

IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION

AT MOSHI

ECONOMIC CASE NO. 3 OF 2020

REPUBLIC

VERSUS

1. ANITHA D/O OSWARD ICHWEKELEZA

2. FRANK S/O SIFAEEL MOSHI @ GAUCHO

JUDGMENT

Anitha d/o Oswald Ichwekeleza (first accused) and Frank s/o Sifael Moshi @ Gaucho (second accused) are arraigned for trafficking in narcotic drug contrary to section 15(1)(a) of the Drugs Control and Enforcement Act, No. 5 of 2015 as amended by section 8 of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017 read together with paragraph 23 of the First Schedule to, and sections 57(1) and 60(2) 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. In the particulars of offence, Anitha d/o Oswald Ichwekeleza and Frank s/o Sifael Moshi @ Gaucho are accused that on 19.12.2017 at Majengo area within Moshi district in Kilimanjaro region, jointly and together trafficked in narcotic

drugs of catha edulis commonly *mirungi* weighing 214.87 kilograms. The accused persons denied an information.

The evidence presented by prosecution is summarized as hereunder:

PW6 Insp Ezekiel Midala, head of narcotic drugs control unit at Arusha, testified that on 19/12/2017 at about 08.00 hours they were tipped by the informant that a motor vehicle T 674 DLB make Toyota Sienta silver was moving from Himo junction to Moshi town center and was suspected to have loaded narcotic drugs type of khat. They conducted patrol in all areas of Moshi urban and main road from Moshi town to Himo junction to hunt down that motor vehicle ultimately saw it at Kwa Alphone road. They pursuing and chased it on various tarmac roads and narrow streets of rough roads on habitat/residential areas in Moshi town centre up to Majengo kwa Mtei where because he was driving very fast, that car knocked a fence of a house of Edwin Sifael Makundi. Then proceeded at high speed to a next street of rough road, arrived at a corner where there was gulley, after crossing that gulley, lost direction and knocked a foundation of a house of Abdallah Seleman (PW4), caused burst of a front right hand side tyre and a rim of a car T674DLB Toyota Sienta and stopped as was unable to move. Thereafter a door of a car Toyota Sienta T674DLB was opened and exited a youth looked muddled, turned back where PW6 and PW3 identified that youth by a name Frank who used to drive unregistered taxi at Dar Express offices. PW3 attempted to call and chase that youth, in vain and disappeared in narrow streets. PW6 approached that car T674 DLB, saw a lady sat at a front seat, covered by air bag which had pulled out. PW6 assisted that lady to

remove a balloon of airbag, later WP Angel arrived there and assisted to bring down that lady (Anitha Oswald Ichwekeleza). That a situation of tense increased and people assembled there were emotional, others (youth) were shouting intimidating chaos and sneak in the exhibit of khat. They were obliged to move and pull by a breakdown a car T674 DLB up to the office of Regional Crimes Officer Kilimanjaro, where PW6 conducted search in respect of that car and unloaded four green sulphate bags with red streaks, two white sulphate bags and two small white sulphate bags. He opened the four green bags which inside had nine small sulphate bags and other nine sisal sacks which inside contained fresh leaves suspected to be khat packed in small bundles and wrapped by fresh leaves of banana plant. He opened the two sacks of sulphate bags inside had small sisal sack and other eight small sulphate bags which inside contained fresh leaves suspected to be khat wrapped by leaves of banana plant. He opened the small white sulphate bags also had narcotic drugs suspected to be khat, wrapped by leaves of banana plant, making a total of eight sacks (exhibit P5) which were unloaded from a car T674DBL. The eight sacks of sulphate bags inside containing substance said to be khat (exhibit P5 collectively) and a silver car T674DLB make Toyota Sienta (exhibit P2), were seized via a seizure certificate exhibit P7. These facts were supported by PW3. Thereafter PW6 handed over the eight sacks of sulphate bags inside containing fresh leaves suspected to be khat marked PR1 to PR8 (exhibit P5 collectively) and a silver car T674DLB make Toyota Sienta (exhibit P2) to PW2 D.S/Sgt Hashim (exhibit keeper), the later registered in exhibit register PF16, an entry No. 137 dated 19.12.2017 (exhibit P6). The handing over were done on the same date

