

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 07 OF 2018

(Originating from Economic Case No.51 of 2017 of the Resident
Magistrates' Court of Dar es Salaam at KISUTU)

THE REPUBLIC PROSECUTOR

VERSUS

MUSTAPHA ALLY KHATIBU ACCUSED

JUDGMENT

Date of Last Order: 28/10/2019

Date of Judgment: 31/10/2019

MASHAKA, J.

The accused person one Mustapha Ally Khatib @**Mustafa Ally Khatibu** stands charged with one offence of trafficking in narcotic drug 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 Amendment) Act No. 3 of 2016.



The particulars of offence are that, on 30th August, 2017 at Togo Street within Kinondoni District in Dar es Salaam region, the accused trafficked in narcotic drug namely heroin hydrochloride weighing 211.36 grams.

Parties' representation before Hon. Matogolo J, Predecessor Judge (as he then was), was Ms. Diana Lukondo State Attorney; and later Ms. Neema Mwanda, Principal State Attorney, Ms. Lucy Diganyeck, Senior State Attorney, Mr. Yamiko Mlekano, Senior State Attorney and Ms. Edith Mauya, State Attorney represented the Republic. The accused enjoyed the services of Ms. Benedicta Beda, Advocate and later Mr. Josephat Mabula, Advocate. This case was earlier assigned to Hon. Matogolo, J who was transferred to High Court, Dar es Salaam Main Registry his new working station. Hence this case file was reassigned to me, to proceed with trial after conclusion of preliminary hearing. The court extend its appreciation to the prosecution team and Learned Counsel for the accused for the hard work, commitment in representing your clients and assisting the court during appearance, arguments and timely submissions.

On 4th June 2018 the accused person entered his respective plea before Hon. Matogolo, J. The accused person denied the charge and a plea of not guilty was entered. On the same day, the court conducted preliminary hearing and the facts of the case were read over to the accused person. The accused admitted only his name.

The prosecution paraded seven witnesses in their bid to prove their case. The witnesses were PW1 Elias Zakaria Mulima, PW2 Insp. Lubambe Kanyumbu, PW3 SP. Neema Andrew Mwakagenda, PW4 John Jacob Muhone, PW5 Yasin Rashid Yakunena, PW6 H8843 D/Constable Optatus and PW7



A/Inspector Wamba. A total of six (6) exhibits were tendered and admitted in court, the envelope Exhibit P1, the Government Analyst report (Form No. DCEA 009 Exhibit P2, the Sample submission Form No. DCEA 001 dated 04/09/2017 Exhibit P3, the certificate of seizure Form No. DCEA 003 Exhibit P4, the cash money TZS 37,000/= and four mobile phones admitted collectively as Exhibit P5 and the caution statement of the accused Exhibit P6.

Let me recite briefly the facts of this case. It is alleged that information was received from an informant that the accused was trafficking in narcotic drugs, this led to the officers of the Drug Control and Enforcement Authority (hereinafter referred to as DCEA) conduct a search in the house of the accused at Togo Street within Kinondoni District. The search was conducted around 02.40 hours at night in the presence of the accused who, was found in his rooms and a ten-cell leader who lives in the neighborhood.

During the search several items were found and seized to wit, a small nylon packet containing a powder like substance, two (2) small nylon packets containing a powder like substance, a nylon packet containing a powder like substance, four (4) mobile phones, accused's passport and Tanzanian shillings thirty-seven thousand (37,000/-). After the search, the items seized were listed in a certificate of seizure (Exhibit P4) by a DCEA officer and was signed by the accused, the Ten-cell leader and the said officer. The nylon packets containing powder like substance were suspected to contain narcotic drugs. The seized items and the accused person were taken to the DCEA office for further investigation and interrogation.



At the DCEA office, SP. Neema packed the nylon packets suspected to contain narcotic drug into envelopes sealed and signed by the accused, John Jacob Muhone an independent witness and SP. Neema. The sealed nylon

packets were taken to the Government Analyst for analysis. After the analysis one nylon packet was found to contain Heroin Hydrochloride weighing 210.59 grams, the other nylon packet contained Heroin Hydrochloride weighing 0.77 grams making the total of 211.36 grams of Heroin Hydrochloride. The other joined two remaining small nylon packets were found to contain no illicit drug. After analysis, the packets were repacked, sealed and signed by the Government Analyst, then handed back to the officer of the DCEA.

On the 04/09/2017, PW1 Elias Zakaria Mulima, a Government Analyst with the Government Chemist Laboratory Authority (GCLA) was on duty at his office in Dar es Salaam. He received an envelope admitted before the court as the Exhibit P1, which contained inside envelopes and nylon packets which had a powder substance. The envelopes were numbered no. 1, no.2 and no.3. PW6 handed over the envelope Exhibit P1 together with a form admitted in the court as Exhibit P3 to PW1. PW1 weighed the powder substance and conduct a preliminary test. He found powder substance in nylon packets packed in envelopes no.1 and no.3 weighing 211. 36 grams is a narcotic drug namely heroin hydrochloride. PW1 took samples to conduct a confirmatory test then returned the narcotic drug and powder substance into their respective nylon packets and envelopes, sealed, signed, placed an official stamp of GCLA and handed back to PW6, the said envelope Exhibit P1. After conducting the confirmatory test, PW1 prepared the Government Analyst Laboratory Report Form DCEA No. 009 dated 08/09/2017 admitted in court as Exhibit P2.



