THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIME DIVISION

AT MTWARA SUB REGISTRY

ECONOMIC CASE NO. 6 OF 2022

THE REPUBLIC

VERSUS

1. **RASHIDI ALLY MBANO**
2. **TWALIBU NANYAMBE KAZUMALI@MKAMATE**

JUDGMENT

24th April & 8th May, 2024

MPAZE, J.:

Rashidi Ally Mbano and Twalibu Nanyambe Kazumali @Mkamate, the first and second accused respectively are charged with one count of Trafficking in narcotic drugs namely cannabis sativa contrary to Section 15 (1) (a) and (3) (iii) of the Drugs Control and Enforcement Act, [CAP 95 R.E. 2019] read together with paragraph 23 of the first schedule to and Section 60 (3) of the Economic and Organized Crime Control Act, [CAP 200 R.E. 2022].

It is ostensible in the particulars of offence that on 7th March 2021 at Sindano village within Masasi District in Mtwara Region, the first and second accused persons trafficked narcotic drugs namely; Cannabis sativa commonly known as bhangi weighing 84.02 kilograms. Both accused denied the offence.

To prove the charge against the accused persons, the prosecution summoned a total of five witnesses to namely; Eliam Ismal Mkenda (PW1), Inspector Jovina Kayange (PW2), SGT Audfasti (PW3), Mohamed Omary Lichanjala (PW4) and D/CPL Hemed (PW5). The prosecution also tendered the following Exhibits; Submission Form No. DCEA 001 (Exhibit P1), Analytical report (Exhibit P2), nine sulphate bags suspected to contain Cannabis sativa (Exhibit P3), Certificate of Seizure (Exhibit P4), a Motor vehicle with registration No. T 229 AFQ, Toyota Chaser (Exhibit P5), a vehicle sale agreement (Exhibit P6), a chain of custody form (Exhibit P7), and a witness statement of Itozya Isibu (Exhibit P8).

At the trial, the prosecution side was at the foot of Ms. Tully Hellela the learned State Attorney, Ms. Elizabeth Muhangwa the learned State Attorney and Mr. Gilala Jagadi the learned State Attorney. Whereas, the first accused person enjoyed the service of Mr. Alex Msalenge, the learned advocate while the second accused was represented by Ms. Lightness Kikao Learned Advocate.

The case on the prosecution concisely states that; on 7th March, 2021 Insp Jovina Kayange (PW2) the assistant of the OCCID of Masasi Police Station received a call from an informer. She was enlightened that in the village of Maparawe, there are two people involved in the trafficking and sale of narcotic drugs namely cannabis sativa, he further informed her that the said people were currently heading towards Masasi using a small white vehicle with registration number T 229 AFQ, a Toyota Chaser (Exhibit P5).

After receiving that information, she prepared the necessary documents one of them being (Exhibit P4) and officers to go to the scene.

Upon arrival at Sindano village, PW2 saw the vehicle approaching from the direction they were coming from, she stopped the vehicle which had also come to a halt, and inside were the first and second accused. She explained to them that she had stopped them on suspicion and needed to conduct a search the accused persons did not resist.

As she contemplated what to do before searching in the absence of an independent witness, considering that the area where she had stopped the accused had no residential dwellings and was remote, she suddenly saw a person passing by carrying a hoe. She called him and explained the intention of calling him, which was to search and ask him to witness it. The said person introduced himself as Itozya Isibu, and agreed to witness the search which was supposed to be done in the vehicle (Exhibit P5) the accused were arrested with.

During the search, PW2 successfully found five sulphate bags in the vehicle's trunk and four sulphate bags in the middle seat. She removed the

sulphate bags and opened them where she discovered the same contained dry leaves suspected to be cannabis sativa. The certificate of seizure (Exhibit P4) was filled, which was signed by her, the accused persons and Itozya Isibu.

The accused persons, along with the sulphate bags found in their possession and the vehicle, were taken to Masasi Police Station. Upon arrival, PW2 weighed the sulphate bags and found a total weight of 84 kilograms. She then instructed the officer in the CRO to open a file for trafficking in narcotic drugs. The case opened was assigned number MSS/IR/385/2021.

PW2 stated further that after the case was opened, she marked each bag using letters A, B, C, D, E, F, G, H and I and the number MSS/IR/385/2021, after marking each bag PW2 handed them over to SGT Audifasti (PW3) Exhibit Keeper for safe custody.

PW3 after he had received the nine sulphate bags assigned them with Exhibit Register Number 10/2021 and labelled each bag accordingly. He kept

them until 10th March 2021, when D/CPL Hemed (PW5) arrived to take the bags to the chemist's office for analysis, he handed them over and according to PW3, the sulphate bags were returned on 11th March, 2021.

