

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. 03 OF 2018

(Originating from Dar es Salaam Resident Magistrates' Court at
Kisutu in Economic Crime Case No. 25 of 2017)

THE REPUBLIC PROSECUTOR

Versus

ATHUMAN AMIR MGONJA 1ST ACCUSED
ALLY MOHAMED NYUNDO..... 2ND ACCUSED
OMARY MASINGA WAGILE..... 3RD ACCUSED

Date of Last Order: - 13/08/2018

Date of Judgment: - 11/08/2018

JUDGEMENT

MATOGOLO, J.

The three accused persons, Athumani Amiri Mgonja, Ally Mohamed Nyundo and Omary Masinga Wagile, first, second and third accused respectively are 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 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 between 18th day of March and 23rd day of March, 2017 within the city of Dar es Salaam in Dar es salaam region, the accused persons did traffic in Narcotic Drugs namely; Heroin Hydrochloride weighing 320 grams. The accused denied when the charge read to them. The accused trial was preceded by preliminary hearing which was conducted on 19.6.2018 in which the accused essentially did not admit anything.

In order to prove the charge against the accused, the prosecution brought a total of nine (9) witnesses namely Theodory Ludanha (PW1), Dr. Julius Narcis Riwa (PW2), Dr. Innocent Martine Mosha (PW3), SSP Ramadhan Kingai (PW4), Issa Rashid Maimbo (PW5), E. 8612 Station S/Sgt. Malugala (PW6), E.4564 D/CPL Dotto (PW7), Inspector Patrick Mkondya (PW8) and D/Sgt. Mkombozi (PW9). The prosecution also tendered in Court the following exhibits; Sample submission Form, No DCEA 001 (exhibit P.1), ten pellets of heroin hydrochloride (exhibit P.2). Chief Government Chemist Report (exhibit P.3), OPD Card of Mwananyamala hospital dated 04.3 2017 (exhibit P.4), Report on Postmortem Examination (exhibit P.5), Caution statement of second accused (exhibit P.6), caution statement of first accused (exhibit P.7) and Caution statement of third accused (exhibit P.8).

At the hearing, Mr. Timon Vitalis, learned Principal State Attorney and Mr. Constantine Kakula learned State Attorney appeared for the Republic. On the defence Mr. Jamhuri Johnson learned advocate represented the second accused, Mr. Mluge Karol Fabian learned advocate represented the third accused and Ms. Abbriaty Sada Kivea learned advocate appeared for the first accused.

The case on the prosecution briefly is that, on 14th day of March, 2017 at Red Carpet Hotel Sinza, a person called Idris Salifu, a citizen of Ghana died in the room he rented. The incident was reported to the police who went there and sent the deceased body to Mananyamala hospital for storage pending other formalities. At the hospital the deceased body was received by Dr. Riwa who certified the death. Then the body was kept in the mortuary where first accused was working as mortuary attendant along with others. He was on duty on that day. On 20.4.2017, the police Dar es salaam special zone received information that the said deceased body was cut open on the stomach while in the hospital mortuary and substances removed therefrom. But on 14.3.2017 when the corpse was received at Mananyamala hospital and kept in the mortuary had no any wound. This led to the first accused and other mortuary attendants to be arrested and interrogated by the police in connection with that incident. The prosecution alleged that the first

accused admitted to have cut the deceased stomach and removed 32 pellets of narcotic drugs. And that the first accused named the second and third accused as co-perpetrators. On 16.8.2018 the corpse was sent to Muhimbili hospital where an autopsy was conducted by Dr. Mosha (PW3). During such postmortem examination, PW3 removed ten pellets from the stomach suspected to be narcotic drugs. PW3 also found one of those pellets had ruptured while inside the stomach which PW3 also found cut. PW3 prepared a report in which he opined that the cause of death was the ruptured pellet which was found inside the stomach. He did not see any other thing which would contribute to the deceased death. The ten pellets were sent to the Chief Government Chemist Laboratory Agency for analysis. After analysis which was done by PW1, the ten pellets were found to be heroin hydrochloride weighing 106.4 grams. The accused persons after being arrested were interrogated and admitted in their caution statements to involve themselves in trafficking such narcotic drug. On 05/6/2017, the accused persons appeared in the Resident magistrate Court at Kisumu for the first time for committal proceedings.