19.12.2017 at 12.30 hours. On 11.1.2018 at 09.00 hours, PW2 handed over exhibit P5 collectively to DC Isack PW5, who submitted it to the Chief Government Chemist and received by chemist Joyce Njisyia PW1. PW1 measured weight of fresh leaves without packing material got a weight of 214.87 kilograms, took sample for and conducted a preliminary test then took samples for conducting confirmatory test. Thereafter PW1 repacked exhibit P5 collectively, sealed, signed and handed over back to PW5. The receiving and handing over back were done in a sample submitting form DCEA 001 exhibit P3. PW5 took exhibit P5 collectively to the office of Regional Crimes Officer at Kilimnjaro and handed over back to PW2, which was done on the same date 11.1.2018 at 18.30 hours, via PF16 exhibit P6. Meanwhile PW1 conducted a confirmatory test of samples in respect of exhibit P5 collectively on 23.1.2018 and issued analysis report form DCEA 009 Lab. No. 88/2018, exhibit P4.

On 12.1.2018 PW2 handed over exhibit P2 to PW5, who in turn handed over to DC Michael (PW7) at main warehouse Field Force Unit (FFU) Moshi.

On 1.6.2018 PW2 handed over the whole exhibit room including the exhibit P5 collectively to DC Michael (PW7). PW7 preserved exhibit P5 collectively and exhibit P2, until when they were tendered in court.

PW5 the investigator, wrote a letter to Tanzania Revenue Authority (TRA) inquiring ownership of a silver car T674DLB make Toyota Sienta (exhibit P2). On 29.1.2019 TRA wrote a letter exhibit P1, showing the owner of a car mentioned being Anitha Oswald Ichwekeleza.

On defence, the first accused (DW1) explained that on the material date the second accused requested for her car (exhibit P2) to ferry Europeans to KIA and when he came back at Nakumat Supermarket, she saw one sulphate of rust colour at a rear seat of the driver. The first accused disowned the eight sulphate bags. She refuted to had participate during search in respect of her car, on the explanation that after she had alighted and inspected her car at the scene Majengo kwa Mtei, she was taken by police officers to the second accused's house where they conducted a search. When she resumed at a scene, her car was not there. She was taken to Police where she saw her car all doors were open, where she was taken direct to the second office near RCO's office. She explained that on the material date in the morning she reported at work, attended some duties including members contribution forms and cheques, then left at about 10.00 hours after she was granted permission to travel to Arusha to nurse her sick mother. The first accused summoned Monica John Mbogomi (DW2) and tendered her caution statement exhibit DE2 to support her defence.

The second accused (DW3) stated that on the material date at 09.00 he ferried Oliver Dustan Mlay (DW4) to Mawela village in Moshi rural district, where he spent the whole day drinking finger millet brew at a local pub of DW5. DW3 summoned DW4 and Filomena Anthony Kisaga (DW5) to support her story. DW3 denied completely to have met, known or being familiar to the first accused. He refuted to had been driving a motor vehicle of the first accused on the material date or any date at all. DW3 refuted claim by PW3 and PW6 knowing him. DW3 stated that PW3 and PW6 made mistake identity between Frank taxi driver and Frank Sifael Moshi.

Mr. Omary Kibwana Senior State Attorney, Mr. Kassim Nassir State Attorney and Ms. Christina Masalu State Attorney appeared for republic; Mr. Adam Jabir Ally Sikamkono learned Advocate and Mr. Warehema Kibaha learned Advocate for first accused; Ms. Ester Kibanga learned Counsel and Mr. Emmanuel Antony learned Advocate for the second accused. Both the defence and prosecution had filed closing submission. I comment for their labored submissions which shall be referred to in the course of deliberation as the need will arise.

