

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
AT DAR ES SALAAM

ECONOMIC CASE NO. 04 OF 2017

(Originating from Dar es Salaam Resident Magistrates' Court at
Kisutu in Economic Crime Case No. 61 of 2017)

THE REPUBLIC PROSECUTOR

Versus

LILIANA JESUS FORTES..... ACCUSED

Date of Last Order: - 11/05/2018

Date of Judgment: - 04/06/2018

JUDGEMENT

MATOGOLO, J.

The accused Liliana Jesus Fortes who is a Cape Verde citizen, is charged with one count of trafficking in narcotic drugs contrary to section 15(1)(b) of the Drug Control and Enforcement Act, No.5 of 2015 read together with paragraph 23 of the first schedule to, and Sections 57(1) and 60(2) both 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.

It is alleged in the particulars of offence that on or about 18th day of October, 2016 at Julius Nyerere International Airport within the District of Ilala in Dar es Salaam region, the accused did traffic in Narcotic Drugs

namely; Cocaine Hydrochloride weighing 2.38 kilograms. The accused denied when the charge read to her.

On 9/2/2018, Preliminary hearing was conducted pursuant to Section 192(3) of the Criminal Procedure Act, [Cap.20R.E.2002]. In that preliminary hearing the following facts were not disputed;-

One, the accused was travelling from Sao Paulo

Two, on 18/10/2016, she landed at Julius Nyerere International Airport Dar es salaam;

Three, accused was connecting to Lilongwe Malawi.

The trial was conducted through an interpreter one Hamid Ally Mbawa who interpreted Kiswahili to Portuguese and vice versa, as the accused know only Portuguese.

In order to prove their case, the prosecution fielded a total of eleven (11) witnesses and tendered in Court ten exhibits both physical and documentary. According to Getrude Kadege (PW3), Fatuma Idd Shomari (PW4) and Yahaya Mkangala (PW5) who are airport security officers with Tanzania Airports Authority were on duty at the said airport on 18/10/2016 afternoon hours, they were at the screening machine. The accused arrived there with her small back bag black in colour. After put that bag on the

screening machine something were detected inside that bag. PW4 who was operating the screening machine, asked PW3 to do physical inspection to the said bag after suspect something which appeared in the image. PW3 who was asked by her co-worker to do physical inspection to the small bag, told accused to open her bag, but she was just looking at her and did not answer her. PW3 told accused to open her bag by signs. She opened it. PW3 inspected the bag in which she found a passport. She read it and found bearing the accused picture. She also found two books, she put those books aside, but the bag was still heavy. PW3 asked the screener (PW4) to pass the said bag again through the screening machine. After further inspection of the said bag she observed certain part of the bag mended. PW3 called Yahaya Mkangala (PW5) so that he can bring a scissor for her to cut that mended part of the bag. Yahaya cut it and found a parcel enclosed in silver paper. After cut the parcel she saw white powder inside. PW3 was present watching, the accused was also present watching.

PW3 said all the time accused who was there watching was in fear. They called the police of the airport to come and see that white powder. PW5, is the one who went to call the police. He returned to the accused together with D/C Ngenda. PW5 also confirmed to have cut the mended part of the bag using a pair of scissors and found a silver bag which contained

white powder in clotted form. The police arrested the accused and left with her to the police station which is situated there at the airport. PW5 managed to identify the accused in Court. He also identified the parcel in silver foil and part of the bag that was mended.

Christina Patrick (PW7), a police officer on 18/10/2016 she was at JNIA Terminal II from 6.00 am, she was called by police of Interpol and told that she was required in their office, she went there and found Insp. Yusuph, D.C Ngenda, an officer from TRA, and another from Immigration. She also found there the accused. PW7 was told to search the accused on her body. She also participated to inspect the big bag property of the accused. In the big bag they found accused's clothes and 11 different cards.

In searching the accused on her body, PW7 was together with Veronica and an immigration officer. They found nothing on her body. PW7 managed to identify the accused in the dock and the 11 cards found in her big bag. Veronica Makwenya (PW8), a customs officer with TRA at JNIA, on 18/10/2016 at about 3.00 pm while in her office, she was assigned by her boss one Rugangira to go to the Anti-Drug Unit offices. She went there where she met three police officers. The woman police called Christina and a lady who was a passenger.

PW8 was told, that passenger was suspected for possessing narcotic drugs, so they wanted to search her. PW8 said she found there one travelling bag on the floor, and a small bag which was on the table and silver parcel. She was told that her role was to witness inspection of the big bag. They inspected the big bag in which they found 11 different cards, a pass book greenish in colour and a card in lamination. Christina is the one who was inspecting the bag. After inspection of the bag, the policemen went out leaving inside PW8, Christina and another woman who searched the accused on her body.

After inspection of the big bag and body search of the accused they signed the seizure certificate then PW8 returned to her office.

Another prosecution witness is Dickson Haule (PW9), a police officer working in Criminal investigation stationed at Julius Nyerere International Airport. On 18/10/2016 he was at JNIA terminal one. During the evening time, he received a call from Insp. Yusuph, the heard of Police terminal II who informed him that they arrested a passenger called Lilian Jesus Fortes who is suspected to have narcotic drugs. PW9 the incharge of investigations was asked to communicate with the Immigration so that arrangements for the accused to enter Tanzania could be made. PW9 told his assistant Insp.