Each of the nine prosecution witnesses explained his role in this case which will be narrated in the course of this judgment. The accused persons on their part denied any involvement in the alleged committed offence. They denied

too to have confessed to do the act, and prayed to this Court to see them as innocent and thus acquit them.

It is a cardinal principle of law in criminal cases that the accused can only be convicted on the strength of the prosecution case. He cannot be convicted basing on the weakness of his defence. The burden of proof therefore lies on the prosecution to prove the case against the accused beyond reasonable doubt. The accused duty is just to raise reasonable doubt to the prosecution case. Given the evidence received, the question beg to be answered is whether the prosecution has discharged their duty legally.

As pointed out above, the accused are charged with trafficking in narcotic drug, that is heroin hydrochloride weighing 320 grams, this is according to the information laid against the accused. The prosecution evidence reveals that after one Idris Salifu, deceased has delayed to wake up and his failure to confirm whether he will continue to board in the room he rented at Red Carpet, the hotel administration (PW5) reported at the police, they responded and went there to find the room locked. After break open the door, Idris Salifu was found lying on the bed dead. The corpse was sent to Mwananyamala hospital by the police being led by PW8. After the death was certified by PW2, the corpse was kept in the mortuary while intact without any wound. But on 08/4/2017, on the date which for the first time

was not put clear, the corpse was cut in its stomach and narcotic drug pellets removed therefrom. The information leaked and reached the police. According to PW4, PW7 and PW9, the first person to discover the cutting on the corpse is Omary Abdallah Lukola@ Buyoya who was also the mortuary attendant at Mwananyamala hospital. The latter told them that when reporting at work on 08/4/2017 taking over from first accused discovered the wound and asked first accused who appeared to know the mission and told Buyoya to keep quiet and that they would talk, but he also promised to send to Buyoya Tshs. 300,000/= by mobile money. On 20/4/2017, PW4, PW7 and PW9 went to Mwananyamala hospital and saw the cut wound in the stomach of the corpse in question. That the cut wound was sewn and covered on the top with super glue. All mortuary attendants of Mwananyamala hospital were arrested by the police and sent to the central police station for interrogation. They were Buyoya, Ally Kidee, Kipenzile and Maulid except 1st accused who was on short leave.

PW7 stated that Buyoya told them that he know the incident which was done by his co-worker of the mortuary and mentioned Athuman Amir Mgonja who was not among the arrested mortuary attendants as at that time he was on short leave. PW7 said he recorded the statement of Buyoya who told him that he discovered the event on 08/4/2017 after report at work for night

shift taking over from Athumani Amir Mgonja. On 24/4/2017 Mgonja reported at work. He was arrested, PW7 said was assigned to arrest him. He said Mgonja was interrogated by the team formed by the regional commissioner, he confessed to have done the act on 08/4/2017 being assisted by Swed, a student and took 32 pellets from the deceased body. That he called his brother in law one Omary Wagile so that he could sell the drugs. PW7 said they traced and arrested him on the date he could not remember in May,2017.

In this case, there is no eye witness who witnessed while the corpse being cut open at Mwananyamala hospital mortuary. The prosecution evidence regarding the fact that the corpse was cut in the stomach and pellets of narcotic drug obtained therefrom is as the learned Principal State Attorney has said in his final written submission is circumstantial evidence. This is because there is no one who saw the act, but also the said narcotic drug pellets were not recovered. The prosecution is relying on two types of evidence to argue that the 32 pellets were heroin hydrochloride and were trafficked by the accused. These are accused persons caution statements, Exhibits P6, P7, P8, and the Chief Government Chemist Report, exhibit P3, in which Theodory Ludanha (PW1) analysed ten pellets which were sent to

him by D/Sgt. Malugala for analysis after being obtained from the deceased body during postmortem examination.