Points for determination are: first, whether the eight sulphate bags inside containing leaves suspected to be narcotic drugs (khat) were seized from a motor vehicle registration number T674DLB make Toyota Sienta; secondly, whether on the date of incident the second accused was driving a motor vehicle registration number T674DLB make Toyota Sienta; thirdly, whether the chain of custody was properly maintained.

For the first issue. The first accused had admitted ownership of a motor vehicle registration number T674DLB make Toyota Sienta exhibit P2, including a report (exhibit P1) for ownership of a motor vehicle registration number T674DLB make Toyota Sienta (exhibit P2). There is no dispute that the first accused was arrested at the scene of incident at Majengo kwa Mtei. On defence, the first accused did not dispute this fact, rather she attempted to introduce a theory that at a scene she was taken away by a police defender which had arrived at the scene after she had rescued herself from airbag, alighted and inspected her car. That she was taken to a next second street, where police officers conducted search inside the room of the second accused in his absentia. And on returning back at the scene, she found her

car not there. They proceeded to the office of RCO where she found all doors of her car were ajar, and disowned to have seen those eight sulphate bags of khat. In other words the first accused was impliedly suggesting that those eight sulphate bags were planted by police officers in between. A proposition by the first accused is wanting. PW3 and PW6 stated clearly, consistently that they saw the first accused into a car, where she was entrapped by airbag covered her face and later the first accused was brought down by woman police. This story was corroborated by Mzee Abdalla Seleman PW4, that he saw the first accused being arrested and removed by police from a car which had knocked a foundation of his (PW4) house. Although PW4 denied seeing woman police at the scene, but PW4 being a mere civilian whose house was knocked and at that age of 87 years, it is unexpected that he could had concentrated identifying gender of police officers who were at the scene.

According to the evidence of PW6, PW3 and PW4 the eight sulphate bags containing khat were unloaded in a motor vehicle registration number T674DLB make Toyota Sienta and seized via a certificate of seizure exhibit P7.

The first accused distanced from ownership of those sacks by relying on some portion in her cautioned statement exhibit DE2, where it was recorded that DW1 explained to have seen one sulphate bag which had rust colour when she boarded her car at Nakumat Supermarket. It is true that at a certain portion in exhibit DE2 the first accused explained to had seen one sulphate bag which had rust colour when she alleged to have boarded her car at Nakumat Supermarket. But frankly speaking, the said caution statement which was tendered by the first accused and admitted as exhibit

DE2 which the first accused aligned to her defence, brings more contradiction to her defence generally. A verbatim account of a portion of exhibit DE2 is reproduced for appreciation,

"...swali: ni kitu gani kilipatikana ndani ya gari lako? Jibu: kulipatikana viroba vya sulphate sikumbuki ni viroba vingapi. Swali: ni nini kilifanyika baada ya kukukamata? Jibu: baada ya kunikamata nilishangaa kuona gari la polisi likija pale na mimi kupakiwa kwenye gari la polisi na kukabidhiwa kwa askari wa kike na wao waliita gari ya kuvuta 'breakdown' na kuivuta ile gari yangu kwa maana haikuweza kutembea yenyewe hadi ofisini kwao. Swali: mlipofika ofisini nini kilifanyika? Jibu: walifungua gari mimi nikiwepo na kutoa kila kitu kilichopo ndani ya gari langu na kutoa hayo mafurushi ya sulphate ambayo akili yangu haikuwa sawa sikumbuki yalikuwa mangapi ya ukubwa tofauti. Swali: baada ya kuyashusha hayo mafurushi walifanya nini? Jibu: waliyapima uzito, pia walifungua kunionyesha vitu vilivyokuwemo ndani ya furushi ambapo niliona majani mabichi yaliyofungwa kwa majani ya migomba kwenye furushi moja tu na hiyo nyingine hawajafungua hivyo siwezi kujua hayo mafurushi mengine yalikuwa na nini"

