



THE JUDICIARY OF TANZANIA
IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT KIGOMA
(CORAM: HON. AUGUSTINE RWIZILE)
ECONOMIC CASE NO. 000014778 OF 2024
REPUBLIC COMPLAINANT / APPELLANT / APPLICANT / PLAINTIFF
VERSUS
LIJE NICHOLAUS @ MADEBERI RESPONDENT / DEFENDANT

JUDGMENT

Fly Notes

-

Facts

-

Ratio Decidendi

-

13th of June 2024

Hon. RWIZILE.:

1. This is an economic case. The accused Lije Nichalous Madeberi is charge on one count of trafficking in narcotic drugs contrary to sections 15 (1)(a), (3)(iii) of the Drug Control and Enforcement Act [CAP 95 R.E 2019] as amended by the Written Laws Miscellaneous amendments (No.5) Act, 2021 read together with paragraph 23 of the 1st Schedule to and Sections 57 (1) and 60(2) of Economic and Organized Crime Control Act [CAP 200 R.E 2022].
2. In the terms of the charges sheet, it was alleged that on 13th day of July 2022, police officers were in special patrols fighting drugs. They received information that the accused who is a resident Kabulanzwili Village within Kasulu District in Kigoma Region, is trafficking in narcotic drugs.
3. In response, they hurriedly went to the same village, called the village leaders, and went to the residence of the accused. Upon arrival, the accused's accommodation was surrounded, and a search mounted. The accused owns three houses at his compound. Upon searching, it was found that in one of his houses, which is new, there was 15 bags of what was suspected to be cannabis sativa. The same were seized, and the accused arrested. The suspected cannabis was taken to the Chief Government Chemist Laboratory Authority. Upon examination and analysis, it was confirmed that the alleged were 398.10 kilograms of Narcotic drugs, Cannabis Sativa Commonly Known as "Bhang".



4. As investigation was completed, the accused was arraigned. In the services of Mr. Khamis Kimilimilo learned advocate, the accused denied the charges. To prove the charge, the prosecution led by Ms. Happiness Mayunga and Ms. Edith Mauya learned State Attorneys tendered 7 witnesses, namely: Bonaventure Masambu -Pw1, who is now a retired Government Chemist Analyst and worked at Mwanza station. Felchesm Labule -Pw2, the OCD of Bukombe District, who worked as the head of investigation department at the police Kasulu in 2022. E 6738 SGT Jacob-Pw3, who is the exhibits keeper at Kasulu police station. Hassan Nyumbamkali-Pw4, who is a primary court Magistrate working with Kasulu Primary Court. Joseph Mwebwe-Pw5, who is the chairman of the Kabulanzwili village. E 7844 SGT Abdul-Pw6, who is the police officer at Kasulu police station in the department of investigation. F 759, DCpl Elias -Pw7, a police officer in the investigation department at Kasulu police station.
5. The prosecution tendered the following exhibits, namely; Sample submission for DCEA 001 -admitted as exhibit P1. The Government Analyst Report DCEA009 which is exhibit P2. Sample in 15 khaki envelopes with cannabis-P3. 15 bags of bhangi-P4, Certificate of seizure form No. DCEA 003 which is exhibit P5 and an Extra-judicial statement of the accused, exhibit P6.
6. On his part, the accused testified under other and called one witness namely Julietha Nadhanael -Dw2. But did not have any exhibits.
7. According to the prosecution case, it all started with the evidence of Pw2. As shown above, Pw2 is a police officer who worked with Kasulu police. On 13th July 2022, at night when in the Kabulanzwili village, got informed that the accused had cannabis ready for transportation. It was according to the information he got; cannabis was kept at his home.
8. Without delay, Pw2, with Pw7 and the informer located the house. They then looked for the leaders of the locality in order to conduct the search. They landed to Pw5 who is chairman of the village. He was taken from his house to the accused's accommodation. It was said that the accused who was sleeping with his wife was called by Pw2 to open the door but did not. When Pw5 did, his wife opened first and was asked to call his husband, the accused. As he came out, they were allowed in the room where the two slept. Full search was conducted but nothing was found.
9. In the premises, the accused owns three houses. A search in the second house did not discover anything, until they went into a new house which was locked. The wife of the accused looked for the keys in the house they were living in but did not. The locks were therefore broken. As they got into, in one room was 15 white bags. 4 of them were on the roof, these were with red strips while 11 of them were on the floor and were with green strips.
10. They were taken out of the house and when opened, it was found, there were leaves, the likes of cannabis. According to Pw2, based on his experience in dealing with drugs, he was clear that it was cannabis. It is at that time a certificate of seizure was executed, signed by himself, the accused and Pw5. The same were brought to the police station at Kasulu with the accused. While the accused was remand, he said, the cannabis was handed to the exhibit's keeper, Pw3. And they were all labelled KAS/IR/1754/2022. According to him on 18th August 2022 prepared the exhibits to be taken to Government Chemist for examination and analysis.
11. Pw3, testified that, upon receiving exhibits from Pw2, he kept them after marking them with red and black mark pen with REG.93/2022 on each bag and kept in the exhibits room, until on 18th August



to Makele with others and forced to admit.