However, during cross-examination, re-examination and through Exhibit D2 it was confirmed that the nine sulphate bags were returned on 10th March, 2021 and not 11th March 2021 as stated by PW3 in the examination in chief. PW3 received them back and assigned them Exhibit Number 11/2021. He kept them until 19th April, 2024 when he brought the nine sulphate bags and the vehicle to court.

PW5 is the investigator of this case. In addition to explaining what he has done in his investigation, he also described how he took the nine sulphate bags from PW3 and delivered them to the chemist on 10th March, 2021, for analysis. He explained that at the chemist's office, he met PW1 and handed over the sulphate bags to him. PW1 weighed the bags and then took samples for analysis. After completing the procedures at the chemist's office, PW5 was given back the nine sulphate bags and returned them to Masasi Police Station, where he handed them back to PW3 for safekeeping. The bags were labelled with the number SZL/15/2021 from the chemist's office.

Itozya Isibu is an independent witness whose statement was recorded by PW5. However, this witness could not appear in court due to reasons explained by the prosecution, which failed to locate him. Therefore, his statement was admitted as Exhibit P8 under section 34B of the Tanzania Evidence Act, [CAP 6 R.E 2022].

A Government Chemist (PW1) confirmed receiving the nine sulphate bags containing dry leaves suspected to be cannabis sativa from PW5. PW1 explained that after verifying the documents brought by PW5, he accepted the Exhibit, weighed it, and found it to be 84.02 kilograms. He then proceeded with the analysis processes, using two methods; a preliminary test and a confirmatory test. PW1 stated that both methods yielded consistent results, confirming that the dry leaves in the nine sulphate bags were indeed cannabis sativa. Following these findings, he prepared an analysis report, which was admitted to the court as Exhibit P2.

The vehicle received as Exhibit P5 was initially owned by Mohamed Omary Lichanjala (PW4). On 29th August , 2019, he sold it to the first accused for the consideration of Tshs. 2,000,000/=. PW4 tendered sale agreement (Exhibit P6) as evidence of the transaction.

In their defence, both accused provided lengthy explanations. In summary, they both denied committing the alleged offence and refuted being arrested on 7th March, 2021 by PW2. They claimed that they were arrested on 2nd March, 2021 by (JKT) soldiers while in the vehicle (Exhibit P5) coming from the village of Nalumbudi, Masasi, where they had gone on 1st March, 2021 to visit their sick friend named Mandela.

They explained that their arrest by the soldiers was due to the soldiers suspecting them of transporting Al-Shabaab in the vehicle. After inspecting the vehicle and finding no such Al-Shabaab, the soldiers demanded to know where they had dropped off the alleged people. Despite denying ever transporting the Al-Shabaab, the soldiers did not believe them. Consequently, the soldiers took them in a military vehicle, blindfolded them, and transported them to an unknown location.

The accused stated that after travelling for a long distance while still blindfolded, the vehicle stopped, and they were taken out, realizing they

were at a military compound. They said, they remained at that military compound from the day they were arrested until on 7th March, 2021 when the soldiers decided to transfer them to Masasi Police Station.

They further claimed that during their entire stay at the military compound, they were subjected to severe torture by the soldiers, who were trying to force them to disclose where they had dropped off the supposed Al-Shabaab and whether they were involved in transporting them. Despite repeatedly denying these allegations, the soldiers continued their interrogation. The accused claimed that when the soldiers realized they were not getting any information about Al-Shabaab, they decided to take them to the police station.

According to the accused, the soldiers who brought them to the police station told the police that they were handing over the suspects to teach them how to live near borders and that once the lesson was complete, they should be released to continue with their activities.

The accused stated further that at the police station, they were placed in a lock-up until 21:00 hours when they were taken to the interrogation room. There, they were asked for their names and instructed to explain what they remembered about 7th March 2021. They provided their names and recounted how they were brought to the station by the soldiers. The story according to the accused the police did not want to hear but instead forced them to admit being found with cannabis sativa.

The accused refused, and the police began writing something unknown to them. Afterwards, they were given the documents to sign without knowing what was written. Fearing the same treatment, they had experienced under the soldier's compound, they decided to sign.

The accused continued to explain that they were later taken before a justice of the peace, although they were not sure if that person was a justice of the peace. Ultimately, they were brought to court for this offence, which

they insisted they never committed. The accused tendered the statement of PW1 and PW2 which were admitted as Exhibits D1 and D2 respectively.

Tersely, this is how the evidence was presented by both the prosecution and defence side. After both parties closed their cases, the defence counsel prayed to submit closing submissions, which both sides agreed to. Consequently, the court ordered that the closing submissions be filed on or before 29th April , 2024. I thank both parties for complying with this order.

However, I will not detail what the parties have submitted in their closing submissions at this juncture. Instead, I will carefully consider the submissions from both sides when addressing the issues for determination.