There is no dispute to the fact that the ten pellets of narcotic drug obtained from the deceased body was heroin hydrochloride. I have no reason therefore to spend much time discussing it. But the centre of controversy is whether first accused cut open the stomach of the deceased body and obtain therefrom pellets of narcotic drug and whether the second and third accused participated to sell those narcotic drug, and lastly is whether that drug has weight of 320 grams as alleged in the information. According to the evidence adduced, the prosecution has relied on the accused persons confessions which were obtained after their arrest. That their arrest was prompted by information availed to the police by one Omary Lukola @ Buyoya, who was among the mortuary attendants of Mwananyamala hospital. But the said caution statements were repudiated by the accused persons. They denied to have made such statements. They have said they were severely tortured and compelled to admit and tell where were the 32 narcotic drug pellets. That they were injured to the extent that some, 1st and 3rd accused suffered permanent disability and lastly on 5/6/2017 morning they were quickly told to sign the written statements

before they were sent to Kisumu RM's Court. This is what 1st and 2nd accused stated in their defence, likewise the 3rd accused.

But the defence alleged also that the statements were obtained in contravention of the law as were recorded beyond the period permitted after the accused arrest. The same arguments were raised during the trial when the defence raised objection to their admissibility. But this Court did not sustain the objection so that it can get opportunity to go through them when analyzing the whole evidence than not admitting them where the Court cannot get such opportunity to look at them. The Court thought that it would be dangerous and may result to miscarriage of justice unlike where they are admitted which may not necessarily be the basis for conviction if any. This Court is going to examine the impugned caution statements in its contents, whether recorded within the time provided and whether were voluntarily obtained. I will examine a statement after another. Starting with the statement of 1st accused, the recording officer, PW9 said he recorded the first accused statement on 24/4/2017, short period after arrest him. That is just one hour and ten minutes. In the statement (Exh.P7) it is indicated that interview started at 08.40 hrs. and completed at 09.58 hrs. But in its contents, the date of arrest is not indicated, it is left blank. The interview is

purported to be in a form of questions and answers. The question relating to date of 1st accused arrest is as quoted bellow:

“ Swali- umekamatwa lini Jibu – Nimekamatwa tarehe.....saa
06.45 baada ya kufika kazini katika chumba cha kuhifadhia
Maiti katika hospitali ya Mwananyamala”

The 1st accused in his defence said he was arrested on 21/4/2017 at 7.30 hrs. while at work at mwananyamala hospital and sent to the central police station where he stayed up to 24/4/2017, then he was sent to a certain room where he found about 11 people, Kingai (PW4) being among them who tortured him compelling him to disclose where were the 32 pellets of narcotic drug. Then D/Sgt. Mkombozi (PW9) took him to a certain room and asked him if he was willing to give statement. 1st accused refused demanding for his brother to be present. From the date he was arrested to 24/4/2017 he was just kept in the lock up. On 05/6/2017 they were sent to a certain room, their finger prints were taken and were forced to sign on a written paper without reading then were sent to Court. The 1st accused brother Dr. Rajab Amir Mgonja (DW7) gave evidence that after hear that his brother was arrested, he went at the central police station, he was told that he was not there. But shortly thereafter he saw him together with other three persons. He wanted to talk to them but he was prohibited and told to wait, but he

could not talk to him he just saw him boarding the motor vehicle and he was in good condition smiling to him. The other day he went at the central police station and managed to talk to him. He was in different condition as he was smelling urine, very dirt and his legs were swollen. 1st accused told DW7 in Pare language that he was severely beaten up, he was not walking properly. For the second accused, he was arrested on 22/5/2017 while in Court at Kisutu. He was sent at the central police station where D/Cpl. Dotto wanted to record his statement but 2nd accused refused and demanded his relative one Paul John to be present as a witness who would also look an advocate for him, so recording of statement was not done on that date. According to D/Cpl. Dotto, he recorded his statement on 24/5/2017 after the 2nd accused has volunteered after fail to get his relative and his advocate. But this was disputed by the 2nd accused that he did not consent for his statement to be recorded without his relative. Although he gave PW7 the mobile phone number of his relative, PW7 did not take trouble to trace him taking into account that 2nd accused was in police lock up all the time. That like the 1st accused he said he was forced to sign a written statement on 05/6/2017 morning before they were sent to court. As to whether 2nd accused consented for his statement to be recorded in the absence of his relative he first demanded to be present, PW7 said 2nd accused consented to give his

statement and signed on the said statement. I have gone through the statement and the so called consent. The same was recorded as follows:

*"MWENDELEZO WA MAELEZO YA ONYO BAADA YA MTUHUMIWA
KURIDHIA KUTOA MAELEZO YAKE PASIPO KUWEPO WAKILI WAKE
WALA NDUGU.*

SAINI YA MTUHUMIWA Sgd. Ally Mohamed

SAINI YA MWANDISHI Sgd. E. 4568 D/CPL. DOTTO".

It is not indicated anywhere that the 2nd accused himself stated that he was willing to give statement in the absence of his relative and his advocate. The 2nd accused has denied to have consented. It cannot be safely said that what PW7 recorded represent what 2nd accused had actually said, this is because there is no commitment made by the 2nd accused himself. Section 48(a)(vi)and(vii) of the Act place obligation to the recording officer to inform in writing the arrested person such extension and the reason for extension and the time interrogation commenced, interrupted, continued and completed. The question here is, was the 2nd accused informed the reason for such extension and the dates and time when the recording continued. According to the evidence of PW7, recording of 2nd accused could not proceed on 22/5/2017 because he wanted his relative to be present, the request which was granted. There is no express statement by the accused himself recorded in which accused has committed to proceed with interview

in the absence his relative or advocate thus vacating his first request. In absence of such proof, it cannot be safely taken that the caution statement was recorded within the 24 hours provided, and that there is no evidence of extension of time that was sought and granted. The accused persons maintained throughout the trial that they were tortured before their caution statements were recorded and that the same were recorded beyond the time provided. There is no convincing explanation offered on part of the prosecution to counter that evidence.

This apply also to the 3rd accused who said was arrested on 3/5/2017 during the night time at 11.00hrs. But the statement reads that it was at 02.00hrs. But Pw9 stated that the 3rd accused was arrested on 4/5/2017 at 8.00hrs. Although the accused said he was arrested on 3/5/2017 this is because he thought it was on 3/5/2017 because it was just still night but the date changed after 12.00hrs, so at 8.00hrs already the date has changed to 4/5/2017. When asked by Mr. Mluge during cross examination, PW9 said in the statement (Exh.P8) he recorded the date of 3/5/2017 because that is what the 3rd accused told him. PW9 had no reason to record date of 3/5/2017 while knowing it was 4/5/2017, even if 3rd accused would have erroneously stated so. PW9 was duty bound to enlight him on the date and record the proper date that would assist the Court in its decision. There is therefore

controversy as to when exactly statement of 3rd accused was recorded. If we go with the 3rd accused evidence and what it is recorded in the caution statement which I think is proper, the same was recorded 29 hours after his arrest which is beyond the 24 hrs. Permitted thus section 48 of the Drug Control and Enforcement Act, No 5/2017, was violated, this apply also to other accused persons. There is no any other evidence upon which this Court can rely apart from what each party has asserted. It is unfortunately that the prosecution did not tender important evidence such arrest warrant issued in arresting the accused persons or detention register after they were placed in the police lock up. The circumstances leading to the arrest of the accused persons were not abrupt or difficult for the arresting officers to prepare arrest warrants. 1st accused for example, before PW7 and PW9 went to arrest him he was already held by the hospital administration. This is what PW4, PW7 and PW9 stated in their evidence. Likewise for the second and third accused who, according to PW4, PW7 and PW9 were arrested after being mentioned by the 1st accused, and actually PW9 said the 1st accused led the police to the 2nd and third accused. He stated so in cross examination by Mr. Mluge advocate. It is therefore obvious that the arresting/investigating officers have ample time to prepare warrant of arrest before they arrest them. Also there is no excuse or explanation given for not tendering the detention

register in the situation when dates for the accused arrests were disputed. But accused persons maintained throughout the trial that they were tortured and were forced to sign already written statements a short time before they were sent to Court.