21. He said, one of them was thrown into river Malagalasi. Seeing that, he admitted having been found trafficking in the drugs. When he was taken to the justices of the peace by Pw6 on 15th July, he was threatened before arriving there, that if he does not admit, he will be returned to Makele.
22. His wife, Julietha Nathanael (Dw2), was of the evidence that as she came from the shamba on that fateful day, in the evening, he was told, her husband was arrested by the police and taken. She was told by her children and when she inquired further, she was told by people that he was taken by the police because of employing people from Burundi illegally. They looked for him but could not find him and was later seen at the Kasulu Police station. They were told, he was charged on the offence that is not bailable.
23. Having briefly led the summary of the evidence, it is important to determine if the prosecution, cast with the duty of proving the charge, has indeed discharged its onus.
24. But before doing so, I have to note that, in cases of this nature, the prosecution apart from proving all elements of the offence, has, in doing so, to prove that the chain of custody of exhibits from the day they were seized, transferred, kept, analyzed and tendered to court has not been broken. Landing in the virgin land, eagles of this land, the Court of Appeal, held, chain of custody must be proved through documentation -see **Paulo Maduka & 4 Others vs Republic**, Criminal Appeal No. 110 of 2007. An extract on pages 17-18 of the judgement has it all. *"By "chain of custody" we have in mind 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, it is stressed, is to establish the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulently to make someone appear guilty. "*
25. However, it is clear to me, based on evidence, that not in all stages from seizure, transfer, control, custody and tendering of the same in court were proved through documentary evidence. Citing for instance, what happened with the exhibit when it was kept in the exhibits room by Pw3, from Pw2 and Pw7, and when the same was taken by Pw6 to Pw1 and as it was brought back.
26. Pw3 told this court that when the exhibit was brought to him, it was in 15 bags with the ID number KAS/IR/1754/2022 as done so by Pw2. Before keeping the same, Pw3, said, he registered the same in the exhibits register with ID KAS/EXH.REG/93/2022. He did not tender this register to prove that he indeed did so.
27. This party was the Centre of cross-examination by Mr. Kimilomilo for the accused. His answer was not plausible as to why he did not cause that register before this court. It appeared to him and to the prosecutors not an issue and its absence could not affect the integrity of the exhibits.
28. As to whether that broke the chain of custody, it is an issue to be venture into as herein. I think, I have to trace how the chain of custody starts.
29. In criminal cases where the procedure is governed by the Criminal Procedure Act, there must be compliance to section 38(3) of the Act, where a written document must be issued, signed by the officer, the owner of the premises and some independent witness(s), while a more or less similar provision is reflected under section 48(2)(c) (vii) of the Drugs Control and Enforcement Act Cap.95, done through form No. DCEA003 which is in this case, exhibit P5.



2022, when they were given to Pw6. Pw3 further said, in his seeing, Pw6 labelled each bag with number 1-15. And took them to the Chief Government Chemist Laboratory Authority for examination and analysis. The same he said, were handed to him back on 20th August 2022, by Pw6. The exhibits were sealed with CGCLA and with lab No. 747/2022. He kept the same until they were brought to court.