Having thoroughly considered the evidence on record and the submissions by counsel for both sides, I find it germane to draw up the issues for determination in this case. Given that the accused are charged

with trafficking of narcotic drugs, the court traditionally is required to address and resolve the following issues;

Firstly, whether the substance contained in Exhibit P3 are narcotic drug in this case namely cannabis sativa. **Secondly,** whether the accused persons were arrested on 7th March 2021 by Inspector Jovina trafficking narcotic drugs namely cannabis sativa. **Thirdly**, whether a chain of custody (Exhibit P7) was well maintained.

Starting with the first issue of whether the substance contained in Exhibit P3 was cannabis sativa, this question will be answered by examining the testimony of PW1, an expert who analyzed Exhibit P3 and concluded that it was indeed a narcotic drug, namely cannabis sativa.

PW1 explained the process he undertook in the analysis, which included using two methods; the preliminary test and the confirmatory test. In the first method, he described how he used Duquenois-Levine reagent, concentrated hydrochloric acid, and dichloromethane. After mixing these

substances and shaking them, he observed two layers, with the lower layer displaying a purple colour, indicating that the leaves were from the cannabis plant. This result confirmed that the substance analyzed in Exhibit P3 was cannabis sativa.

However, PW1 did not stop there. He continued to ensure the accuracy of his findings by conducting a confirmatory test. In this second method, he used a microscope and thin-layer chromatography. Under the microscope, he examined the leaves and identified characteristic trichomes typical of cannabis leaves. Additionally, he observed seed shells resembling tortoise shells, a unique feature of the cannabis plant.

By conducting the confirmatory test, PW1 further confirmed that the analysis undertaken on Exhibit P3 revealed it to be nothing other than a narcotic drug known as cannabis sativa.

Following these results, PW1 prepared an analysis report, which was admitted as Exhibit P2. In the defence closing submission, they contested

Exhibit P2 by arguing that what is written in Exhibit P2 differs from the facts of the case at hand. They claim that the oral evidence of PW1 differs from what has been recorded in Exhibit P2, although they did not specify the exact difference. However, they continued to assert that PW1 described it as a typing error, a claim they disagreed with. They argue that since the report (Exhibit P2) was also signed by an authorizing officer, he was supposed to be called to testify in support of PW1, the discrepancy between PW1's testimony and the report as per defence submissions indicates that PW1 simply rebutted what was written in Exhibit P2.

On the prosecution's side, they do not dispute the existence of this discrepancy. However, they were quick to point out that in his testimony, PW1 was able to clarify that the difference was a typing error, which does not invalidate the validity of Exhibit P2. In his oral evidence, PW1 explained how he analyzed Exhibit P3, and he stated that he discovered Exhibit P3 to be a narcotic drug known as cannabis sativa.

Let me pause here and highlight the disparity mentioned concerning Exhibit P2. The discrepancy in question emerged even during the hearing of this case when the term 'Mfuko (01)' appeared in Exhibit P2. For clarity, let me reproduce what is contained in Exhibit P2 as follows;

'TAARIFA YA UCHUNGUZI WA MAABARA YA SERIKALI

(Chini ya Kifungu cha 48A(1))

Mimi, Eliamini I. Mkenga wa Mamlaka ya Maabara ya Mkemia Mkuu wa Serikali, ambaye ni Afisa niliyeidhinishwa kufanya uchunguzi wa vielelezo nathibitisha kuwa;

(1) Mnamo tarehe 10/3/2021 katika eneo la ofisi ya Mamlaka ya Maabara ya Mkemia Mkuu wa Serikali-Kanda ya Kusini- Mtwara nilipokea ***Mfuko Mmoja(01)*** *wa salfeti ndani yake ukiwa na viroba tisa (09) vyenye majani makavu na mbegu vidhaniwavyo kuwa ni bhangi, rejea barua yenye kumbukumbu namba MSS/CID/FB/21/383 ya tarehe 10/3/2021 kwa ajili ya uchunguzi wa kielezo shauri namba MSS/IR/385/2021 kutoka kwa Mkuu wa Upepelezi Wilaya ya Masasi kwa kutumia Fomu No. DCEA 001 ambayo iliwasilishwa, kusainiwa na kusajiliwa kwangu na Askari G. 1562 D/C HEMED*

(2) Nimefanya uchunguzi wa vielelezo na Matokeo yake ni kama ifuatavyo hapo chini;

VIELEZO "A-I" VIROBA (09) VYA MAJANI MAKAVU NA MBEGU ZIDHANIWAYO KUWA NI DAWA ZA KULEVYA AINA YA BHANGI

a) Uchunguzi wa vielelezo umethibitisha kuwa na dawa za kulevya

b) Aina ya bhangi "Cannabis"

c) Uzito wa vielelezo bila kifungashio ni: A-Kilogramu 10.82, B-Kilogramu 7.82, C-Kilogramu 8.58, D-Kilogramu 9.86, E-Kilogramu 7.82, F-Kilogramu 10.14, G-Kilogramu 9.58, H-Kilogramu 10.74, I -Kilogramu 8.66, JUMLA -Kilogramu 84.02

d) Madhara ya Bhangi/"Cannabis"