Robert to write a letter to the incharge of immigration at the JNIA to prepare a visa for the accused who was on transit to Malawi.

After that was done, the accused was permitted to enter Tanzania so that other formalities could follow. After a short time the accused was sent to PW9 by Insp. Yusuph who was together with another police officer from Anti-Drug Unit, D/Constable Ngenda.

The accused was handed to him along with one black bag which had two books and a silver parcel containing white powder suspected to be narcotic drug. There were also several documents handed to him including 11 cards, two passports, a visa to Lilongwe Malawi, air ticket, boarding pass and a laminated card bearing accused name. PW9 briefly interrogated the accused, who said know little English, but there was language barrier. PW9 handed the exhibits to CPL. Jesias the exhibit room keeper and ordered the accused to be remanded. The following day on 19/10/2016 they continued with investigation. They traced for an independent witness one Faitha Ally (PW6), took out the accused from the lockup and packed the exhibit for purpose of sending it to the Chief Government Chemist for analysis. He found a box in which the bag containing silver parcel with powder suspected to be narcotic drug was kept. He wrapped it with a khaki paper and sealed

it. PW9, the accused and an independent witness signed on the sealed box. They also wrote their names.

This was done in the presence of the accused, an independent witness and other police officers who were present.

Then PW9 sent the exhibit to the Chief Government Chemist being escorted by some police officers including D/Constable Ngenda. They started at the reception where PW9 presented to the receptionist a submission form No. DCEA 001. They were given laboratory No.1811 of 2016 which was affixed to the box containing the exhibit, then they were led to the laboratory where analysis was conducted. At the laboratory they met one Domician Dominic, a chemist who received the documents from the receptionist, after read them he received the box containing the exhibit from PW9.

The said chemist verified the contents of the submission form No. DCEA 001 on which he signed and proceeded with analysis process. He opened the box, took out the bag, opened it and took out two books and silver parcel and weighed it. He poured the powder in a tray then weighed the powder alone.

PW9 was told by Domician Dominic that the powder alone without container weighed 2.38 Kgs. After took samples and do preliminary testing, it was found that the powder was narcotic drug that is cocaine hydrochloride. After preliminary testing, the chemist further took samples for further analysis then he repacked the exhibit, seal it and returned it to PW9. PW9 said the chemist signed on the box and stamped it with official stamp. PW9 gave the exhibit to CPL. Jesias, the exhibit keeper, who kept it until when is required in Court. That the handing over was done by using handing over notes. PW9 also handed to Cpl. Jesias the case file. On 18/7/2017, PW9 received a report from the Chief Government Chemist for the exhibit they sent there for analysis.

PW9 tendered in Court the handing over certificates used during handing over of the exhibits between Insp. Dickson Haule and Cpl. Jesias, the same was admitted as exhibit P9.

The contents of exhibit P9 was read aloud in Court. PW9 also tendered in Court Exhibit submission form, No. DCEA 001 which was admitted as exhibit P10, which was read by PW9 aloud in Court. He managed to identify exhibit P1, P2, P3 and P4 when shown to him in Court. He identified them by labels they fixed, his signature, and the seal. He also identified the Chief

Government Chemist Report (Exhibit P5), likewise exhibits P7 and P8 (handing over certificate) between him and PC. Ngenda.

On his part D/Cpl. Jesias (PW10) told this Court that is a police officer stationed at JNIA in the criminal investigations. On 18/10/2016 at about 7.30 pm, Insp. Dickson Haule, the OCCID assigned him to record the statement of the accused Liliana Jesus Fortes who was suspected for possession of narcotic drugs. He told Detective Macleana, a female police to take the accused from the lockup and sent her to the investigation office. PW10 introduced himself to the accused and told her that he wanted to record her statement. But the accused appeared not to understand him. He repeated several times and believed she has understood him. He asked her name but did not respond. PW10 told her in English that he is called D/Cpl. Jesias and asked her name, the accused mentioned her name to be Liliana Jesus Fortes. When asked for her occupation, she took a considerable long time before she reply.

But later she replied saying "business". He asked her where she live in her Country. But there was communication breakdown. PW10 told PW9 accordingly who advised him to record in the statement paper the reason for failure to record the statement of the accused, and to tell the accused to sign on the paper to show that she was called for purpose of recording

statement, but that failed due to language barrier. He told the accused who understood him and signed. Then PW10 told WP. Macleana to send back the accused to the lockup. At about 8.00 pm the same day, Insp. Dickson handed to him the exhibits in relation to the case accused is facing so that he could keep them in the exhibit room, which included a small black bag usually carried on the back.

Inside that bag there was a silver parcel with white powder suspected to be narcotic drugs. He said inside that bag there were present two books. PW9 also handed to PW10 accused's air ticket, two passports and boarding pass. Others were one mobile phone Samsung Duos, a card in lamination bearing accused's picture and 11 different cards. Those exhibits were handed to him as the exhibit room keeper. He labelled them with police case file number JNIA/IR/175/2016 for the small black bag, the silver parcel found in the black bag, the two passports and the mobile phone. For small items, 11 cards, boarding pass and air ticket, PW10 put them in an envelope and on the envelope he labelled same police case file number. He therefore entered all items in the exhibit register with serial No.88 of 2016. On 19/10/2016 PW10 handed over to PW9 the small black bag and the silver parcel with white powder suspected to be narcotic drugs so that he could send them to the Chief Government Chemistry for analysis. The same day

during the day time Insp. Dickson (PW9) returned from the Chief Government Chemistry and handed over to PW10 the exhibits that was sent to the Chief Government Chemist.