The position of law is that the confession which is tendered in Court cannot be rejected on the ground that there was threat or promise held out unless to the opinion of the Court, such threat or inducement is likely to cause an untrue admission of guilty. This is provided for under section 29 of the Evidence Act, Cap. 6 RE 2002. But which weight is to be attached to the repudiated confession. The Court of Appeal of East African in the case of **Tuwamoi V. Uganda (1967) EA 84**, held:

"a trial Court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated And must be fully satisfied that in all the circumstances of the Case that the confession is true".

*This decision was followed in the decision of the Court of Appeal of Tanzania in the case of **Ndalahwa Shilanga and Another V. Republic**, criminal Appeal No 247 of 2008, at Mwanza where at page 13 the Court has this to say:*

" We think that the law relating to confessions is now fairly settled after the decision of the Court of Appeal for East African, in TUWAMOI V.

*UGANDA (1967) E.A. 84, henceforth religiously followed by all Courts in this Country. In HATIBU TENGU V. R., Criminal Appeal No 62 of 1993 (unreported), this Court extracted two tests from TUWAMOI's case, which any confession must pass, if is to be acted upon by a Court. The first test is whether the confession was made voluntarily and properly, that is legally by (if necessary) by the process of a trial within a trial or inquiry (in trials without assessors). This determines the **admissibility** of the confession. The second stage is the evaluation of the confession to determine, whether it is true, including the need of and whether or not there is corroboration. This stage determines the **weight/value** of the confession. If the Court finds that there is no corroboration, it can still convict if the Court finds that the confession contains nothing but the truth, and after warning itself of the danger of convicting without corroboration. But in determining whether or not the confession contains the truth, all the circumstances of a particular case must be taken into account, including whether the confession is retracted or repudiated by an accused person'.*

In this case the accused persons have repudiated their statements. Unfortunately there is no any other independent evidence led by the

prosecution corroborating what is said to have been stated by the accused persons in their caution statements.

Mr. Vitalis, learned Principal State Attorney in his final written submission pointed out that exhibits P2 and P3 which are the ten pellets of heroin hydrochloride and analyst report corroborate the accused persons confessions. But it should be remembered that the accused persons are not disputing the fact that what was found in the ten pellets recovered from the deceased body during postmortem examination was heroin hydrochloride. What they dispute is for them to be found or traffic 32 pellets. I would expect that the person like Omary Abdallah Lukola@ Buyoya who was mentioned by the prosecution as the source of the information and who revealed the incident would be brought by the prosecution to tell the Court what he had actually witnessed and what he told them. Buyoya is among the persons listed in the list of prosecution witnesses. But he was not fielded and no reason was given for him to be left out. The defence side in their final written submission asked this Court to draw adverse inference against the prosecution for their deliberate failure to bring in Court such an important witness to them. In actual fact, it is astonishing, and does not sound well as to why such an important witness was not brought. I understand, the prosecution are at liberty to bring witnesses of their own choice (see

Tumaini Mtayomba V. R., Criminal Appeal No217/2012, CAT at Mwanza).

But as the majority number of prosecution witnesses, PW4, PW6, PW7, PW8 and PW9 all have mentioned him to be the source of all information as to what happened to the deceased body and who did the act; this was the key and material witness who was very important to them and to the Court. But failure by the prosecution to bring in the Court such an important witness and instead rely on the accused persons caution statement which was repudiated, the Court has to draw adverse inference against the prosecution for not bringing Buyoya in Court as a witness deliberately or for reasons only known to them. Perhaps they feared that he would disclose information which is not in their favour. But without the evidence of the said Omary Abdallah Lukola @ Buyoya, who was also a suspect in this case, but who was later converted to a prosecution witness, there is no independent evidence corroborating the alleged confessional statements by the accused persons. This is because what other police officers prosecution witnesses told this Court is hearsay. Therefore, I hereby draw adverse inference against the prosecution for their failure to bring in Court Omary Abdallah Lukola @Buyoya as a witness. There is another complaint by the defence that both PW7 and PW9 who recorded the accused statements were also members to the special team formed by the regional commissioner of Dar