Bhangi/"Cannabis" ina madhara kwa mtumiaji kama vile kudhoofisha kinga ya mwili, kuharibu mfumo wa fahamu kunapopelekea mtumiaji awe mgomvi na kumfanya kuwa mtegemezi wake(Drug addiction)

*3) **Mfuko wa salfeti** uliofungwa kwa lakiri ya Mamlaka ya Maabara ya Mkemia Mkuu wa Serikali na kusainia umerudishwa baada ya uchunguzi kwa askari G.1562 D/C HEMED tarehe 10/3/2021.*

Mkemia aliyefanya uchunguzi

Jina: Eliamini I Mkenga

Saini: .....

Cheo: MKEMIA MKUU II

Tarehe: 29/03/2021

Afisa Aliyethibitisha

Jina: Abdallah M. Kipuja

Saini: .....

Cheo: KAIMU MENEJA OFISI YA KANDA KUSINI

Tarehe: 29/03/2021'

I have decided to reproduce at length the entire report to highlight the concerns raised by the defence counsel, who went further to argue that this report violates the requirements of section 48A of the DCEA, thus it should not be considered a report as it contradicts the oral testimony of PW1.

I have carefully examined the arguments from both sides concerning this issue and found that there is no dispute when looking at the first and third items of Exhibit P2 it indicated that PW1 received one sulphate bag and handed over that same bag to PW5

In his testimony here in court, PW1 clarified that these statements were typing errors and explained that what he received were nine sulphate bags. In the case of **Njake Enterprises Ltd vs Blue Rock Ltd & Another** (Civil Appeal 69 of 2017) [2018] TZCA 304, the Court of Appeal underscored that;

"The Court agrees with Mr. Kamara that, in order to determine whether or not the error was a mere slip of the pen or typographical error there ***should be proof from*** *the Registrar who issued the certificate or* ***the person who typed it****. The assertion cannot just come from the advocate representing a party."*

Since PW1 is the one who prepared Exhibit P2 and explained in his testimony about the typographical errors, I agree with him that the phrase '***one sulphate bag***' was a typographical error.

However, apart from PW1's clarification on a typographical error, Exhibit P2 also indicates that PW1 analyzed nine sulphate bags, as shown in the second item as follows;

(2) Nimefanya uchunguzi wa vielelezo na Matokeo yake ni kama ifuatavyo hapo chini;

VIELEZO "A-I" VIROBA (09) VYA MAJANI MAKAVU NA MBEGU ZIDHANIWAYO KUWA NI DAWA ZA KULEVYA AINA YA BHANGI

a) N/A

b) N/A

c) Uzito wa vielelezo bila kifungashio ni: A-Kilogramu 10.82, B-Kilogramu 7.82, C-Kilogramu 8.58, D-Kilogramu 9.86, E-Kilogramu 7.82, F-Kilogramu 10.14, G-Kilogramu 9.58, H-Kilogramu 10.74, I -Kilogramu 8.66, JUMLA -Kilogramu 84.02.

Reading this part of Exhibit P2, it is quite clear that PW1 analyzed nine sulphate bags, the same bags which he identified in his testimony as the ones he analyzed and which he himself tendered as Exhibit P3. In Exhibit P2, he indicated that the nine bags were marked A-I, marks that were identified in Exhibit P3 when tendered as Exhibit.

Moreover, PW1 described how he received nine sulphate bags from PW5, stating various documents submitted by PW5, including the submission form (Exhibit P1). This form explicitly details what was submitted and received by PW1, who endorsed his signature on the form after receiving the nine sulphate bags.

From this perspective, I find that the discrepancy mentioned here is minor and does not go to the root of the case, thus not rendering Exhibit P2 invalid.

The defence argues that the discrepancy between PW1's testimony and what is written in Exhibit P2 suggests that Exhibit P2 has been rebutted and is inadmissible under section 48A of the DCEA. Let's examine what this section states. The section reads;

> *48A (1) 'The Government Analyst to whom a sample of any narcotic drugs, psychotropic substance, precursor chemicals, controlled or any other substances suspected to have drug-related effect* ***has been submitted for test and analysis shall deliver to the person submitting it, a signed report*** *in quadruplicate in the prescribed form and forward one copy thereof to such authority as may be prescribed.*
>
> *(2) Notwithstanding anything contained in any other law for the time being in force, any document purporting to be a report signed by a Government Analyst* ***shall be admissible as evidence of the facts stated*** *therein without formal proof and such evidence shall,* ***unless rebutted****, be conclusive.'*

As previously stated, the defect in Exhibit P2 is minor. By examining this provision, it will be noted that it generally requires the Government Analyst, to whom any substances suspected to have drug-related effects have been submitted for testing and analysis, to deliver a signed report to

the person submitting it. The report shall be admissible as evidence of the facts stated therein unless rebutted, and if not rebutted, shall be conclusive.