Learned Counsel for the accused raised an objection challenging the admission of Exhibit P1. His contention was that what is tendered is an envelope with no information of what is inside the envelope, that it is not

known. The court overruled the objection to be premature. Learned Counsel for the accused person raised an objection on admissibility of the Laboratory Report dated 08/09/2017, his contention was that on the 12/12/2017 the State Attorney Elias Atanas while prosecuting this matter before Hon. Thomas Simba, at the subordinate court informed the Court that the investigations were incomplete to enable committal proceedings to proceed. This court overruled the objection based on the committal proceedings conducted on the 30/05/2018, for the Government Analyst Laboratory report was among the listed documentary exhibits marked E1 to be relied upon by the prosecution during trial at this Court. This is in compliance with Rule 8(2) of the Economic and Organized (the Corruption and Economic Crimes Division) (Procedure) Rules 2016, GN No. 267 of 2016.

PW2 testified that having received the information about the involvement of the accused person in drug trafficking on the 29/08/2017, decided to effect an arrest and search of the accused person's residence. On the 30/08/2017 at around 2.30am or 2.45am PW2 accompanied with D/SSgt Titolaus Edward, D/Sgt Juma Selemani, Insp. Daniel Mtewele and D/Constable Optatus PW6 went to a house at Togo Street, Kinondoni, which Mustapha Ally Khatibu the accused resides. Upon arrival at the house they surrounded the house and knocked on the door of the said house. The door was opened by one of the tenants and PW2 went straight to the room in which the accused resides in. PW2 knocked and immediately after the accused open his door, PW2 placed him under arrest and the accused sat on the sofa. SSgt Titolaus and Sgt Juma Selemani remained with the accused guarding him, while PW2 went to get an independent witness the 'mjumbe' one Yasin Rashid Yakunena PW5. PW2 introduced himself to the 'mjumbe',



informed him the reason why they were at his place and requested him to witness the intended search at the accused person's residence.

A search was conducted by PW2, in the presence of PW5 the independent witness, accused person commenced in the sitting room and a nylon packet with a powder substance suspected to be narcotic drug was found after overturning the sofa the accused person sat on. The search continued and two nylon packets were found on the fridge suspected to contain a powder substance to be narcotic drug. Also, 3 mobile phones make TECNO and one NOKIA, total 4 phones were found at the sitting room. The search proceeded to the accused's bedroom and the following items were found; his passport, money in his trouser Tshs. 37,000/= and one small nylon packet under the bed suspected to contain narcotic drug. After the search, PW2 filled a certificate of seizure admitted in court as Exhibit P4, where he listed all the items recovered from the sitting room and bedroom. The certificate Exhibit P4 was signed by the accused person, PW5 Yasin Rashid Yakunena, D/SSgt Titolaus Edward and PW2. PW 2 identified Exhibit P1 as an envelope which contained inside the exhibits, he had seized from the search conducted in the rooms of the accused person.

In his reply to cross examination by Learned Counsel for the accused, PW2 stated that the house at Togo Street, one of the tenants opened the door. That after opening the door, he went straight to the room which the accused is a tenant, knocked on the door and once opened he placed the accused under arrest in his sitting room. That he went to get the independent witness PW5 while SSgt Titolaus and Sgt Juma Selemani remained guarding the accused. That it was around 2.40hrs at night.



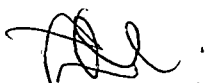
PW2 further stated that he found the packets, which were placed in envelope Exhibit P1 in the rooms of the accused person as witnessed by the independent witness PW5. That Exhibit P1 is a big brown envelope marked with case no. DCEA/IR/09/2017 and there is a signature of the accused person, signature of an independent witness John Jacob Muhone PW4, the name of SP. Neema PW3, a laboratory number 2411/2017 and an official stamp of the GCLA. PW2 testified that inside the big brown envelope there were 3 small envelopes and each envelope contained a nylon packet with powder substance inside. That in envelope marked no. 1 contained a nylon packet of powder substance marked DCEA/IR/09/2017 which he found under the sofa in the accused's sitting room, the envelope marked no. 2 contained the two small nylon transparent packets joined together marked DCEA/IR/09/2017, which contained a powder substance was found on top of the fridge. That the envelope no. 3 contained a small nylon packet with powder substance marked DCEA/IR/09/2017, this was found under the bed of the accused in his bed room.