He recorded them in the exhibit Register with a new entry number 89/2016. PW10 told this Court that, in all occasions handing over was done by preparing and signing handing over certificates, which he identified them after been shown to him in Court. PW10 also identified other exhibits P1,P2,P3 P4,and P7. Insp. Yusuph Maneno Chiwanga (PW11), a police officer stationed at JNIA Dar-es-salaam on 18/10/2016 he was the police Inspector on duty at police airport. He said he reported at work at 06.30 am. At 10.00 am, PW11 went to the police post at terminal II. At about 02.00 pm D/C Ngenda went to inform him that at the passengers' departure area screening machine there is a female passenger who was detained there by the airport security officers suspected for possession of powder suspected to be narcotic drug. PW11 left together with D/C Ngenda to the place. He met there airport security officers; Yahaya, Fatuma, Getrude and a passenger called Liliana. D/C Ngenda showed to him the passenger and the luggage suspected to contain narcotic drug. PW11 was told that the luggage belong to the accused because of her passport. He inspected the passport where he saw the accused photo picture and her name. He said the luggage was

went to the immigration office for other activities including cancelling accused flight. He also traced for the accused travelling bag which she had checked in and looked for witnesses from other departments. He said he managed to get a black bag. They searched that big bag in which they found different cards about eleven in number, one was big in lamination bearing accused photo picture. The other search was body search which was done by WP Christina. PW11 said they managed to seize a silver parcel with white powder weighing 2.3 Kgs, two bags black in colour, one big and a small one (basket). A Samsung mobile phone, 11 different cards, boarding pass and air ticket bearing accused's name.

They also seized two passports and a laminated card property of accused. After seizure, PW11 handed the accused to Inspector Dickson, the OCCID. PW11 signed the seizure certificate prepared by DC. Ngenda. PW11 stated further that they were communicating with the accused in little English but mostly by signs. He said they did so at the screening machine where he showed to the accused the bag and asked her if it belongs to her. Accused showed him her ring, then started to weep. That she was taking the ring from her finger as if wanted to throw it but she wore it again and

identified the seizure certificate he signed and other exhibits which he saw when shown to her as they bear accused's name. PW11 instructed D/C. Ngenda to hand over the exhibits to Insp. Dickson. He also said at the screening machine he met Yahaya, Fatuma and Getruda.

Domician Dominic (PW1) is the Chemist with the Drug Control and Enforcement Authority, is the one who conducted analysis to the suspected white powder submitted to the Chief Government Chemist.

In his testimony, he told this Court that on 19/10/2016, he was at the offices of the Chief Government Chemist Dar es Salaam, he received an exhibit from the police which was sent to him by Inspector Dickson Haule. The exhibit was in a sealed box written JNIA/IR/175/2016 and accompanied by a Form No.001. He said after receive the sample he read the form in order to know what he was required to do. In that form he was required to do three things. To do analysis to establish if the sample was narcotic drug, to weigh the sample and to explain the effect of the sample to human being if used.

He said Insp. Dickson Haule was received at the reception where the exhibit was given laboratory number to avoid confusion to other exhibits.

After being received at the reception, the sample was sent to the laboratory where PW9 was accompanied by other officials.

PW1 said he opened the box to see what was inside. He found a small bag, inside that bag there was silver parcel with white powder. There were also present two books. But his interest was on the powder which was suspected to be narcotic drug. He weighed the powder and found weighing 2.38 Kgs. Then he said he did preservative or preliminary test, in which he said he used standard operating procedure.

He said he used spots method on which there are different reagents. He took one reagent and mix with the sample. He took five samples picked randomly, each sample has one milligram. After preliminary test, it showed that the sample was cocaine Hydrochloride. He said the result is shown in the guiding manual, and that in preliminary test he used cobalt thiocyanate which is used with concentrated acid hydrochloride and chloroform. He said after preliminary test, he sealed the sample and signed on it. The police officer Insp. Dickson Haule also signed. PW1 said he remained with samples he took for confirmatory test. And that at the reception, the exhibit was labeled No.1811/2016. He stated further that in the second stage for identification and confirmation they used a machine known as gas chromatography which has comparison reference standards which they use

to confirm suspect sample. They took reference sample and run on the machine which has library. The suspect sample must tally with cocaine in the machine library. PW1 said he did confirmatory test on 17/7/2017. He then prepared a report which was approved by the Chief Government Chemist the same day. He sent the report to the receptionist with direction for him/her to communicate with Insp. Dickson Haule to collect the same.

PW1 tendered in Court the box which he sealed and signed and presented to Insp. Haule. The same was admitted as exhibit P1. He also tendered in Court the small bag, two books and a parcel containing powder. The parcel of powder was admitted as exhibit P2, the bag was admitted as exhibit P3 and the two books were admitted as exhibit P4 respectively. PW1 also tendered in Court the Chief Government Chemist Report dated 17/7/2017 which was admitted as exhibit P5.