The defence argues that the report has been rebutted by PW1's oral testimony. With respect, this argument is misplaced. For evidence to be considered rebutted, it must come from the opposite party. In other words, rebuttal evidence or arguments are introduced to counter, disprove, or contradict the opposing party's evidence or argument during the hearing of the case.

In the case at hand, no evidence was provided by the defence to rebut Exhibit P2. Typographical errors, such as writing '***one sulphate bag***' instead of '***nine sulphate bags***' do not constitute a rebuttal of Exhibit P2. Therefore, it is incorrect to claim that Exhibit P2 has been rebutted.

The Court of Appeal of Tanzania in the case of **Aldo Kilasi v. Republic** (Criminal Appeal 466 of 2019) [2021] TZCA 537, cited with

approval the case of **Mwinyi Bin Zaid Mnyagatwa v. Republic** [1960] EA 218, which observed, inter alia, that;

> *'The prosecution in the offences related to narcotic drugs must submit expert analysis which is mandatory as its result is final| conclusive and it provides check and balances that warrant conviction'*

From the discussion above, since no evidence was provided to rebut Exhibit P2, which I consider to be conclusive, I am left with no doubt that the nine sulphate bags (Exhibit P3), weighing 84.02 kilograms, contained narcotic drugs, namely cannabis sativa, commonly known as '*bhangi*, hence the first issue is answered in affirmative.

The first issue being answered in the affirmative, I now move to the second issue; whether the accused persons were arrested on 7th March 2021 by Inspector Jovina (PW2) for trafficking narcotic drugs, namely cannabis sativa. I have considered this issue, particularly in light of the defence provided by both accused, who denied being arrested on 7th March 2021 by PW2. Instead, they claimed they were arrested on 2nd March 2021 by National Service soldiers (JKT), who accused them of transporting Al-Shabaab.

The accused stated that after being arrested by these soldiers, they were taken to a military camp where they were subjected to torture from 2nd March, 2021 until 7th March, 2021 at which point the soldiers handed them over to the Masasi Police Station. The soldiers instructed the police to educate the accused on how to live in border areas.

While the accused defended themselves in this manner, the prosecution, through PW2, testified on how she was able to arrest the accused persons in Sindano Village who were in a vehicle with registration number T 229 AFQ, Toyota Chaser (Exhibit P5). PW2 stated that she acted upon information received from an informant. She also explained that immediately after arresting the accused and identifying herself, she conducted a search inside the vehicle and found nine sulphate bags. She filled out a certificate of seizure and then took the accused and the Exhibit to the police station. After the investigation was completed, they were brought to court.

Looking at the defence of the accused, is centered on an alibi defence. Section 42 (1) (2) of the Economic and Organized Crime Control Act [CAP 200 R.E. 2019] acknowledges the defence of alibi as follows;

'(1) Where a person charged with an economic offence ***intends to rely upon an alibi*** *in his defence* ***he shall first indicate to the court the particulars of the alibi at the preliminary hearing,***

(2) Where an accused person does not raise the defence of alibi at the preliminary hearing, ***he shall furnish the prosecution with the particulars of the alibi he intends to rely upon as defence at any time before the case for the prosecution is closed.'***
(Emphasis added)

According to this provision, a person who intends to rely on an alibi defence must first indicate the particulars of the alibi during the preliminary hearing. Second, if he did not indicate the particulars of the alibi during the preliminary hearing, he must furnish the prosecution with the particulars of the alibi he intends to rely upon as a defence at any time before the prosecution closes its case.

Examining the defence of the accused, it is clear that they did not comply with either of these requirements. In the case of **Jason Pascal & Another vs. Republic** (Criminal Appeal 615 of 2020) [2022] TZCA 448, the Court of Appeal held:

'In their evidence, the appellants claimed to have been arrested in Muleba at the residential house of a person called Hashimu. They did not, however, through their advocate, raise this defence while cross-examining PW1 and PW2. The trial court having regarded the defence raised in the appellant's evidence as alibi, accorded it no weight for the reason that it was not preceded by prior notice or particulars of alibi as per section 194(4) of the Criminal Procedure Act read together section 42 of EOCCA. For the reasons above discussed, it was quite right.'

Even though the defence of the accused did not comply with Section 42 of the EOCCA, I have still considered their defence. However, I hesitate to accord it any weight due to the following reasons;

As stated earlier, the accused denied being arrested by PW2. However, PW2 detailed how she arrested the accused on 7th March ,2021. Notably, she was not cross-examined on this aspect of her testimony.