12. It was the evidence of Pw6 that he did not only investigate the case, but also went to the Government Chemist at Mwanza where he took exhibits, 15 bags of the suspected cannabis for examination and analysis. He said, being instructed by Pw2, he took the same from Pw3 who kept them. It was in the morning of 18th August 2022. The bags were with number KAS/IR/1754/2022, he assigned them serial Number 1-15 for easy identification of each of them.
13. The exhibits, according to him were received at the reception and registered with Lab. Number 747/2022 and handed to Pw1 with the sample form, DCEA001- exhibit P1 and had the covering letter from Pw2. He said, bags were opened, weighed and samples taken from each bag and labelled them with number 1-15 from each bag. The overall weight in terms of his evidence was 398.10KGs.
14. The exhibits, he said, were put back in the bags, sealed with the CGCLA seal, and with the letter and form DCEA001-exhibit P1. On each of the bag, Pw1 signed and wrote the lab. 747/2022. Pw6 further said, the exhibits were given back to him, he brought them to Pw3 on 20th August for safe custody.
15. Later, he said, on 31st October 2022, he received the samples from Pw1. He said Pw1 gave him the said samples in the khaki envelopes which were sealed with the CGCLA seal with case Number KAS/IR/1754/2022 and signed by Pw1 and with lab. number 747/2022 and with the report. He said on 1st November 2022, he gave the said samples to Pw3 and a report to Pw2, it was read and then kept.
16. Pw1 on his part said, on 19th August 2022, in the morning hours, in Mwanza Chief Government Chemist office, received from Pw6, 15 bags of the suspected cannabis with reference KAS/IR/1754/2022 with sample submission form P1 and a letter asking him to examine and analyze them which he did. He opened the same, weighed them and found with overall weight of 398.10KGS. The sample according to him, were taken from all 15 bags in the size of 10gm and put them on the khaki envelopes which he marked 1-15 matching with bags where the samples were taken from.
17. As he kept the sample, in the envelopes, he returned to Pw6, 15 bags with the suspected cannabis with Lab. Number 747/2022, sealed with the CGCLA seal, signed on each and dated 19th August 2022.
18. Pw1 further said, on the next day, he did preliminary a test upon crushing into powder a small sample from the envelopes mixed with the *duqueinos* reagents and proved the same contained hydrochloric acid and chloroform. The second test was by use of a machine called High performance liquid chromatography (HPLC). It was from these tests that proved that all samples taken were cannabis sativa. He prepared a report that was verified. It is exhibit P2. It was later given to Pw6 with the samples.
19. Pw4, is the justice of the peace. He worked at the Primary Court of Kasulu as a Magistrate. He testified that on 15th August 2022, received from Pw6, the accused. He said, the same had a confession to make, which he did. He recorded, the extra-judicial statement in his chambers where the accused admitted having been found with cannabis in his house which were in 15 bags. The extra-judicial statement is exhibit P6
20. On his part, the accused who testified under oath, told this court that, he was arrested at night on the allegation that he employed people from Burundi in his farms without permits. He was taken to the police station where he was beaten to admit cannabis trafficking which he denied. He said he was taken



30. The same was admitted without objection and therefore, there was no reason to test its admissibility in terms of subsection 4 of section 48 of Cap. 95. In the form-P5, it was signed by Pw2, the accused, and Pw5 an independent witness. Pw2 said, he supervised the whole search exercise which was done by Pw7. His evidence is supported by Pw5. Although Pw7 did not sign, his name is written in it, and it is clear to me that, there was nothing wrong in the so doing, provided that Pw5 signed and the three were present witnessing all that was taking place. In **Moses Mwakasindile vs The Republic**, (CAT) Criminal Appeal No. 15 of 2017, faced with the similar situation, the Court had this to say on page 18. "...As regards the manner the certificate of seizure was prepared and issued, we think PW6 and PW8 sufficiently explained the position. The certificate of seizure was prepared by PW8 who is shown to have certified on it to have conducted the search at "Inyala Village in the motor vehicle Reg. T.664 BXQ Fuso Bus." Further, the certificate bears out that PW6 signed it as the Officer Executing order. It is significant that both PW6 and PW8 were consistent that PW6 carried out the search under the supervision of PW6. The certificate was duly signed by the appellant as well as two independent witnesses: PW4 and one Mahesa Nyerere. In the premises, we find no merit in the fourth ground of appeal. It stands dismissed..."
31. According to Pw2, Pw5 and Pw7, the bags were taken from the house in the presence of the accused and his wife-Dw2. They did so by aid of the touches. Out of 15, four of them were on the roof, and 11 on the floor. They all had cannabis as it was identified by Pw2 based on his experience and the way he knows it. Pw5 said and identified the same in court but did not know if it was cannabis because he does not know it.
32. Based on the evidence of three witnesses, Pw2, Pw5 and Pw6, the 15 bags were white, 4 with red strips while 11 had green strips. They were all identified in court to have been with the same colours and texture as they were taken from the crime scene.
33. Pw3 who received the same after they were brought to the police station and kept them in the exhibits room, identified the same colours in court. In the similar way, it was to Pw6, who took them to Pw1 and then returned them and ultimately to court on the day the evidence was tendered.
34. By all traces, it is clear to me that, despite failure to produce the exhibits register, still, the integrity of the exhibits cannot reasonably be brought to task. It is therefore convincing that from when the exhibit was seized and exhibit P5 executed, its transfer and custody at the police station, its chain was not broken.
35. Adding, Pw3 said, the exhibits were marked by Pw2 with KAS/IR/1754/2022 when brought to him. Pw6 said, before taking them to Pw1 added to the same bags serial number 1-15. Pw1 said, they were received in that form, with KAS/IR/1754/2022 and serially numbered 1-15. He took the samples in accordance with the same numbers. He placed the samples in 15 khaki envelopes in accordance with the bag's serial numbers. He sealed the bags with CGCLA, signed on each and date them and recorded the lab. number 747/2022. He did the same to the sample after they taken. The bags were admitted as P4. while the envelopes were admitted as P3.
36. His evidence was supported by Pw6 who witnessed the labelling done by Pw1 at the laboratory in Mwanza. Pw3 as well, as he received the same from Pw6. This is on both, bags and envelopes that contained the samples. Both, Pw1 and Pw6 as well as Pw3 identified the said marks and colours of bags in court without hesitation.



