

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**CORRUPTION AND ECONOMIC CRIMES DIVISION**

**AT DAR ES SALAAM**

**ECONOMIC CASE NO. 12 OF 2018**

*(Originating from Economic Case No. 44 of 2018 in the Resident Magistrate's Court of Dar es Salaam at KISUTU)*

**THE REPUBLIC**

**VERSUS**

**SAID SHABANI MALIKITA**

**JUDGMENT**

Date of last order: 04/09/2020

Date of Judgment: 07/09/2020

**MASHAKA, J:**

The Republic instituted two counts against the accused person Said Shabani Malikita. In the first count the accused stands charged with the offence of trafficking in narcotic drugs contrary to the provisions of section 15(1)(b) of the Drugs Control and Enforcement Act (The Act), No. 5 of 2015 read together with Paragraph 23 of the First Schedule to, and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act (the EOCCA), Cap 200 R.E 2002 as amended by Act No. 3 of 2016. In the alternative, the second count, accused stands charged with the offence of unlawful

possession of narcotic drugs contrary to the provisions of section 15(1)(a) of the Act No. 5 of 2015 read together with Paragraph 23 of the First Schedule to, and section 57(1) and 60(2) of the EOCCA, Cap 200 R.E 2002 as amended by Act No. 3 of 2016.

The particulars of offences in the first and second counts state that on 29<sup>th</sup> August 2017 at Kinondoni, Ufipa area within Kinondoni District, Dar es Salaam region, the accused was trafficking and, in the alternative, found in unlawful possession of narcotic drugs namely heroin hydrochloride weighing 238.24 grams.

Before the court, Mr. Constantine Kakula, State Attorney and Ms. Batilda Mushi, State Attorney entered appearance for the Republic and the accused person enjoyed the services of Mr. Abraham Senguji, Advocate. I extend my appreciation for the commitment, hard work, dedication and cooperation for the pursuit of justice.

The accused person entered his plea to the first and second counts on the 20<sup>th</sup> day of December 2018. In his plea, the accused person denied both the two counts and a plea of not guilty was entered. On the same day, preliminary hearing was conducted. Facts of the case were read over to the accused person and the accused admitted his name, his residence, his arrest

and arraignment before the court. A memorandum of agreed facts was signed by both parties to this case.

Briefly, it is alleged that the accused Said Shabani Malikita on the 29<sup>th</sup> day of August 2017 at Ufipa Street, Kinondoni District in Dar es Salaam region was arrested by the Drug Control and Enforcement Authority (hereinafter referred as the DCEA) officers suspecting him to be dealing with narcotic drugs. The accused was searched by the DCEA officers and was found with a nylon bag containing a powder substance suspected to be narcotic drug in one of his trouser pockets.

The nylon bag containing the powder suspected to be narcotic drug was seized by the DCEA officer who filled and signed a seizure certificate, that was also signed by the accused person and an independent witness. The suspected powder substance was examined by a Government Analyst and found to be a narcotic drug namely heroin hydrochloride weighing 238.24 grams. Eventually the accused was arraigned in court.

To prove the facts, the prosecution paraded eight (8) witnesses to prove their case. The witnesses were PW1 Elias Mulima, PW2 SP. Neema Mwakagenda, PW3 John Jacob Muhone, PW4 A/Insp. Hassan Msangi, PW5 Deodatus Masare, PW6 A/Insp. Johari, PW7 A/Insp. Wamba and PW8 SSgt Juma Suleiman. A total of five (5) exhibits were tendered and admitted in

evidence namely Sample Submission Form No. DCEA 001 Exhibit P1, Chemist Report dated 08/09/2017 Exhibit P2, envelope with nylon packet containing heroin hydrochloride Exhibit P3, Seizure certificate Exhibit P4, statement of Martin Luambo Exhibit P5.

The first prosecution witness Elias Mulima a Government Analyst testified that, on 04/09/2017 at 11.00am, while in his office at the Government Chemist Laboratory Authority (hereinafter referred to as GCLA) performing his duties, he received an exhibit brought by a DCEA officer one DEODATUS LEONARD MASARE (PW5). The DCEA officer handed the exhibit to PW1 and signed a form used to hand over exhibits; Form No. DCEA 001 which PW1 tendered in court, was admitted and marked Exhibit P1. PW1 received the exhibit a sealed envelope. PW1 opened the sealed envelope and inside he found a nylon packet which contained a powder substance suspected to be a narcotic drug.