It is trite law that failure to cross-examine a witness on a relevant matter connotes acceptance of the veracity of the testimony, and any doubt to the contrary is taken as an afterthought if raised thereafter. See the case

of **Nyerere Nyague vs Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103. Where the CAT held that;

> *"Unfortunately, the appellant did not cross-examine PW1 on this to shake her credibility. As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

I have carefully considered the detailed account provided by the accused, stating that they were arrested on 2nd March, 2021 by National Service soldiers, who accused them of transporting Al-Shabaab. They claimed that after their arrest, they were taken to the soldiers' camp and tortured from 2nd March, 2021 until 7th March, 2021 when the soldiers finally took them to the police station and handed them over, instructing the police to teach them how to live at the border.

This part of the defence presented by the accused has made me ponder deeply, but it does not make any sense that these National Service soldiers, if indeed they were the ones who arrested the accused, later found them innocent and decided they merely needed education on how to live at

the border. Why would these soldiers, who are responsible for guarding the country's borders and were in the best position to educate the accused, decide to take them to the police station for this education instead of providing it themselves?

I have been unable to find a satisfactory answer to this question and have instead concluded that the accused persons chose to come up with this kind of defence as a way to extricate themselves from the commission of this offence, but the truth remains that it was PW2 who arrested the accused, and not the National Service soldiers.

Continuing to consider the defence of the accused, I have also examined Exhibit D1, which was admitted to impeach the testimony given by PW2 during the examination-in-chief. However, even when examining the parts of the statement/evidence that the defence pointed out as contradictions, these alleged contradictions are not contradictions at all.

For instance, the defence pointed out that in her testimony, PW2 mentioned the police officers who accompanied her were CPL Hamduni Mambe, Sweetberth, and Eliuta (the driver), whereas Exhibit D1 mentions Hamduni, Mambe, and Hemedi. I find that the omission of some officers'

names in her testimony compared to Exhibit D1 does not make PW2's testimony contradictory. Furthermore, Exhibit D1 details clearly how PW2 arrested the accused. Therefore, I continue to emphasize that the defence's claim that they were not arrested by PW2 is baseless.

Given this, I affirm that the defence's assertion that they were not arrested by PW2 holds no truth. Due to the foregoing analysis, a part of the 2nd issue relating to the arrest of the accused persons by PW2 on 7th March 2021 is answered in the affirmative.

Since I am satisfied the accused persons were arrested by PW2, now I proceed with the 2nd part of the 2nd issue as to whether at the time of the arrest, the accused persons were found with cannabis sativa commonly known as *bhangi*.

The evidence linking the accused persons to the possession of nine sulphate bags comes from PW2, the certificate of seizure, and Exhibit D1. In her testimony, PW2 categorically explained that after arresting the accused, who were in a Toyota Chaser with registration number T 229 AFQ, she conducted a search of the vehicle and found nine sulphate bags. Upon

opening them, she discovered the bags contained dry leaves suspected to be cannabis sativa. These details are corroborated by Exhibit D1.

PW2 further explained that after conducting the search and discovering that the sulphate bags contained substances suspected to be cannabis sativa, she filled out the certificate of seizure. This certificate was signed by herself, the accused, and Itozya Isibu, an independent witness (although he did not testify in court due to being unavailable).

The certificate of seizure was admitted as Exhibit P4 without any objection from the accused persons. Their failure to contest anything regarding Exhibit P4, which they have signed implies their agreement with its contents and signifies acknowledgement of being found with Exhibit P3. Thus, the second part of the second issue is also answered in the affirmative. In other words, I can conclude that the second issue is now answered in the affirmative.

On the last issue regarding whether the chain of custody (Exhibit P7) was well-maintained, the defence in their final submission argued that the chain of custody was not properly maintained for the following reasons;

1. **Lack of Signature by PW3**: The defence pointed out that PW3, the Exhibit Keeper, did not sign the chain of custody document on the date it is claimed he received Exhibit P3 from PW2. This absence of a signature raises doubts about whether PW3 received the Exhibit from PW2 as evidenced.

2. **Contradictory Testimony:** The defence challenged the oral testimony of PW3, who stated he received Exhibit P3 from PW5 on 11th March, 2021, after it had been analyzed by the chemist. They contended that this testimony conflicts with the testimony of PW5, Exhibit P7, and Exhibit D2, which indicate that Exhibit P3 was returned to PW3 on 10th March, 2021.

3. **Lack of Clarity from PW1:** The defence further argued that PW1, who tendered Exhibit P3, did not indicate where the Exhibit was sourced from after analysis. PW1 stated that after completing the analysis, he returned Exhibit P3 to PW5. Now the defence wonders how it got back to PW1 for him to tender it as an Exhibit.