The Exhibit keeper of the DCEA PW3 SP. Neema Andrew Mwakagenda has the sole responsibility to receive all exhibits which are suspected to be narcotic drugs from officers who were involved in the arrest, to register the exhibits in an exhibit register, to pack and seal the exhibits so they can be sent to the Government Chemist and to keep the exhibits in safe custody. On the 30/08/2017 PW3 received the following exhibits from Insp. Kanyumbu PW2, one nylon packet which was suspected to contain a narcotic drug and two (2) nylon packets which were joined together suspected to contain narcotic drug. PW3 also received another small packet which was suspected to contain a narcotic drug. In total PW3 received three packets; one of them is the 2 in 1 packet. After receiving the packets, she registered

them in the exhibit register case no. DCEA/IR/09/2017 and marked them in numbers. The 1st packet which is nylon and transparent marked no. 1, the joined 2 small nylon and transparent packets marked no. 2 and the last nylon packet marked no. 3. Each of the 3 marked packets were each kept in an envelope and numbered as in respective packets and the case number recorded on the top of the envelopes. PW3 placed the nylon packets each into an A4 envelope and seal the same. This exercise was done in the presence of an independent witness Jacob Muhone PW4, the accused person, D/C Optatus Kimunye PW6 and A/Insp. Mteweale. PW3 kept the packed and sealed exhibits under safe custody in the Exhibit room. Apart from sealed exhibits, PW3 received 4 mobile phones, a Tanzanian passport with the names of Mustafa Ally Khatibu and cash Tanzania money 37,000/=.

PW3 stated that on the 04/09/2017 during morning hours, she handed over the sealed envelope which contained inside the 3 envelopes marked numbers 1, 2 and 3 with case no. DCEA/IR/09/2017 to D/C Optatus Kimunye PW6 to take it to the Government Analyst for scientific analysis. D/C Optatus Kimunye PW6 returned the sealed envelope exhibit to PW3, which was sealed with a cello tape marked GCLA, on top of the envelope was written LAB No.2411/2017, an official stamp of the GCLA and there was a signature placed on said envelope exhibit. PW3 was informed by D/C Optatus Kimunye PW6 that the signature was of the Government Analyst who conducted the tests. She registered the envelope received from D/C Optatus Kimunye in the Exhibit register and kept in safe custody in the Exhibit room. PW3 kept the envelope under custody, until on the 26/09/2018 she handed over by dispatch 4 mobile phones, Tanzania passport with the names Mustafa Ally Khatibu, cash Tanzania money 37,000/= and the sealed envelope to the State Attorney Lucy for tendering in court as exhibit. That in the afternoon



of 26/09/2018, she was called in Court to keep under safe custody the envelope Exhibit P1, which had been opened. The envelope Exhibit P1 was handed over to PW3 by the Court Clerk of this court by a court dispatch and signed it.

When cross examined by Learned Counsel for the accused, PW3 stated that the exhibits in envelopes marked no. 1 and no. 3 in Exhibit P1 were found to contain heroin hydrochloride a narcotic drug, while exhibit in envelope marked no. 2 was not a narcotic drug.

John Jacob Muhone PW4, testified that on the 30/08/2017 around 3.00pm he was called by one DCEA officer Optatus. When he entered the office, he found two other people, one a woman and she introduced herself as Neema and the man introduced himself as Mustafa, together with Mr. Optatus. PW4 corroborates the testimony of PW3 on the exercise of packing the exhibits done by SP. Neema PW3. That the packing was done by labeling on some paper, the packing and sealing of the exhibits. PW4 saw through the transparent nylon plastic packets contained a powder substance, white in color. That there were 3 exhibits which were packed and placed each in an envelope, hence 3 envelopes. That PW3 Neema took the 3 envelopes and placed inside one envelope. That he and Mustafa the accused signed on the envelope.



While under cross examination PW4 explained that he is an employee of UCHE ENTERPRISES and his work station is at the DCEA Office Upanga. That he is not a member or co-worker of the DCEA office. PW4 identified the envelopes marked no. 1, 2 and 3, he witnessed during the packing exercise of the exhibits by PW3. PW4 also identified the accused in the dock.

The independent witness Yasin Rashid Yakunena PW5 witnessed the search conducted by PW2 and another officer in the accused person's rooms in the presence of the accused person. That in the sitting room under the sofa a plastic nylon packet, which PW5 identified as the packet marked no. 1 contain a powder substance color either cream or off white. Also, two nylon packets with powder substance inside color white or off-white was found on the fridge and identified by PW5 as the nylon packet marked no.2 with case no. DCEA/IR/09/2017 and small nylon packet with powder substance marked no.3 was found in the accused's bedroom. Other items found were 4 phones, accused's passport and money Tshs. 37,000/= which were collectively admitted as Exhibit P5. PW5 corroborated the testimony of PW2 that PW2 seized and listed all the items found in the certificate of seizure Exhibit P4. PW5 confirmed to have placed his name and signature on the said certificate of seizure and also recorded his statement, PW5 identified Exhibit P4 as the same document he signed after the search.

PW5 identified Exhibit P4 from the words he wrote and signed in own handwriting. He also identified the 3 mobile phones and one smartphone and the Tshs. 37,000/= in note currency of 5,000/= and 2,000/= Tanzanian shillings. He identified the accused person in the dock as the person who was searched by PW2.