37. It is therefore clear to me, the chain of custody despite not, in all, being proved with documentary evidence, still the prosecution endeavored to show they were not interfered with. Even in situations where the chain of custody is broken, still, the court based on all circumstances of the case may admit the exhibit in question as in the case of **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 on pg. 18-19. It was stated; thus, *"... 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, or 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 despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."*
38. In this case, it is my considered view that the chain of custody was not broken, but, to some extent, it was proved with some oral evidence contrary to what was decided by the Court in **Maduka & 4 Others vs Republic** (supra). In the circumstances, it is not in all cases that when the chain of custody is not proved by documentation, it affects the entire chain rendering the exhibit inadmissible. This was the position in the case of **D.P.P vs Mussa Hatibu Sembe, (CAT)**, Criminal Appeal No. 130 of 2021 on pg.16. The Court said; *"On our part, we agree that there was no proper documentation in respect of exhibits P4 (a) and (b). We are also of the view that, chain of custody can be established by oral account of witnesses as we have held in our previous decisions"*.
39. The next issue to determine is if, it was proved that the exhibit P4 was cannabis. Pw1 told the court that in his analysis, it was proved that the small sample that was crushed into powder from the suspected cannabis plant contained pure tetra-hydro-cannabinol which proves it was cannabis. In simple terms therefore, since the examination process was done by Pw1 with use of a certified machine called High Performance Liquid chromatography (HPLC) and because I have ruled that the same exhibits, from the time they were seizure, to when they were examined were in the perfect chain of custody, there is no doubt that what was found from the accused is indeed cannabis.
40. The accused defended himself and denied having been involved in the offence. His evidence contradicts. He said he was arrested at 8.00pm at the market in Kabulanzwili village but does not dispute the signature in exhibit P5. As well, he did not dispute that he did not make the statement before the justice of the peace- exhibit P6.
41. When it was tendered, the accused objected on two grounds that, it was not written by the justice of the peace but a magistrate, and that it was not recorded by hand but rather, it was computer written. He did not say, he never made it at all or that it was made by force or threats. When he was testifying, it is the time he said, he was threatened by Pw6 when taking him to the justice of the peace to have it recorded.
42. I think, this defence was an afterthought. If he was indeed threatened, why did he not tell the magistrate about it. It means, the situation said by Pw4 that the accused was brought to him by Pw6 who was then allowed to leave the chambers and the accused freely admitted, is true.
43. But again, his wife said, she came from the farming activities in the evening and was told the accused was arrested while the accused said, was arrested at 8.00pm. I think, all the said, is no but statements that are not consistent with the truth. There are too many contradictions in the defence case. It should be dismissed.



44. Another important piece of evidence is an extra-judicial statement. It was written by Pw4 at the primary court of Kasulu. It was admitted as I have shown, as P6. The court at this juncture is concerned with whether it was properly recorded, in terms of the law.
45. When recording the same, magistrates have to follow the prescribed guidelines issued by the Chief justice. They are in the "A Handbook for Magistrates in the Primary Courts". The Court of Appeal in the case of **Japhet Thadei Msigwa vs. R**, Criminal Appeal No. 367 of 2008 (unreported) stated that; "So, when Justices of the Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justice's Instructions to the letter... " We think the need to observe the Chief Justice's instructions are two-fold. One, if the suspect decides to give such a statement; he should be aware of the implications involved. Two, it will enable the trial court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntarily"

Things to be observed include the following based on the cited case above:

The time and date of his arrest

The place he was arrested

The place he slept before the date he was brought to him.

Whether any person by threat or promise or violence has persuaded him to give the statement

Whether he wishes to make the statement of his own free will.

That if he makes a statement, the same may be used as evidence against him.

46. In my view, all the above were complied with and I have no doubt the same was recorded in accordance with the prescribed guidelines and therefore freely recorded. But if it is found that the same was obtained in contravention of the law and therefore subject to section 169 of the Criminal Procedure Act and is liable to exclusion. Still there is enough evidence from Pw1, Pw2, Pw3, Pw5 and Pw6 to prove that the accused committed the charged offence.

47. From the foregoing, this court is satisfied beyond doubt that the offence was committed by the accused. The accused is therefore found guilty as charged and convicted.

Dated at KIGOMA ZONE this 13th of June 2024.



AUGUSTINE RWIZILE
JUDGE OF THE HIGH COURT