Based on these points, the defence counsel concluded that the chain of custody had not been properly established and thus prayed that Exhibit

P7 be expunged from the record and not be relied upon. However, it is important to note that the defence's prayer to "expunge" the Exhibit is not entirely appropriate. Instead, if the court finds deficiencies in the chain of custody, the correct procedure would be to diminish the evidentiary value of the Exhibit rather than to expunge it from the record entirely.

After going through the defence's final submission on this matter, I also examined the prosecution's position.

The prosecution acknowledges that PW3 did not sign the certificate of seizure when received Exhibit P3 from PW2. However, they were quick to point out that this issue was addressed by PW3's testimony, in which he explained that the lack of a signature was due to human error as he forgot to sign.

The prosecution further argued that even if the court were to find that the lack of a signature affects the reliability of the chain of custody, there is still the oral evidence of PW3 that establishes the chain of custody of Exhibit P3. They emphasized that Exhibit P3 is not easily alterable and noted that there were no complaints or indications that Exhibit P3 had been tampered with.

To support their argument, they cited the cases of **Marceline Koivogui v. Republic**, Criminal Appeal No. 469 of 2017, and **Sano Sadiki & Another versus Republic**, Criminal Appeal No. 623 of 2021, which underline the importance of oral testimony in establishing the chain of custody and maintaining the integrity of the evidence.

Having considered the submissions from both sides, it is indisputable that PW3 did not sign Exhibit P3 upon receiving it from PW2. However, it is also a fact that during his oral testimony, PW3 stated that he received Exhibit P3 from PW5 on 11th March , 2021 after it returned from the chemist's office.

Nonetheless, the claim about receiving Exhibit P3 on 11th March , 2021 instead of 10th March, 2021 need not take much time to discuss. PW3's statement, which was admitted as Exhibit D2, clearly indicates that he received Exhibit P3 from the chemist on 10th March, 2021. This testimony is corroborated by both PW5 and Exhibit P7.

Equally, when PW3 was reexamined by the State Attorney, he stated the Exhibit was returned on 10th March, 2021. Therefore, I find this discrepancy to be minor and not substantial enough to affect the root of the case.

Furthermore, the issue of PW3 not signing Exhibit P7 upon receiving Exhibit P3 from PW2 has also been addressed by the oral evidence of PW2, who testified that she handed over the said Exhibit to PW3. This is further corroborated by Exhibit D1, which details that PW2 handed the Exhibit to PW3. Hence, the failure by PW3 to sign it does not invalidate Exhibit P7.

The case of **Abas Kondo Gede v. Republic**, Criminal Appeal No. 472 of 2017, emphasized that documentation will not always be the only requirement in dealing with exhibits. In further detail, the case elaborated on this point as follows;

> "*However, as the Court stated in Joseph* ***Leonard Manyota vs. The Republic,*** *Criminal Appeal No.485 of 2015;* ***Kadiria Said Kimaro*** *(supra) and* ***Chacha Jeremiah Murimi and Three Others vs. The Republic,*** *Criminal Appeal No.551 of 2015 (unreported), documentation will not always be the only requirement in dealing with exhibits. Thus, the authenticity of the exhibit and its handling will not fail the test merely because there was no documentation.* ***It follows that, depending on the circumstances of every particular case, especially where the tempering of exhibits is not easy, oral***

evidence will be taken to be credible *in establishing the chain of custody concerning the handling of exhibits."*

Thus, I find these two arguments insufficient to convince the court that the chain of custody was broken.

What has particularly caught my attention regarding the chain of custody issue raised by the defence is the assertion that PW1 tendered Exhibit P3 in court without explaining how it came back to him for tendering after stating in his testimony that he returned it to PW5 after analysis.

When Exhibit P3 was being tendered in court, the defence raised objections, one of which was this same point about the witness failing to explain how the Exhibit came back to him for tendering as Exhibit. However, the court dismissed this objection, determining that the witness tendering the Exhibit was competent and that the Exhibit was material and relevant to the case. This ruling was also based on the understanding that the chain of custody does not need to be proven by a single witness only.

Therefore, following this complaint again but this time concerning the issue of the chain of custody, I asked myself whether PW1's failure to explain

how the Exhibit came back to him for tendering in court means that the chain of custody was broken.

I have previously highlighted that PW1 did not explain how this Exhibit came to him before tendering it as Exhibit but PW3, who was the custodian of this Exhibit, stated that on 19th April, 2024, he brought Exhibit P3 and handed it over to the Court Police, without specifying exactly who these police officers were or how he handed it over to them.

Given this circumstance, doubts may arise as to whether this Exhibit was tampered with when it was brought to court on 19th April, 2024. Clearing this doubt the question that needs to be resolved is Whether Exhibit P3 was tampered with. Before answering this question, I find it necessary to pause here and explore what it means when we refer to the chain of custody.