As I have said above, exhibit DE2 contradict explanations by DW1. Basically exhibit DE2 is of little assistance to the first accused's defence. This is because, a defence by the first accused that she was taken to the second accused's house where search was conducted or that there were no women

police at the scene, including her story that she did not witness a search being conducted in her car at the office of RCO, on explanation that from the scene she was taken direct to the second office near RCO's office, are either missing in exhibit DE2 or reflect the contrary. More important a fact by the first accused that she was taken to the next street to the house of the second accused and that from the scene she was taken direct to the second office near RCO's office, were not cross examined to PW3, PW4 and PW6. The evidence presented by PW3, PW4 and PW6 is water tight that the first accused was arrested red-handed in her car which had loaded eight sacks containing khat. As such an argument by the learned Counsel for first accused that there was no eye witness or direct evidence to connect the first accused and that prosecution employed circumstantial evidence, is misplaced and out of context.

Again the first accused alleged to have sought and obtained a leave of absence at work, for what purportedly she wanted to travel to Arusha to nurse her mother who was allegedly to have fallen sick. Surprisingly, the first accused did not summon the alleged mother to support her story or explanation of her whereabouts. DW2 explained that she was not sure if at all the said mother was sick or not. For another thing, DW1 said to had parted at work just before 10.00 hours, on explanation that she was clearing pending issues/works including members contribution forms and cheques. While DW2 stated that the first accused's permission started at 08.20 hours and at 09.00 hours the first accused had already left. According to DW2, on the material date the first accused did not stay for long period just reported at work, sought a permission and left. As alluded by the learned State

Attorney, the facts above do not suggest any physical impossibility of the first accused's presence at the location of the scene crime. Therefore, the first accused's defence fade away.

The first accused heaped more blame to the second accused as possibly the one who loaded the eight sulphate bags of khat in her car. However, as it turned around on her defence, she disowned completely to had seen the eight bags, only admitted seeing one sulphate bag which had rust colour as aforesaid, which she alleged had disappeared. At this time round she was contemplating of possible implant by police in respect of those eight sulphate bags. This conduct is inconsistency with her innocence. If at all the first accused knew or doubted the second accused being owner of the eight sulphate bags, why she refuted altogether. Secondly, if the first accused had no knowledge at all that her car had a luggage, she could had been bold, firm and stick to that defence, instead of jumping here and there. A resultant is to render her story unworthy of belief. On the other hand, the second accused denied completely to have met, known or being familiar to the first accused. He refuted to have been driving a motor vehicle of the first accused on the material date or any date at all.

However, the second accused was identified by PW3 and PW6 at the scene of incident at Majengo kwa Mtei immediately after he had alighted from a car (exhibit P2). PW3 and PW6 managed to identify the second accused properly by face and his name after the second accused had turned back and looked to the direction of PW3 and PW6, where PW3 even summoned the second accused by his name Frank when PW3 was asking the second accused to stop. According to PW3 at the scene it was an open space, sunrise

at 10.00 hours, a road was empty, no shrub. In the circumstance, the possibility of mistaken identity is minimal, given that the second accused was familiar to PW3 and PW6, who sometimes used to board his taxi on divert occasion and knew where the second accused used to park his taxi at Dar Express. As such the *alibi* by the second accused (DW3) that on the material date at 09.00 he ferried Oliver Dustan Mlay (DW4) to Mawela village Moshi rural district, where he spent the whole day drinking finger millet brew, as supported by DW4 and DW5, is unmerited. The evidence presented by PW3 and PW6 regarding how they identified the second accused is watertight. On similar vein, a call for identification parade as suggested by the learned Counsel for second accused could be a superfluous exercise. To my understanding an identification parade cannot be mounted to identify a suspect who is familiar and known by a particular witness.