es salaam which also interviewed the accused after being arrested. And according to Pw4, the accused appeared before that team before they were interviewed by both PW7 and PW9. The recording officers therefore had information of the accused before even they have appeared before them for recording caution statements. Both PW7 and PW9 were arresting officers who arrested the accused. They are also investigating the case and recorded the caution statements. Under such circumstances they cannot be impartial. (see **Shani Kapinga V. Republic**, Criminal Appeal No 337/2007, unreported). This argument was not controverted by the prosecution I therefore hesitate to take the accused confessional as representing the truth of facts stated therein, without corroboration from other independent witness or evidence. The situation also become worse considering the fact that the accused persons were held in police lock up for a very long time and without any good explanation before they were arraigned in the Court. The 1st accused was arrested on 21/4/2017, while 2nd and 3rd accused were arrested on 19/5/2017 and 03/5/2017 respectively but were kept in police lock up until 05/6/2017 when they were sent in Court more than a month for the 1st and 3rd accused, and 17 days for 2nd accused. This is in violation of section 48(2)(b)(vii) of the Act. The prosecution did not give any explanation for such a prolonged delay to charge them in Court.

The evidential value of the said confessional statements declined for various reasons; one for them to be recorded beyond the period of time permitted, and two lack of corroborative evidence that when the accused person giving such statements were free agents and thus voluntarily offered the statement. If the caution statements are expunged, or not accorded any weight, what else remains to support the prosecution case. I do not see any other evidence. There is another issue relating to the charge sheet/ information laid on the accused that the amount alleged to be trafficked by the accused persons is heroin hydrochloride weighing 320 grams. But the heroin hydrochloride recovered from the deceased body and sent to the Chief Government Chemist for analysis has weight of 106.4 grams. The underlining question is whether the charge is proper and whether the tendered evidence supports the charge. It is the argument by Mr. Vitalis learned Principal State Attorney that weight is not among the ingredients of the offence of drug trafficking. That weight is only relevant to bail. On their part, the learned counsel for defence argued that there is variance in the weight of narcotic drug alleged trafficked by the accused persons. While the charge alleges that the accused persons trafficked 320 grams of heroin hydrochloride, the evidence brought is that the heroin hydrochloride recovered is 106.4 grams. The defence argued that pursuant to section 29(2)

of the Act, where there is inconsistency in weight, type of chemical concerned or any other matter of similar nature, the weight, type of chemical or that other matter determined by the Government Chemist shall prevail. The Chief Government Chemist Report (Exh.P3) certified that the narcotic drug (subject of this case) is heroin hydrochloride weighing 106.4 grams. The same was found inside the deceased body during postmortem examination. The charge alleges the accused trafficked 320 grams of heroin hydrochloride. The prosecution evidence which lacks analyst proof is that they trafficked in 32 pellets of heroin hydrochloride weighing 320 grams. There is no any other evidence to prove that the accused person trafficked in 32 pellets weighing 320 grams apart from the impugned caution statements. There is also no scientific proof that the 32 pellets alleged to be trafficked by the accused was heroin hydrochloride weighing 320, and were removed from the deceased body. The variance of weight of the alleged heroin hydrochloride, said to have been trafficked by the accused and the weight which was established by the Chief Government Chemist is fatal as has affected the accused in preparing their defence. Apart from variance in the weight, there is also variance of the date when such narcotic drug was trafficked as pointed out by counsel for the accused persons. In the information it is alleged that the accused trafficked in heroin hydrochloride

