike to apprehend the Accused persons.

In **Papaa Olesikaladai** (supra) at page 9, the apex Court held,

> *'The complaint that the said Joseph Masele was not called to testify will not consume much of our precious time to answer it in detail, for it is trite law that, in terms of section 143 of the Evidence Act, Cap 6 of the Laws of Tanzania, no particular number of witnesses is required to prove a certain fact. What matters is the credence of the witness or witnesses who testify in support of that fact. That is to say, what is important is the quality, not the quantity, of the evidence placed before the court'*

The learned defence Counsel submitted that there was a breakdown of chain of custody for reason that exhibit P7 did not have a reference number; PW2 and D/Sgt Selestina (exhibit keeper at Mkuu Rombo Police Station) did not comply to requirement for preparing an inventory after seizure of narcotic drug, citing regulation 15(1) and (2)(a), (b), (c), (d) and 16(a), (b), (c),

(d), (e), (f) and (g) of the Drugs Control and Enforcement (General) GN 173 (sic); PW3 did not record the exhibit into PF16, citing PGO No. 229 paragraph 16 and 17(a) and (b) and section 48(2)(d)(iv) of Cap 95 (supra). To my view, even if there was non-compliance or omission, the same cannot be said that had the effects of impacting a chain of custody. The alleged non compliance were not material and therefore not fatal. As submitted by the learned Senior State Attorney the prosecution paraded all witnesses who handled exhibit P6 from seizure by PW2 who after seizing it handed over to PW3 vide handing over exhibit P8, PW3 handed over to Insp. Mohamed Sefuko (PW5) vide handing over exhibit P9 who in turn handed over to A/Insp. Hashimu Ally Mafuru (PW6) vide handing over exhibit P11. PW6 allowed D.Cpl Isack (PW8) to access the exhibit within the store for purpose of compliance of formalities of submitting to PW9, thereafter PW6 handed over to DC Michael (PW1) vide handing over certificate exhibit P1. After PW9 had tendered in court in Economic case No. 9 of 2021, it remained under custody of Godlizen Gelas Tarimo (PW10) who is the court clerk, later handed over back to PW1. I therefore go along the argument of the learned Senior State Attorney that the chain was maintained and the item were never tempered with at any point. In that regard, the argument of the defence Counsel is disregarded.

Having said as above, I rule that the information leveled to the First and Second Accused was proved beyond reasonable doubt.

Therefore the First and Second Accused are convicted for the offence of trafficking in narcotic drugs contrary to section 15(1)(a) of the Drugs Control and Enforcement Act No. 5 of 2015 as amended by section 8 of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017, read together with paragraph 23 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002], as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

E.B. LUVANDA
JUDGE
29/05/2024

Judgment delivered in the presence of Ms. Marietha Maguta learned State Attorney and Ms. Bora Mfinanga learned State Attorney for the Republic, Denis Maro learned Counsel for Second Accused also holding brief for Mr. Rashid Shaban learned Counsel for First Accused.

E.B. LUVANDA
JUDGE
29/05/2024

Sentence

I have heard the mitigation. However, the penal statute prescribe for the maxim sentence without any other option. I therefore sentence the First and Second Accused to life imprisonment.

Order

A motor vehicle T656 BYA Toyota Mark Two brand exhibit P5, is confiscated to the Government.