During cross examination, PW5 stated that when he reached the accused's place, found the accused seated in his sitting room alone. That several police officers were at the accused's place of residence, some wore plain clothes and others were armed. That a total of 4 officers entered the house where the accused lived. That a total of 3 packets were found in the

sitting room and bedroom of Mr. Mustapha the accused. One of the packets were two small packets joined together hence termed as one packet, because they had not been separated.

In his testimony, H8843 D/Constable Optatus Kimunye PW6, stated that on Wednesday 30/08/2017 around 10.00 am morning hours, he was instructed by his supervisor SSP. Shelimo to join SP. Neema the Exhibit Keeper to pack, label exhibits and take the exhibits to the GCLA. PW6 went to the Exhibit room and found SP. Neema PW3, the accused person Mustapha and Insp. Mteuele an officer of the DCEA. That SP. Neema instructed him to get an independent witness to witness the packing of the exhibits which were seized from the accused person. PW6 got one JOHN MUHONE PW4 and they were a total of 5 people.

PW6 corroborated the testimony of the Exhibit Keeper PW3 and PW4 that PW3 did the packing and labelling in the presence of the accused. SP. Neema PW3 packed 4 four nylon packets containing powder substance. That he could see the powder substance inside because the nylon packets were transparent and were labeled no. 1, the joined two packets no.2 and no. 3. That SP. Neema PW3 placed the exhibits into three envelopes, sealed the envelopes with a cello tape and on top of each envelope the accused person, SP. Neema and the independent witness PW4 signed on top of each envelope. PW3 then placed all the 3 envelopes in one big envelope and the accused person, SP. Neema PW3 and the independent witness Muhone PW4 signed on top of the big envelope.

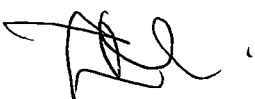


Evidence substantiates the reason why PW6 took the exhibits to the GCLA on the 04/09/2017, that the 01/09/2017 was Eid El Haji a public

holiday, not a working day. The 02/09/2017 was a Saturday and 03/09/2017 was a Sunday, hence not working days. That on the 04/09/2017, SP. Neema PW3 handed over the exhibits to PW6 who took them to the GCLA for tests. PW6 corroborated the testimony of PW1 on the two tests conducted and PW6 signed the sample form. PW6 identified the Government Analyst report Exhibit P2 and the Sample submission form Exhibit P3.

While under cross examination, PW6 identified the signature and name of the accused person, name and signature of the independent witness PW4 and name and signature of SP. Neema on the big envelope. PW6 identified PW1 Mulima's signature, date and official stamp of the GCLA and the cello tape seal on the big envelope. He stated that the accused person, independent witness PW4 and SP. Neema PW3 did not sign on the envelopes marked no. 1, no. 2 and no. 3. That they only signed on the big envelope Exhibit P1. That the handing over of the exhibits back to PW3, they both signed the Exhibit register.

A/Inspector Wamba PW7 recorded caution statement of the suspect/accused Mustapha Ally Khatibu on the 30/08/2017 at the DCEA office around 4.00am early morning hours. During the interrogation, the accused person gave history of his level of education. Further the accused contended that, he was induced into trafficking and use of narcotic drugs. That he bought 33 grams of narcotic drugs from a person known as Hamza Mfundo, sold the drugs and had one gram remaining when he was arrested. According to the statement of the suspect/accused, is that among the packets seized from his rooms, only one packet contains a narcotic drug and the other packets were not narcotic drugs. The accused corroborated that the search was conducted in the presence of 'mjumbe' one Yasin Abdallah



PW5, that the certificate of seizure was filled and he signed the certificate together with the 'mjumbe' and the DCEA investigative officers.

Further PW7 stated he commenced to record the statement of the accused at 5.00am until 7.15am. That at 4.30pm, the suspect was brought to him again to record an additional statement. The said caution and additional statement by accused person was admitted as Exhibit P6.

During cross examination PW7 stated that he has powers to record caution statement of a suspect under section 32 and 48 of the Drug Control and Enforcement Act No.5 of 2015. That under Section 48(2) of the Act provides mandate to record a caution statement of a suspect and section 32 provides powers to any officer of the DCEA to arrest, search and interrogate suspects involved in trafficking narcotic drugs and all the powers under the Criminal Procedure Act, an officer of the DCEA is also vested with the powers. PW7 testified that he was not present during the arrest of the suspect. That as an officer of the Authority has powers to search arrest and to interrogate a suspect. That provisions of Section 32 complements Section 48 of the Act No.5 of 2015. Further PW7 contended that he is required to record the statement of a suspect within 24 hours. That as a matter of practice after the arrest of a suspect they do not waste time to record the statement of such a suspect, because he can be induced to give a false statement, and that when a statement is recorded immediately after being arrested is true and correct.



Subsequently the prosecution closed its case. The evidence adduced before the court established a prima facie case against the accused person and this requires the accused to submit his defence case. The court finds

the accused person has a case to answer, has a right to defend himself and call up witnesses if any.