H.3469 D/constable Ngenda Luja Ngenda (PW2) told this Court that is a police officer working with the police force in the Anti-Drug Unit. On 18/10/2016, he was at the JNIA terminal II. He has been there since 6.00 am. While there in the office of police Interpol, one Yahaya Mkangala (PW5), the security officer with Tanzania air ports authority went there and informed him that there was a suspected passenger. So he wanted (PW2) to render

assistance. PW2 and other police officers who were in uniform left together with PW5 to the passengers final check.

He found airport security officers together with the passenger who was suspected. PW2 mentioned the security officers to be Fatuma Shomari and Getrude. He was told that there was a passenger who was suspected, and he was shown that passenger (accused). PW2 was introduced to the accused that is the police officer from Anti-Drug Unit. PW2 also introduced himself. The suspect (accused) was handed to him along with the things that were suspected. PW2 took the accused. He was also given her properties which include her passport which was found while the accused being inspected. He was given a small bag black in colour. Inside that bag there was a parcel enclosed in a foil paper of silver colour. He took the accused together with these properties to the Interpol offices for interview.

He was together with the airport security one Yahaya Mkangala and a female police. Upon arrival at the Interpol offices, PW2 informed his bosses Insp. Yusuph and Insp. Dickson and others what happened. He also called people from other authorities, TRA and Tanzania Intelligence Services for purpose of witnessing. After they have arrived there, Inspector Yusuph, the OCS of the police station permitted them to proceed inspecting the accused. The accused was searched in her bag. She was also searched on her body

by the female police. PW2 said she had two bags, the other bag was taken from the plane under the supervision of Insp. Yusuph. PW2 searched in the small bag which was torn on the top. It had two zips, one upper chamber had a book. The lower chamber also had a book. Between the two books there was a place torn, and is where the parcel with silver foil was placed. He stated further that while so searching in the small bag Yahaya Mkangala (PW5), Veronica, Fatuma Shomari (PW4) and the state securities were all present witnessing. They managed to find the parcel hidden and the two books one big and another small. He said after open the parcel they found containing white powder in clotted condition, they suspected it to be cocaine. PW2 said in their office they have reagents for preliminary testing. They tested the powder which turned to green color indicating that it was cocaine hydrochloride. After such preliminary test, they consulted each other and decided to bring the sniff dog. But the dog did not detect anything. Then they decided to send the sample/exhibit to the Chief Government Chemist.

As it was already night, PW2 sent the sample to Insp. Dickson, the incharge of investigation. They left with the exhibit in a motor vehicle together with the accused. He stated further that during the search, they found a big bag which had accused clothes. They found two passport, air ticket, boarding pass, 11 different cards, and a card in lamination.

PW2 prepared seizure certificate which was signed by the accused, and other witnesses. He said the purpose of preparing seizure certificate is for the accused to sign to acknowledge that she was found with the properties in question. PW2 prepared the seizure certificate which was signed by his incharge Insp. Yusuph. He stated further that they were communicating with the accused in English but she know very little English. The seizure certificate was also signed by the TAA security officers.

PW2 tendered in Court the seizure certificate which was admitted as exhibit P6. He read its contents aloud in Court. PW2 also tendered in Court different properties which were recovered during the search, these include two passports, one blue and another green in colour, (work permit), 11 different cards, one mobile phone Samsung duos blue in colour, white laminated card, air ticket, accused boarding pass and a copy of visa application form which were admitted as exhibit P7 collectively.

PW2 also tendered in Court handing over certificate dated 18/10/2016 between him and Insp. Dickson Haule which was admitted as exhibit P8. He also read its contents aloud in Court. PW2 stated further that the big black bag which had accused clothes, was returned to the accused at the police station. But for other seized properties, he handed them to Insp. Dickson.

PW2 managed to identify the small black bag (exhibit P3), a parcel of powder in silver paper (Exhibit P2) and the two books (exhibit P4).

During cross-examination by Mr. Nkoko learned advocate for the accused, PW2 admitted that he found the small bag, the parcel of silver colour containing white powder under other persons and not the accused. He also admitted that he found the small black bag already cut, likewise the powder parcel. But he said even though the accused admitted to him that she possessed those properties, and he also believed those other people what they told him. He also admitted that there were other witnesses who witnessed the search but did not sign and that accused signed by writing her name and not complex signature.

After the prosecution has closed its case, this Court ruled that the accused has a case to answer.

The accused gave her sole sworn evidence and did not call any other witness. In her defence, being led by Mr. Ndosi and through an interpreter she said she is a Cape Verde national and is a nurse. Her journey of 18/10/206 started at Sao Paulo Brazil and she was going to Malawi. She connected at Abu Dhabi and was to connect at Dar es Salaam. But upon arriving at Dar es Salaam airport, she was told that she was found with narcotic drugs. At Sao Paulo airport, she was checked at two check points and allowed to board

the plane. She was also checked at Abu Dhabi and allowed to proceed with her journey. That at Dar es Salaam airport, she alighted from the plane having her pouch. And that while checking at Sao Paulo she had only one luggage, a big bag which was checked and placed in the plane. At the final check at Dar es Salaam airport she had her passport, mobile phones and money. Her passport and mobile phone were in her pouch but other small items were in her pocket. That at the check point screening machine she said she put her belonging in the tray. There were other people in front of her and behind her.

After she has passed through the screening machine, she was told to take her belongings and told to stand aside. Her passport was snatched from her without being told anything, other passengers passed and left.