between 18th and 23rd March, 2017. But the evidence adduced in support, alleges that the narcotic drug were removed from the deceased body on 08/4/2017. This can be gathered from the testimonies of D/Sgt. Mkombozi (PW9) who said recorded statement of Omary Abdallah Lukola @ Buyoya, and D/Cpl. Dotto (PW7). According to both PW7 and PW9, on 08/4/2017, Buyoya discovered that the deceased body was cut in the stomach after report at work taking over from the 1st accused. It means therefore that the cutting and removing the pellets would not have taken place before, as Buyoya told PW7 and PW9 that while a mortuary attendant reporting at work and taking over from another he has to count and inspect all dead bodies kept in the mortuary. That is why Buyoya discovered the cut stomach immediately after assume duty taking over from 1st accused and that is why he asked the latter as to what happened. The date when the incident occurred is undetermined. But in any way, it cannot be between 18th to 23rd March, 2017, it would be a bit later. This difference of date when the offence was committed is also fatal and affected the accused in their defence. The learned defence counsel pointed another contradiction on the date. PW4 SSP Kingai and his team interrogated the accused persons. He said it was on 20/5/2017. But PW7 state that he arrested the second accused on 22/5/2017 that is two days after they were interrogated in the team. In his evidence

PW4 stated that they interrogated the accused in the team at the time they were at the central police station. The question is how did they interrogate the accused before he was arrested. Another thing PW4 mentioned in his evidence is that only Buyoya and 1st accused had access to the mortuary. Others were just trainings.

In the case of **Kandola Paulo @Kadala V. The Republic**, Criminal Appeal No 61/2017 CAT at Dodoma, the Court of Appeal was faced with almost a similar situation in which the amount of the alleged stolen money indicated in the charge sheet and the amount mentioned by the witnesses was different, because of that difference the Court was of the opinion, that was not a minor discrepancy since the appellant could not be in a position to understand exactly which amount of money he has been alleged to have stolen to enable him prepare his defence. After deliberating at length, and making reference to its previous decisions, the Court held:

"there are a number of occasions where this Court has ruled out on situations where particulars of the offence differ from the evidence of the prosecution witnesses, particularly the complainants. In the case of **Sanke Donald@ Shapanga Versus Republic**, Criminal Appeal No 408/2013, for example, where the date when the offence was committed in the charge sheet was at variance with the date explained by the complainant in

evidence, the Court quoted with approval the case of **Ryoba Mariba@Mungare Versus Republic**, Criminal Appeal No 74 of 2003 (Unreported) in which it was stated:

*"....if there is variation in the dates, then the charge must be amended forthwith and the accused explained his right to require the witnesses who have already testified recalled. **If this is not done the preferred charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that a failure of justice will occur (Emphasis added)**".*

Likewise, the Court in the case of Noel Gurth aka Bainth and Another Versus Republic, Criminal Appeal No 339 of 2003(Unreported) the similar principle was extended to a situation where there was a variance of place where the offence was committed in the charge sheet and the evidence adduced in the trial court. The Court stated as follows:

"we can for purposes of our present appeal extend the same principle and hold that where there is variation in the places where the alleged armed robbery took place, then the charge must be amended forthwith. If no amendment is effected the charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that a failure of justice will occur."

In this case as we have endeavoured to discuss herein above, we are of the view that the variance in the amounts of money stolen in the charge

sheet and the evidence adduced is similarly serious. Therefore a similar principle can be extended even to the difference of the amount of money shown in the particulars of offence in the two counts in the charge sheet and the contradicting evidence on the amounts stolen from the complainant's prosecution witnesses that is PW1 and PW2 and Exh.P1. Under such a situation, an amendment of the charge was unavoidable to enable the appellant understand the nature of the offences charged and prepare his defence. Otherwise the variance between the charge sheet and the contradicting evidence from the prosecution witnesses sufficiently creates a doubt on the appellants' conviction. In that regard, we agree with Mr. Mbogo's stance".

The circumstances of the case at hand are not different to the case cited above. There is no amendment to the charge sheet was effected. The accused persons cannot be said to have understood the allegations levelled against them for them to be able to prepare defence sufficiently. The amount of heroin hydrochloride alleged to have been trafficked by the accused persons is 320 grams which was not even recovered. But the heroin hydrochloride which was recovered and sent to the Chief Government Chemist for analysis has weight of 106.4 grams. The same was not even found possessed by the accused persons, they were found in the stomach

of the deceased body. So there are doubts as to whether or not the present accused persons trafficked in those named 320 grams of heroin hydrochloride. The available doubts therefore benefit them.