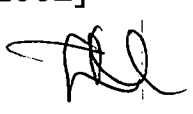
On the part of the defence case only one witness testified, the accused person. DW1 Mustapha Ally Khatibu testified that on 30/08/2017 at 2.00 am at night he was sleeping at his residence. That someone knocked on his door, he opened the door and a group of people more than 10 civilian dressed entered his room. That he was ordered to sit down and keep quiet, because they were waiting for another person to arrive at his place. That the Ten cell leader (mjumbe) PW5 and 3 other people, one of them was dressed as a police officer arrived. They entered his room accused and the Ten-cell leader asked them their purpose of being there. They informed the Ten-cell leader that they want to conduct a search. That PW5 asked them why they acted against the law, because they were required to get the Ten cell leader first before entering his house, that PW5 was supposed to be present when they knocked on the accused's door.

DW1 corroborated the testimonies of PW2 and PW6 on how the search was conducted and the nylon packets found in his sitting room and bedroom.

When cross examined, DW1 stated that he was given a paper to sign after the search at his place of residence, but not willingly. That he was forced and he did not remember the officer who forced me to sign the document. DW 1 identified Exhibit P4 by his signature. DW1 also identified his signature on the caution statement Exhibit P6 at page 3 of the said statement. However, DW1 denied to have written and read the caution statement.

Having thoroughly gone through the evidence both oral and documentary adduced by both parties, I find it pertinent to draw up the issues for determination in this case. **First issue** is whether the search was properly conducted in the presence of an independent witness and the accused person. **Secondly**, whether the envelope Exhibit P1 was retrieved from the accused's rooms and forms part of items listed in the certificate of seizure. **Thirdly**, whether the powder substance in the packets marked No.1, No.2 and No. 3 were proved to be a narcotic drug and admitted in evidence. **Fourthly**, whether or not the chain of custody was broken. **Lastly**, whether the defence case raised any reasonable doubt against the prosecution case.

The **first issue** is whether or not the search was properly conducted in the presence of the independent witness and the accused person. It is clear from the testimonies of PW2, PW5 and DW1 accused person that PW2 conducted the search in the accused person's sitting and bed rooms in his presence, where PW5 'mjumbe' the independent witness witnessed the search. Section 38 (3) of the Criminal Procedure Act, [CAP 20 R.E.2002] provides that;



"(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."

This provision is in pari materia to section 48 (1) and (2) (c) (v) and (viii) of the Drugs Control and Enforcement Act, No. 5 of 2015 which is relevant to this case. In this case the owner or occupier of the premises searched is DW1 the accused person. PW2 recorded and issued a certificate


of seizure which the accused signed to acknowledge the search and seizure of the items from his sitting and bed rooms listed in the certificate Exhibit P4. PW5 the independent witness signed the said certificate of seizure. The requirement of the law provides that the signature of an independent witness signifies that he was present to witness together with the accused person and PW2 the officer who conducted the said search in the accused person's rooms. The Court of Appeal in the case of **DAVID ATHANAS@ MAKASI JOSEPH MASIMA@ SHANDO Vs THE REPUBLIC**, Criminal Appeal No. 168 of 2017 (unreported), stated that;

"In determining the matter, we will first determine the issue of search and chain of custody. It is in evidence that the search was conducted at Chinangali, Dodoma and the certificate of seizure (Exh P3) was filled at Manyoni. With due respect, as per section 38 (3) of the Criminal Procedure Act, CAP 20 R.E 2002, the certificate of seizure ought to have been signed at the place where the search was conducted and in the presence of an independent witness. Since the certificate of seizure was not signed at Chinangali, the place where the search was conducted and considering that there was no independent witness present as required by law, the said certificate cannot be accorded weight."



Subscribing to the position held by the Court of Appeal of Tanzania in the cited case of **DAVID ATHANAS@ MAKASI JOSEPH MASIMA@ SHANDO Vs THE REPUBLIC** (Supra), I find the search was properly conducted. The search was conducted by PW2 in the sitting and bed rooms in a house situated at Togo street, in the presence of the accused person the occupier and PW5 the independent witness where items were seized, listed in certificate of seizure Exhibit P4 and both signed the said certificate of seizure to acknowledge their presence, seizure of the listed items from the two rooms of the accused in the house along Togo street.

Moving to the **second issue** as to whether the envelope Exhibit P1 was retrieved from the accused's rooms and forms part of items seized and listed in the certificate of seizure. PW2 conducted the search in the presence of PW5, DW1 and other officers who accompanied PW2 in the two rooms of DW1. After completion of search, PW2 seized several items and recorded in the certificate of seizure Exhibit P4. It is not in dispute that PW5 and DW1 witnessed the seized items were recorded. Among the items listed, there was no big brown envelope Exhibit P1 said to contain the envelopes marked no. 1, no. 2 and no. 3, which contained the nylon packets containing a powder substance. The items seized are as listed in Exhibit P4 and the nylon packets were listed in serial numbers 5, 6 and 7 stated as 'paketi ya nailoni' in Exhibit P4 certificate of seizure. Hence the big brown envelope Exhibit P1 was not seized and listed in Exhibit P4 because it was not retrieved from the accused's sitting and bed rooms.