She said she only talk and understand Portuguese. At the place she was told to wait, there were no other persons. Some other persons were called. Accused disowned the small bag (exhibit P3) she also said she does not know the box (exhibit P1) and does not know where it came from. That the pouch which she had and where she kept her passport and mobile phones was taken by the police. In that pouch she had 700 USD, but she had also Brazilian coins which were left to her but the 700 USD were taken by the police officer one Christina who was searching her. Accused said the

pass book blue in colour is her passport but the one in green colour is her working permit. The passport and air ticket were in her pouch. But the other documents were in the big bag. She said she believe every airport has CCTV cameras. She was not arrested having any other things. That they just arrested her, she has no any other evidence to prove. Accused stated further that PW7 told the Court that after she was arrested she was showing him a ring. She said she was telling him that she is married and she was going to her husband and asked him to assist her so that she could make a call to her husband but he did not help her. And that from the date she was arrested to the time she was testifying she did not get any assistance to communicate with her relatives.

After she was shown the seizure certificate (exhibit P6) accused said she does not know such document and that at the airport she was led to different places. In that document (exhibit P6) the police signed above, she was told to sign below. She did not know anything, she said what she know at the airport check point there were many people, she was arrested but she fail to understand why those properties were planted to her.

During cross-examination by Mr. Mango learned Senior State Attorney, the accused admitted that the police officer gave her seizure certificate (exhibit P6) to sign but she did not know what was listed therein.

Although the defence side did not tender any exhibit through the accused (DW1) but during trial, and at the time the prosecution witnesses testifying, Mr. Nkoko learned advocate prayed for statements of some of the prosecution witnesses to be admitted in Court in which learned advocate said what those prosecution witnesses stated in Court while giving evidence is different to what they stated in their statement recorded at the police station. Their statements were admitted in Court as defence exhibits. These include the following witnesses, with their corresponding statements:

PW1 Domician Dominic, exhibit D1, statement of Faidha Ally (PW6), exh.D2, statement of Veronica Makwenya(PW7), exhibit D3, statement of Insp. Dickson Haule (PW10), exhibit D4 statement of D/C Jesias (PW10), exhibit D5, and statement of Insp. Yusuph (PW1), exhibit D6.

Likewise, the defence tendered in Court the accused statement exhibit D7.

From the above evidence, it is a common ground that the accused was arrested on 18.10.2016 at Julius Nyerere International Airport where she landed by ETIHAD airline with a view to connect to Lilongwe Malawi by Ethiopian Airline.

accused was arrested suspected of possessing narcotic drugs. Given the above summarized evidence from both the prosecution and from the defence, there are questions or issues to be resolved in determination of this case.

- (i) whether or not the procedure underlining arrest, seizure, search transfer, chemical analysis of the suspected sample and its production in Court was followed or adhered to;
- (ii) whether the evidence levelled against the accused is sufficient and has proved the offence against the accused beyond reasonable doubt
- (iii) Whether the accused's defence has, in anyway raised doubt to the prosecution case.

The law requires that the chronological events from the arrest of the suspect, seizure of the subject matter, transfer of that subject matter, its chemical analysis for suspected narcotic drugs, its custody and its exhibition in Court must be recorded. That is the chain of custody should be revealed and that should not be broken at any point in time.

There are lot of authorities both of this Court and of the Court of Appeal explaining and giving guidance on the chain of custody. These cases include; **Paulo Maduka and others Vs. The Republic**, criminal Appeal No.110/2007 CAT – Dodoma, **Zainab d/o Nassoro @ Zena**, criminal Appeal No.348 of 2015 CAT at Arusha, **Mustafa Darajani Vs. Republic**,

The land mark case for chain of custody appears to be that of **Paulo Maduka** in which the Court of Appeal among other things, held:-

"...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 assessed it."

Now taking this position of case law, and compare with what transpired in the case at hand, one may pose a question, were these conditions met in the instant case?

There is evidence of PW3, PW4 and PW5 who are security officers with Tanzania Airports Authority (TAA) who were at the final check point for departure passengers. PW4 was at the screening machine. She said she saw the accused while placing her luggage, the small black bag on the screening machine. But also PW3 was present who told this Court that she

was at the luggage inspection area, she also saw the accused while placing her luggage on the screening machine which is the small black bag.

The screener (PW4) saw something suspicious in that bag which was detected by the screening machine. That necessitated PW4 to tell PW3 to inspect that bag physically, PW3 did so by telling the accused to open her bag, she opened it in which PW3 found accused passport and books which she took them out. But still the bag appeared heavy. She requested Pw4 to screen again the said bag. The suspected thing still was detected. PW3 inspected again the bag physically. It is when she saw a certain part inside the bag sewn. PW3 asked Yahaya Mkangala (PW5) to bring a pair of scissor for her to cut open that part. It is PW5 who cut it. The accused was present standing aside. A silver parcel was uncovered from that sewn part of the bag. That parcel contained whitish powder which was suspected to be narcotic drug. PW5 called the police where PW2 came and arrested the accused. He sent her to the office of the police Interpol there at the airport along with her bag and the parcel in question. Thorough search was done again at the police station which involved body search after other persons from other departments were called to witness. Then a seizure certificate was prepared. The handing over certificates were prepared at the time the

exhibits exchanged hands, such as between PW2 and Insp. Dickson Haule (exhibit P8). Between Insp. Dickson Haule and CPL. Jesias (Exhibit P9).