After discussing the issues on the repudiated confessions, variance in the amount of heroin hydrochloride indicated in the information and exhibit P3, the date of commission of offence and the position of the relevant laws, the next and last question is whether the prosecution has discharged their duty of proving the charge against all accused persons. As I have narrated earlier above, after the deceased body was sent to Mwananyamala hospital, first it was to be certified if really Idris Salifu was dead. PW2 is the one who certified the death before the corpse is sent to the mortuary for storage. He issued a certificate (OPD card dated 14/3/2017 No 3156-01-15-77/2017, but which later was replaced by card No 51845 after the first card is said to be misplaced or get lost although there was no proof to that. It is not clear as to whom the corpse was entrusted. But under normal circumstances it was received by the mortuary attendant who was on duty. PW8 Inspector Patrick who sent the deceased body to Mwananyamala hospital did not tell the name of the mortuary attendant who was on duty on that date and who received the corpse in the mortuary, even PW2 Dr. Riwa who certified death did not tell.

In his evidence, PW2 stated that the corpse was received at the reception where he certified death then was sent to the mortuary that is why PW2 said there was no mortuary attendant while examining the corpse. There is no even a person from the hospital administration who gave evidence and named the mortuary attendant who was on duty on that day. It is only in the 1st accused caution statement where it is stated that 1st accused was on duty at Mwananyamala hospital as mortuary attendant on 13/3/2017 when the deceased body was sent there. There is no any person who was present and saw the 1st accused operating the dead body and removed 32 pellets. Even Buyoya, according to PW7 and PW9 he was not present, and did not witness while the corpse being operated to remove the pellets of narcotic drug. In actual fact, apart from the caution statements there is no any direct evidence connecting the accused persons with the charged offence.


It is trite that the accused who confesses to his guilty is the best witness, that was held by the Court of Appeal in the case of **Peter Sanga V. Republic**, Criminal Appeal No91/2008 (unreported). But where the confession is retracted or repudiated, then independent witness is required for corroboration. In the caution statements tendered in this case though retracted and repudiated there is no independent evidence tendered for corroboration. In the received caution statements several persons were

mentioned who could be good and independent witnesses to prove the charged offence. These include Buyoya and Swedi Ally Juma who was asked to buy thread and superglue, these could prove act done by 1st accused. But also Zuberi and Harid @ Mgosi would testify against 3rd accused as they were named in the caution statement that participated in the business. Those persons were not called by the prosecution. The only evidence is that of the caution statements which, as I pointed out above cannot be acted upon and form basis for conviction. It follows therefore that as there are doubts whether the accused committed the charged offence or not, and in the absence of corroborating evidence, the available doubts are to be resolved to the benefit of the accused. Thus the prosecution has failed to prove the charged offence to the required standard. The accused persons are hereby acquitted.

Ordered accordingly.



Right of appeal is explained.


F.N.MATOGOLO
JUDGE
11/9/2018


F.N.MATOGOLO
JUDGE
11/9/2018

ORDER

The heroin hydrochloride 106.4 grams exhibit P2 be destroyed in the appropriate manner.


F.N. MATOGOLO
JUDGE
11/9/2018

ACCUSED PERSON ADDRESSES

1st Accused Athumani Mgonja of Gongo la mboto ulongoni A. Ilala District.

2nd Accused Ally Mohamed Nyundo of Ilala District Songea Street House No. 5 Box 5413 Dar es Salaam.

3rd Accused Omary Masinga Wagile of ulongoni A, Gongo la Mboto Box 4335 Dar es Salaam.




F.N. MATOGOLO
JUDGE
11/9/2018

COURT

Judgement delivered today this 11th day of September, 2018 in the presence of the accused persons and in the presence of Mr. Constatine Kakula learned State Attorney and in the presence of Mr. Muge Karol Fabian and M/s. Abbriaty Sada Kivea learned defence counsel.




F.N. MATOGOLO
JUDGE
11/9/2018