Thirdly, whether the powder substance in the packets marked no. 1, no. 2 and no. 3 was proved to be a narcotic drug and admitted in evidence.

It is established by the testimonies of PW2, PW4, PW6 and DW1 that the nylon packets seized at the accused's sitting and bed rooms were handed over to PW3 who packed, labeled and sealed the packets then placed in envelopes marked no. 1, no. 2 and no. 3. These nylon packets were packed into three envelopes, sealed and each marked number no. 1, no. 2 and no. 3 on top as marked on the nylon packets then both three envelopes were placed into one big envelope Exhibit P1. On each of the three envelopes was also marked by the case number DCEA/IR/09/2017. It is stated that PW3, PW4 and DW1 signed on each of the three envelopes and also on top of the big envelope Exhibit P1.

The nylon packets placed into three envelopes and placed into a big envelope Exhibit P1 was taken by PW6 to the GCLA for testing. PW6 handed over the big envelope Exhibit P1 to PW1 through Exhibit P3 Sample Submission Form. PW1 received the big envelope Exhibit P1, opened the envelopes and the nylon packets to weigh the powder contained inside and conducted two tests. The tests proved that the suspected powder substance contained in nylon packets placed in envelopes marked no. 1 and no. 3 is a narcotic drug namely heroin hydrochloride. PW1 prepared and tendered in court the Government Analyst Report Exhibit P2 proof of narcotic drug heroin hydrochloride weighing 210.59 grams contained in the nylon packet marked no. 1 and 0.77grams found in nylon packet marked no. 3. The accused was found with 211.36 grams of heroin hydrochloride. The big envelope Exhibit P1 was admitted in evidence but the nylon packets marked no. 1 and no. 3 found to contain heroin hydrochloride together with the heroin hydrochloride was not tendered and admitted in evidence. The Government Analyst Report Exhibit P2, the Sample Submission Form Exhibit P3 and the testimonies of PW1, PW3, PW4, PW6 and DW1 corroborate that Exhibit P1 is a big envelope which contained three envelopes marked no. 1, no. 2 and no. 3, in which the nylon packets containing heroin hydrochloride were placed in the envelopes and sealed by PW3 and PW1.



The Defence contended that, PW2 entered the house of DW1 the accused person before calling the Ten cell leader PW5 hence doubts created on the part of prosecution on proof whether the nylon packets containing powder substance belong to the accused person or was planted in the accused's rooms. That if the conduct of PW2 and his colleagues were in good faith they should have called first the Ten cell leader before doing anything. That PW5 testimony indicates that it was not the rules of practice on what

was done. Learned Counsel maintains that the situation must have been motivated by ill will against the accused person.

The prosecution adduced evidence that a packet was found under the sofa where the accused person was seated after being placed under arrest. It is important to take note that the accused was seated on the sofa and the sofa was overturned after DW1 stood up to enable the officer to search under it. It is not fatal for the arresting officer to arrest a person or go to a scene of crime without an independent witness. However, if a search is conducted without an independent witness, it becomes fatal. No search can be conducted without the presence of an independent witness and has to testify in court on the search and seizure.

The nylon packets were seized from the accused's sitting and bed rooms, were listed in Exhibit P4 and marked no.1, no.2 and no.3. The heroin hydrochloride contained in nylon packets marked no. 1 and no. 3 was not tendered and admitted in evidence. Even the envelopes marked no. 1 and no. 3 which contained the nylon packets were not admitted in evidence. The big envelope Exhibit P1 the packaging material was the exhibit admitted in evidence.

The **fourth issue** is whether or not the chain of custody was broken. In this case it evidenced that there are nylon packets marked no. 1, no. 2 and no. 3 seized by PW2 at the scene of crime on 30th August 2017, and handed over to PW3 to pack, label, seal and keep in custody on the same day. That on the same day the packets containing suspected powder substance alleged to be a narcotic drug were packed into envelopes and sealed by PW3 in the presence of DW1 the accused person and PW 4 an independent witness. The said envelope Exhibit P1 was kept in the custody of PW3 the only person who had access to the exhibits. That Exhibit P1

remained in the custody of PW3 until the 04/09/2017 after a weekend, which was followed by a public holiday. Then PW3 handed over the envelope Exhibit P1 to PW6. PW6 handed over the Exhibit P1 to PW1 to conduct tests and returned the same envelope sealed back to PW6. The chain of handling Exhibit P1 shows that on the same day PW6 returned the Exhibit P1 to PW3.