PW2 told the Court that at the Interpol offices, they did preliminary test on the white powder and found the powder turning to green colour to show that it was cocaine hydrochloride. The sample was kept by CPL Jesias the exhibits keeper. The next day he handed over the sample to PW9, who packed the sample ready to be sent to the Chief Government Chemist in the presence of the accused, an independent witness Faitha Ally (PW6) and other police officers. PW9 signed on the box containing the bag and the parcel of white powder. The accused and the independent witness also signed. The box was labelled police case file number JNIA/IR/175/2016 The bag and the parcel containing whitish powder were also labelled the same police case file number. A submission form (exhibit P10) was prepared. At the Chief Government Chemist the analysis was done by Domician Dominic who, after colour test he sealed the sample, put it in the bag and sealed it in the box. He signed on the said box and affixed official stamp of the Chief Government Chemist and handed it over to PW9 who returned it to PW10.

With that chronological events which were documented, there is no doubt that the conditions which were explained in **Paulo Maduka case** (supra), were accurately followed.

In his final submission, Mr. Nkoko learned advocate for the accused contended that the accused was not informed of the reason for her arrest basically due to language barrier, and the search was conducted in the absence of the accused. With due respect to the learned counsel, PW2, PW3, PW4, PW5 and PW11 were very clear in their evidence. PW3 and PW4 saw the accused while placing her bag on the screening machine. After something suspicious was detected in the bag, PW4 told PW3 to search the bag physically. PW3 told the accused to open her bag, she opened it then PW3 searched in the bag until when she saw the sewn part inside that bag. She told PW5 to come with a pair of scissor so that they could cut open that sewn part. PW5 cut open that part, it is where the silver parcel was uncovered. PW2 was called by PW5, who arrested the accused. Given that facts, it cannot be correctly argued that the accused was arrested without being informed, the language barrier notwithstanding. The whole process began with the screen check of the accused bag. It is obvious that the accused was aware of what was taking place, why she was told to open her bag and why she was arrested. Both PW2, and PW11 clearly told this Court that accused never disowned her bag. Even during the second search, the same was done in the accused presence where PW2 searched the small bag, then Christina Patrick (PW7) searched the accused on her body in the

presence of Veronica Makwenya from TRA. The big bag of the accused was also inspected and found containing accused clothes. Both bags, along with other properties found during the search, a parcel of whitish powder recorded as "kifurushi kimoja chenye uzito kilo 2.3", Samsung mobile phone, two passports, air ticket, 11 different cards, boarding pass, laminated card and one tag were listed in the seizure certificate, which was signed by Insp. Yusuph Chiwanga (PW11), accused and Veronica Makwenya. So it is not correct for the learned advocate to argue that accused was not searched by the police, the search by the police was done in the presence of the accused. The big bag was not tendered in Court because it was restored to the accused according to PW2 while at the police station.

The learned advocate also alleged contradictions by the prosecution witnesses, for example he said there is no evidence that proves exhibit P2 and exhibit P3 were kept in the box, exhibit P9 as alleged by PW9 and PW1. Both PW9 and PW1 testified to the effect that the small bag (exhibit P3) which contained parcel of whitish powder (exhibit P2), were enclosed in the box (exhibit P1). PW9 is the one who looked for the said box on the date he was packing the sample for the purpose of sending it to the Chief Government Chemist, the reason he gave for the use of that box is according to the directives from the Chief Government Chemist for ease of labelling.

PW6 stated in her evidence that after the whitish powder contained in silver parcel was shown to her and those who were present including the accused, the parcel was returned into the bag. PW9 traced for the box, he took the black bag containing the silver parcel put it in the box then sealed the box. It is the same box PW1 sealed and signed on it after preliminary test. The evidence is therefore clear. Regarding presence of another Chief Government Chemist Report dated 16/2/2016, recorded by PW1 in his statement recorded at the police, in his evidence PW1 stated that he did confirmatory test on 17/7/2017 the same date he prepared the report which was approved by the Chief Government Chemist the same day. PW1 clearly said, he could not do confirmatory test the day the sample was sent to them because of work load. They do confirmatory test starting with samples submitted there earlier. While being cross-examined, PW1 said the report dated 26/2/2016 is not known to him so he disowned it. This led to Mr. Nkoko advocate to pray to tender in Court the statement, the same was admitted as exhibit D1. But in his evidence, PW1 insisted that the report he prepared and which he know, and which was also approved by the Chief Government Chemist is that of 17/7/2017 and not of 26/2/2017.

Normally between the evidence of PW1 he gave in Court and what he stated in his statement recorded at the police, what can be acted upon by

the Court is that the witness gave in Court under oath. Any deposition he made at the police cannot be acted upon as the same was not given upon oath or affirmation. The then East Africa Court of Appeal in the case of **Ngeti Mwaghnia V. R. (1960) EA 3**, held:-

- (i) depositions are not evidence at a trial unless they have been put in evidence even then a deposition is not evidence of the truth of its contents unless authorized by law to be so used in the absence of the witness who gave evidence, but is only valuable to destroy the credit of a witness and make the value of his evidence negligible.*
- (ii) A trial should be conducted upon evidence before the trial Court and if reference is made to matters which is not before the Court, whether it be in favour of the accused or prosecution, injustice is likely to result as there has been no opportunity for explanation or for the testing of the matter by cross-examination”.*

This is therefore the position of the law as far as contradictions or inconsistencies referred to by Mr. Nkoko learned advocate is concerned. If there has been a different date of the report in question appearing in the statement of PW1 recorded by the police, it may be for other reasons including slip of a pen or error by the recording officer.