The above exposition takes into board the first and second issues, which are answered in affirmative.

Regarding the third issue, whether a chain of custody was properly established. PW6 seized eight sacks or sulphate bags inside containing fresh leaves suspected to be khat (exhibit P5 collectively) inside a car T674DLB make Toyota Sienta (exhibit P2) and handed over to PW2 D.S/Sgt Hashim (exhibit keeper), the later recorded in exhibit register PF16, (exhibit P6). The handing over were done on the same date 19.12.2017 at 12.30 hours. On 11.1.2018 at 09.00 hours, PW2 handed over exhibit P5 collectively to DC Isack PW5, who submitted it to the Chief Government Chemist and received by chemist Joyce Njisyia PW1. PW1 conducted a preliminary test then took samples for conducting confirmatory test, thereafter repacked exhibit P5

collectively, sealed, signed and handed over back to PW5. The receiving and handing over back were done in a sample submitting form DCEA 001 exhibit P3. PW5 took exhibit P5 collectively to the office of Regional Crimes Officer at Kilimanjaro and handed over back to PW2, which was done on the same date 11.1.2018 at 18.30 hours, via PF16 exhibit P6. On 1.6.2018 PW2 handed over the whole exhibit room including exhibit P5 collectively to DC Michael PW7. PW7 preserved exhibit P5 collectively until when they were tendered in court. These chronological events suggest that there was unbroken chain of custody in respect of exhibit P5 collectively. As such an argument by the learned Counsel for accused of possible tempering or breakage of chain of custody is not there. The learned Counsel for first accused raised a concern including difference on lab. No. NZ29/2018 and NZL 29/2018, or that PW1 did not explain to have found small parcels of sacks and small sulphate bags inside those eight sulphate bags. Even if those discrepancies are there, but are ruled being minor details or typing error and are therefore ignored. Equally an argument by the learned defence Counsel that there was still a need to call for paper trail, is unmerited. As much all witnesses who handled exhibit of eight sacks or sulphate bags containing leaves said to be khat were summoned, suffices to say chronological events in respect of eight sulphate bags containing leaves of khat was properly established by the prosecution.

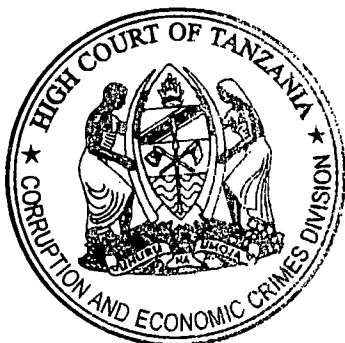
Finally, whether the act committed by the accused persons amounted to trafficking in narcotic drugs. According to penal provision to wit section 15(1)(a) of the Drugs Control and Enforcement Act, No. 5 of 2015, provide that it is an offence to traffic in narcotic drug or psychotropic substance.

Section 2 of Act No. 5 of 2015 (supra) define trafficking to mean (and include) possession and conveyance by any person of narcotic drugs.

The evidence presented herein, depict that the eight sacks containing fresh leaves suspected to be khat (exhibit P5) were carried in a car T674DBL exhibit P2 owned by the first accused. The first accused was arrested red-handed in that car and the second accused was a driver. Therefore, the duo accused person are taken to have been in possession and conveying khat, which amount to trafficking in narcotic drug within the purview of the definition of trafficking depicted above.

Having premised as above, I rule that the prosecution has managed to prove an information levelled against the first and second accused person.

The first and second accused persons are convicted for trafficking in narcotic drug contrary to section 15(1)(a) of the Drugs Control and Enforcement Act, No. 5 of 2015 as amended by section 8 of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017 read together with paragraph 23 of the First Schedule to, and sections 57(1) and 60(2) 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.



E. B. Luvanda
JUDGE
8/9/2020