Learned Counsel for accused person asserted that the chain of custody was broken and argued that the absence of SSP Salmini to testify in court, who according to testimony of PW2 ordered PW2 to remain with allegedly narcotic drug for some hours till 9.00am when PW2 handed to PW3, that this discrepancy shows the chain of custody was no longer intact, that it was broken. In support of his argument Learned Counsel cited the case of **Paulo Maduka and 4 Others Vs. Republic**, Criminal Appeal No. 110 of 2007, Court of Appeal of Tanzania at Dodoma (unreported), where it held that *".....By "chain of custody" we have in mind the chronological documentation and/or paper trail showing seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic."*

On the part of the prosecution, the Principal State Attorney on the issue of chain of custody, referred the case of **Charo Said Kimilu and Mbwana Rua Kubo Vs The Republic**, Criminal Appeal No. 111 of 2015, CAT at Tanga (Unreported) where the Court of Appeal stated that the chain of custody of narcotic drugs may be proved by oral evidence and the Court of Appeal upheld the conviction. Further, Principal State Attorney cited the case of **Vuyo Jack Vs The DPP**, Criminal Appeal No. 334 of 2016, CAT at (Unreported) where the Court of Appeal held that:

"during trial all the officers who handled Exhibit P1 from arrest, storage, transmission to and from the Government Chemist, valuation and production were all paraded as prosecution witnesses... Besides,

Exhibit P1 was tendered in the evidence and identified by PW1 and PW5.... there was no fraudulent interference of the chain of custody.....the rationale behind of parading the witness who dealt with the Exhibit is to rule out the possibility of tampering with the exhibit."

Having gone through submissions by both parties, I find that in fact SSP Salmini did not deal with the exhibits from the time of seizure until tendered before the court as exhibit. SSP Salimini instructed PW2 the seizure officer to remain with the exhibits until sunrise and hand them over to PW3 the Exhibit Keeper. The Exhibit P4 shows that the alleged narcotic drug in nylon packets was seized by PW2, he documented as shown in the certificate of seizure Exhibit P4, then handed over to PW3 the Exhibit Keeper through Exhibit register at the office to pack, label, seal and keep the exhibits in custody. On the 04/09/2017, PW3 handed over the big envelope Exhibit P1 to PW6 to take to the GCLA for tests. By means of Exhibit P2, PW6 handed over the big envelope Exhibit P1 to PW1 for tests. After completion of the tests, PW1 handed over the big envelope Exhibit P1 back to PW6. On same day PW6 handed over the envelope to PW3 who later brought the Exhibit P1 to the court. All the prosecution witnesses PW1, PW2, PW3 and PW6 who handled the Exhibit P1 at one stage or the other testified in court.

In the light of the testimonies of the prosecution witnesses mentioned above, the court is sufficiently convinced to hold that, the account by the prosecution witnesses was plausible. *"The rationale is not farfetched, it includes, **one**, to ensure the integrity of the chain of custody to eliminate the possibility of the exhibit being tampered with. **Two**, to establish that, the alleged evidence is in fact related to the alleged crime in which it is being tendered, rather than for instance having been planted fraudulently to make someone guilty"*, this was elucidated by the Court of Appeal of Tanzania in the case of **Chukwudi Denis Okechukwu and 3 Others Vs The**

Republic, Criminal Appeal No. 507 of 2017, Court of Appeal of Tanzania at Dar es salaam (Unreported).

Therefore, the issue is whether or not, the chain of custody of the narcotic drugs in this case, was established to the requisite standard. In this case apart from the fact that the Exhibit register was not tendered as an exhibit and based on the holding in the case of **Charo Said Kimilu and Mbwana Rua Kubo Vs The Republic (Supra)**, that the chain of custody can be established by the oral evidence of the prosecution witnesses who dealt with the envelope Exhibit P1 and is enough to prove handling of the exhibit.

In the light of the above cases cited, I am satisfied that the chain of custody in this case was not broken.



The last issue is whether the defence case raised any reasonable doubt against the prosecution case. The Defence Counsel submitted that there is inconsistency on the number of officers who went to the accused's house where PW2 mentioned a fewer number of them while in the testimony of PW5 stated that they were many of them. There was no exact number mentioned by either of them. Defence Counsel further asserted a serious doubt on the time PW2 commenced and completed the search that as per testimony of PW2, it was from 2.30am to 2.40am and later changed that they left the house on 4.00am. While PW5 testified that at 2.30am he was sleeping and the search ended around 5.00am. Learned Counsel concluded that these are reasonable doubts on the integrity of PW2 testimony because the accused person stated the search commenced at 2.30 am until 5.00 am in the morning at the last 'adhana' call for prayers. The Defence specified that it is settled principle that whenever a witness is proved to have made a statement on oath like PW2 which is inconsistent with previous statement

made by him, the credibility of that witness is completely destroyed unless he can give an acceptable explanation for the inconsistency, this was held in the case of **Kibwana Salehe Vs R. (1968) HCD 151**. Therefore, PW2 was required to give an acceptable explanation for the inconsistency at all material times.

Further Defence Counsel argued strongly that, the accused person did not record the caution statement at 10.00am at the DCEA office. That PW7 gave DW1 documents to sign for bail purposes as his relatives came to bail him out. In addition to that it has been stated at the material time stated by PW7 he commenced to interview the accused it is clear in the record of the court through PW5 that at 4.30am to 5.00am accused had not yet arrived at the DCEA office.