As to the possibility of tempering with the sample at the Chief Government Chemist Laboratories due to length of time passed to the confirmatory test, I think there is no such possibility for the simple reason that the results in the confirmatory test to that of preliminary test are not different.

Having answered the first question in the affirmative, the second question is whether the prosecution evidence levelled against the accused is sufficient, and proves the charged offence beyond reasonable doubt. There is credible evidence from the prosecution witnesses as above narrated. The arrest of the accused was done in the presence of PW3, PW4 and PW5. These are witnesses who uncovered the narcotic drug in question. The Police were informed who went to arrest the accused, that is PW2 and PW11. The search was done accordingly as above explained. The accused is charged with trafficking in narcotic drugs c/s 15(1) (b) of Act No 5/2015 read together with paragraph 23 of the first schedule to, and Sections 57(1) and 60 (2) of Cap.200 as amended by Act No. 3/2016. The Section provides as follows:-

"15(1) Any person who-

(b) trafficks in narcotic drug or psychotropic substance commits an offence and upon conviction shall be liable to life imprisonment".

Narcotic drug means any substance specified in the schedule or anything that contains any substance specified in that first schedule to the Act. It is alleged that the accused was trafficking in narcotic drug known as cocaine hydrochloride. Trafficking has been defined under S. 2 of the same Act to mean:-

*"The importation, exportation, manufacture, buying sell, giving supplying, storing, administering, **conveying**, delivery or distribution 'by any person of narcotic drug or psychotropic substance, any substance represented or held out by that person to be narcotic drug or psychotropic substance or making of any offer but shall not include-....."*

According to the gathered evidence from the prosecution, the accused was found possessing cocaine hydrochloride, she was travelling from Sao Paulo Brazil to Lilongwe Malawi. The accused therefore was conveying such cocaine hydrochloride to Lilongwe Malawi where she was heading to, or any other destination known to her.

The counsel for the accused argued that in order for the offence of trafficking to be committed, the accused must have intention of trafficking such narcotic drug, in other words she must have knowledge or mens rea in trafficking of narcotic drug, and referred this Court to the decision of the Court of Appeal in the case of **Nurdin Akasha @ Habab V. Republic**

[1995]TLR 227. There is no doubt that by conveying the said 2.38 Kgs of cocaine hydrochloride, the accused had intended to traffick those narcotic drug. There is no any explanation from the accused that she was authorized or had license of dealing with those narcotic drug. The said narcotic drug could not be present in her bag without her knowledge, if she has such knowledge, then she had intended to traffick the same. Her assertion that she does not know that small bag is mere afterthought. The way the narcotic drug was concealed in the bag, as it was sewn within the bag and placed the silver parcel of foil material probably with a view not to be detected easily, and on each side there was a book placed. That type of packing obviously imports knowledge, intention or *mens rea* on part of the accused.

On the alleged inconsistencies of the prosecution evidence, I wish to add that I do not see any serious discrepancies, the discrepancies referred to by the learned counsel are minor and unable to occasion injustice. In the case of **Joseph Sypriano V. R.**, Criminal Appeal No 158/2011, the Court of Appeal held:-

"Accordingly we would have ruled out that the discrepancies were not fatal if that was the only discrepancy. This is because not every inconsistency however so minor, irrelevant or flimsy would be taken into account in assessing a witness credibility."

a decision can be reached as to its veracity”.

With such strong evidence there is no doubt that the prosecution has discharged its obligation of proving the charge against the accused beyond reasonable doubt.

As to the third question whether the accused in her defence gave strong evidence enough to weaken the prosecution case, I do not see any material evidence in her defence apart from general denial. The same does not shake the strong prosecution evidence. In her defence, the accused admitted to have been travelling from Sao Paulo Brazil to Lilongwe Malawi and that she was a transit passenger. She admitted too that even transit passengers they have to check at the final check point at the airport one wants to connect a flight. The accused admitted to have checked at JNIA Dar es salaam, she admitted to have passed through the screening machine and immediately after pass the screen machine she was stopped. She admitted too that in checking at the screen machine one passenger pass after another.

Although in her defence, the accused alleged that the small bag does not belong to her, implying that the same was planted her, but she did not give evidence to explain how that happened. She did not request for CCTV camera footage to establish allegation of the narcotic drugs to be planted to her so as to raise doubts to the prosecution case. But she also admitted that

thing raised by Mr. Nkoko learned advocate that some prosecution witnesses what they stated in evidence is deferent to what they stated in their statement recorded at the police. This refers to the statements of PW1, PW6, PW8, PW9, PW10, and PW11. But as we saw above depositions are not evidence to be acted upon by the Court. But I understand as was held in **Ngeti case** (supra), such deposition may be used to destroy credit of a witness. This may be Mr. Nkoko was seeking for. But it should be understood that not everything a witness stated in his statement recorded by the police should feature in his evidence he gave in Court. The reason is that as a witness, is led by the prosecutor, he may not be asked on every information he gave in his statement. But again, a witness is not precluded to state in evidence what he actually witnessed only that what he want to state is not in his statement recorded by the police see **Abdallah Waziri V. Republic**, Criminal Appeal No 116/2004, CAT at Tanga.