The chain of custody refers to the sequence or flow of how an Exhibit is taken from one person to another, how it is handled, managed, analyzed, and controlled from the time of seizure until it is tendered in court as an exhibit. Thus, the chain of custody cannot be established by a single witness alone. See the case of **DPP v. Kristina d/o Biskasevskaja**, Criminal Appeal No. 76 of 2016, CAT.

In another case of Joseph Leonard **Manyota v. The Republic**, Criminal Appeal No. 485 of 2015 (unreported) the Court of Appeal observed that:

> *'It is not every time that when the chain of custody is broken then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence although the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case.'*

Having considered the points raised and reflecting on the decisions made in the cases cited above, I now revert to the question I posed.

Despite PW1's failure to clarify how Exhibit P3 came into his possession before tendering it in court, there is no dispute that this Exhibit is the one he analyzed. Similarly, although PW3 did not specify the exact person who handed over Exhibit P3 to him on the day he brought it to court, which could

suggest a breakdown in the chain, I don't find this fault alone leads to the conclusion that Exhibit P3 was tampered with. Based on the following reasons;

PW3 testified that he brought Exhibit P3 to court on 19th April , 2024 which is the same day this Exhibit was tendered in court. Likewise, PW1, PW2, PW3, PW5, and PW6 all identified Exhibit P3 as the same item that passed through their hands. None of these witnesses expressed any discrepancies during the identification of Exhibit P3, all confirmed that Exhibit P3 was the same item they had seen before it was brought to the court. The consistency leads me to conclude that Exhibit P3 was not tampered with.

In the case of **Allan Duller vs Republic** (Criminal Appeal 367 of 2019) [2021] TZCA 689. The Court of Appeal stated that;

> *"It is, we consider, well established in law that movement of exhibits from the time of its seizure, investigation and production in court must be of such nature that will eliminate the allaying fears about the possibilities of its tempering are avoided."*

Upon careful examination of all the evidence regarding the movement of Exhibit P3 from the moment it was seized from the accused persons until

the day it was tendered in court as an Exhibit, I cannot find any evidence to suggest that the movement of Exhibit P3 was tempered with, leading me to conclude that the chain of custody remained intact.

In other words, Exhibit P3 is what the accused persons were found with and it is the same which was tendered in court. The defects highlighted by the defence regarding the chain of custody are minor and do not lead this court to conclude that the chain of custody was not maintained. Instead, I conclude that the chain of custody was well-established and maintained.

To sum up, all that has been discussed above, the court finds that, the prosecution side has managed to prove the case against both accused beyond reasonable doubt. I therefore find Rashidi Ally Mbano and Twalibu Nanyambe Kazumali @ Mkamate the 1st and 2nd accused persons respectively guilty of the offence of Trafficking in narcotic drugs. Consequently, I hereby convict them as per section 15 (1) (a) and (3) (iii) of the Drugs Control and Enforcement Act, [CAP 95 R.E. 2019] read together with paragraph 23 of the first schedule to and Section 60 (3) of the Economic and Organized Crime Control Act, [CAP 200 R.E. 2019].

It is so ordered.

Dated at **Mtwara** this 8th May 2024

M.B. Mpaze,

Judge

Court: Judgement delivered in open court this 8th day of May, 2024 in the presence of Ms. Elizabeth Muhangwa and Ms. Alice Nanna learned State Attorneys for the Republic, 1st and 2nd Accused, Mr. Emmanuel Ngowi learned Advocate for the 1st accused and Mr. Stephen Lekey Learned Advocate for the 2nd Accused.

M.B. Mpaze,

Judge

8/5/2024

SENTENCE

Taking into account the gravity and seriousness of the offence of trafficking narcotic drugs, it poses significant harm to both users and the broader societal well-being. While acknowledging the detrimental impact of drug trafficking on communities and the Nation at large, mitigating factors such as being the first offenders, their age and that they have families which

depend on them have been considered in determining the appropriate sentence. This balanced approach aims to address the severity of the crime while also allowing for the possibility of rehabilitation and eventual societal reintegration, with the overarching goal of safeguarding both public safety and individual accountability.

Based on all these considerations I hereby sentence Rashidi Ally Mbano and Twalibu Nanyambe Kazumali @ Mkamate the 1st and 2nd accused persons respectively to serve a sentence of 20 years imprisonment each.

M.B. Mpaze,

Judge

8/5/2024

ORDER

1. Exhibit P3 be confiscated and destroyed in accordance with the law.
2. Exhibit P5, the Motor vehicle with Reg. No. T 229 AFQ is hereby confiscated and forfeited to the Government pursuant to section 60 (3) of the Economic and Organized Crime Control Act, [CAP 200 R.E 2022].

M.B. Mpaze,

Judge

8/5/2024

Court: Right of Appeal fully explained.

M.B. Mpaze,

Judge

8/5/2024