It is the observation of the court that there is no statement in the testimony of PW2 that the search commenced at 2.30am to 2.40am. According to the testimonies of PW2 and PW5 on the precise time when the search ended varies as PW2 stated that the search was completed at 4.30am, while PW5 stated that it was completed around 5.00am and the testimony of PW7 on when he commenced to record the caution statement of the accused person. PW7 stated he commenced the interview at 5.00am after being handed the accused person at 4.30am. Inconsistencies on accuracy of time on when the search ended does not go to the root of this case since it is not in dispute that the testimonies PW2, PW5 and the accused himself stated that the search commenced around 2.00am and 2.30am, on this fact, the issue of time as to when search ended is not material. In the case of **Chukwudi and 3 Others Vs. Republic (Supra)**, the Court of Appeal stated that;

"While we are in agreement with the contention by the learned counsel for the first and fourth appellants, as well as the third appellant that, there were some contradictions in the testimonies of PW3 and PW6, as regards the proper ten cell leader of the area where the drugs were recovered, as well as the testimonies of PW2 and PW8, in respect of the police station, where the appellants and the seized narcotic drugs were taken from the scene of crime, in our view the discrepancies were inconsequential, as they did not go to the root of the case. The actual point which was made by the testimonies of the witnesses on that aspect, was to the fact that, the substance believed to be narcotic drugs was recovered in the house where the first appellant and his co-appellants were found on the material night, and that after being seized, they were sent to the police station together with the appellants."

Basing on the above cited case, I am of the holding that the discrepancy is minor for it does not go to the root of the case. The testimonies of the prosecution witnesses testified that a search was conducted and the narcotic drug was seized from the sitting and bed rooms of the accused. The seized items nylon packets containing narcotic drug were taken to the DCEA office and later taken to the GCLA for tests. The nylon packets were marked no.1, no. 2 and no. 3. Furthermore, the testimony of PW1 who weighed and conducted the preliminary and confirmatory tests proved that the alleged powder substance found in the nylon packets retrieved from the accused's rooms is a narcotic drug namely heroin hydrochloride weighing 211.36 grams found in the nylon packets marked no. 1 and no. 3, which were packed into three envelopes and placed in one big envelope Exhibit P1.



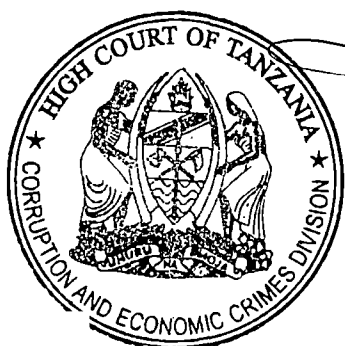
The big envelope Exhibit P1 in which three envelopes labeled no.1, no.2 and no. 3 were packed by PW3 the Exhibit Keeper. These three envelopes contained the nylon transparent packets containing the said narcotic drug in envelopes no. 1 and no. 3, while nylon transparent packet in envelope no.2 was found not to contain a narcotic drug. The question that comes to haunt this case is why the nylon packets seized from the accused containing a narcotic drug not tendered in court as proof that the accused was trafficking heroin hydrochloride. It is a fact that the big envelope Exhibit P1 was not seized from the accused's rooms, it was not listed in the certificate of seizure as one of the items seized from the accused's rooms. Even the envelopes marked no.1, no.2 and no.3 were not seized from the accused's rooms or listed in the certificate of seizure. The envelopes were used by PW3 the exhibit keeper to pack in the nylon transparent packets containing the narcotic drug heroin hydrochloride seized from the accused's rooms, which were listed in the certificate of seizure Exhibit P4.



It is the submission of both the prosecution and the Defence for the court to observe the principle that it is upon the prosecution to prove their case beyond reasonable doubt. As explained under the provision of section 110 of the Evidence Act [CAP 6 R.E. 2002] that '*whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*'. In this case, the burden of proof lies on the prosecution. The legal burden of proving any fact essential to the prosecution case rests on the prosecution. It was upon the prosecution to tender each envelope and after admittance by the court proceed to open the said envelope and pray to tender the next envelope inside and then tender the nylon transparent packet containing the narcotic drug heroin hydrochloride. Failure on the part of the prosecution to tender

into evidence the narcotic drug heroin hydrochloride leaves a shadow of doubt in this case; there is no narcotic drug said to be trafficked by the accused. The prosecution did not sufficiently discharge its duty to tender the narcotic drug heroin hydrochloride, which I hold in favor of the accused person.

The court finds the prosecution did not prove the charge of trafficking heroin hydrochloride weighing 211.36 grams contrary to section 15(1)(b) of the Drug Control and Enforcement Act No. 5 of 2015 as 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 Amendment Act No. 3 of 2016 against MUSTAPHA ALLY KHATIBU and I hereby acquit the accused. Unless held in custody for any other legal reason, the accused MUSTAPHA ALLY KHATIBU is a free man.




L.L. Mashaka

Judge

31/10/2019