However, what is important to be looked at is whether the inconsistency complained of go to the roots of the case and results in occasioning injustice. But the inconsistencies complained of in this case do not go to the roots of the case, the same therefore does not render the prosecution case unproved.

Another complaint which was raised by the defence side, which is also in the Court record is that the copies of witnesses statements supplied to them, which are typed are sometimes different to the original copies, thus they feel they are prejudiced to prepare their defence. But I must say out rightly, that may be typing error. But during committal, what is read to the accused is from original handwritten copy, so there is no reason for them to be prejudiced in preparing their defence. In his final submission the learned Senior State Attorney, after he has summarized the prosecution evidence and citing relevant principles laid in different decided cases and provisions, concluded by inviting this Court to find the accused guilty.

It has been demonstrated at length above, with the prosecution evidence both oral and that relating to tendered exhibits, there is no doubt that the same link the accused with the charge levelled against her. The witnesses who gave evidence on the prosecution are credible ones, there is no reason for their evidence not to be believed as was held in **Goodluck Kyando V. Republic [2003] TLR 363.**

That said and done, and as above explained, I am satisfied that the prosecution has proved the case against the accused beyond reasonable

doubt. I therefore find the accused guilty of trafficking in narcotic drugs as charged, and convict her forthwith.


Firmin N. Matogolo
JUDGE
4/6/2018

PREVIOUS CONVICTION

Mr. Maugo – SSA

My Lord we have no record of the accused previous convictions. But we pray for severe punishment to the accused to be a lesson to her and to those who engage themselves in these offences. The narcotic Drugs are affecting the youth, who are nation working power.

That is all.

MITIGATION – (Mr. Ndosi – Advocate)

My Lord we pray for lenience in sentencing the accused for the following reasons:

- (i) As stated by the State Attorney, the accused is the first offender.
- (ii) The accused is the mother of two children thus has dependents
- (iii) The accused is a foreigner who was on transit and had no reason to enter those narcotic drugs in Tanzania and had no reason to affect Tanzanians for those narcotic drugs.

My Lord I pray to your honourable Court to consider that and impose lenient sentence. That is all.

ALLOCUTUS – (Accused)

After I have travelled from Cape Verde, behind my children were arrested and now are under the social welfare officers. I separated with my husband who cannot be permitted to maintain the children. I am the only parent who can care for them. I pray for assistance including to be transferred to my home country.

That is all.

SENTENCE

The accused was convicted of trafficking in narcotic drugs. She was arrested trafficking in cocaine hydrochloride weighing 2.38 Kgs at Julius Nyerere International Airport while connecting a flight to Malawi. In mitigation read on her behalf by Mr. Ndosi Advocate, the accused has two children, a foreigner and had no intention to circulate those narcotic drug in Tanzania thus affect Tanzanians. In allocutus the accused stated that her children are under the social welfare department only herself can be allowed to take them because she separated with her husband. Mr. Maugo learned Senior State Attorney prayed for stiff punishment to be imposed against the accused for the offence she committed and the effect of the narcotic drugs to the nation.

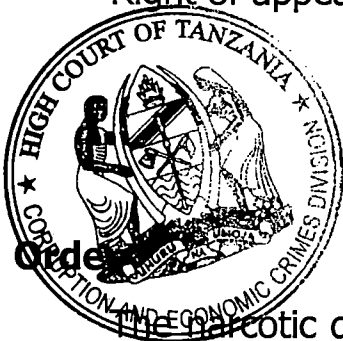
It is true that the business accused is doing of trafficking in narcotic drugs has tremendous effect to the societies worldwide. Therefore concerted efforts are required to minimize if not to stump it out. I have taken into account accused mitigating factors. But I have also considered

the amount of narcotic drugs accused was found trafficking, 2.38 Kgs and its effect if could be spread in the society. I therefore sentence the accused to life imprisonment as provided under the law.



Firmin N. Matogolo
Firmin N. Matogolo
Judge
4/06/2018

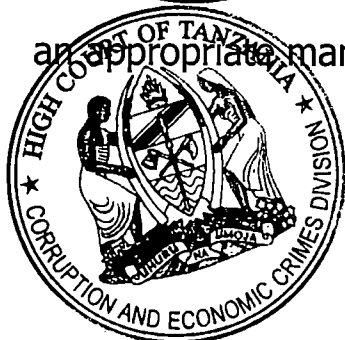
Right of appeal is fully explained.



Firmin N. Matogolo
Firmin N. Matogolo
Judge
4/06/2018

Order

The narcotic drugs, cocaine hydrochloride exhibit P2 be destroyed in an appropriate manner.



Firmin N. Matogolo
Firmin N. Matogolo
Judge
4/06/2018

Date: 4/6/2018

Coram: F.N. Matogolo J.

For Republic: Mr. Joseph Maugo – SSA

For Accused: Mr. David Ndosi

Accused: Present

B/C: Lukindo

Interpreter - Hamidu Ally Mbawa

Judgment delivered in open Court in the presence of Mr. Joseph Maugo – Senior State Attorney and in the presence of the accused and Mr. David Ndosu Advocate for Accused.




Firmin N. Matogolo
Judge
4/06/2018