PW1 weighed the powder substance and its weight was 238.24 grams. After the weighing exercise, PW1 conducted a preliminary test using a reagent known as MECKE mixed with a sample of the powder substance. The powder substance changed color into dark green, hence found to be a narcotic drug known as heroin. PW1 took another sample to conduct a confirmatory test and returned the remaining powder substance into the

nylon packet and back in the envelope. PW1 sealed the envelope with a cello tape, which had the logo of the GCLA and signed on the cello tape. PW1 handed over the sealed envelope to Deodatus L. Masare (PW5) for custody of the exhibit.

PW1 further testified that, on the 08/09/2017 he completed the confirmatory test and found the powder substance was a narcotic drug known as heroin hydrochloride. PW1 prepared a report as prescribed in Form No. DCEA 009, which he tendered in court was admitted and marked Exhibit P2 (Chemist Report). PW1 stated that this is his second time to testify in this case. That the first time he testified on the 08/05/2018 before this court, he opened the envelope before the court and prayed to the court to admit in evidence the envelope containing the nylon packet with the narcotic drug and the court admitted the envelope with the nylon transparent packet containing the heroin hydrochloride as exhibit. PW1 tendered the same envelope with the nylon transparent packet filled with heroin in court and was admitted and marked Exhibit P3 collectively in this case. That at the GCLA, Exhibit P3 collectively was not handled by two different officers; the sample reception officer received the DCEA officer and took him to PW1's working place the laboratory.

In her testimony PW2 SP. Neema Andrew Mwakagenda, a DCEA officer and the Exhibit Keeper stated that on 30/08/2017 while at the DCEA office, received one nylon packet suspected to contain narcotic drug. PW2 registered the packet in the Exhibits register by the file no. DCEA/IR/08/2017 and placed on the packet a label of the case file no. DCEA/IR/08/2017, which she wrote on a tape. Then PW2 packed the exhibit on the very same day. Before PW2 commenced the packing exercise, she prepared the envelope, cello tape seal and an independent witness. After preparation of these items and in the presence of the accused and independent witness John Jacob Muhone (PW3), PW2 took the nylon packet the exhibit and placed it in an envelope size A4. PW2 closed the envelope by cello tape a red seal with the words '*evidence*' and '*sealed by ..... and date .....*'. The accused and the independent witness John Jacob Muhone (PW3) wrote their names and signatures on the envelope. PW2 also wrote her name, signature and the date 30/08/2017 on same envelope. On the sides of the envelope, she wrote the case file no. DCEA/IR/08/2017. After completing this task, PW2 left with the sealed exhibit and kept it in the exhibit room for safe custody.

While in her office on the 04/09/2017 morning hours, PW2 handed over the envelope exhibit file no. DCEA/IR/08/2017 to Deodatus Masare (PW5) to take to the GCLA for tests. On the same day at 2.25 pm, PW2

received the envelope from Deodatus Masare in her office at the DCEA, which had an additional seal of the GCLA. PW2 registered the envelope exhibit in the Exhibits register to acknowledge the receipt of the said exhibit and kept in custody awaiting trial of the case. The envelope exhibit had a Laboratory number 2412/2017 on top of the envelope, was signed and had an official stamp. PW2 was informed that the result of the exhibit file no. DCEA/IR/08/2017 was narcotic drug known as heroin weighing 238.24 grams.

PW2 further testified that on the 08/05/2018 she was summoned by this Court to testify in Economic Crime Case No. 2 of 2018 before Hon. Matogolo, Judge. PW2 brought the exhibit, and after testifying, the Exhibit P3 was handed over to her by the Court Clerk for safe custody by signing the hand over Court Exhibits Register until the 19/02/2019 when she came to Court after being summoned to testify in this case. PW2 identified the Exhibit P3. PW2 explained that she did tender the Exhibit P3 in the previous Economic Crime Case No. 2 of 2018 and testified on same Exhibit P3 in this case. That she handed over the Exhibit P3 through the Court Exhibits register to the Court Clerk as ordered by the Court. During the handing over through the Court Exhibits register on the 08/05/2018 the envelope exhibit

was open and PW2 did not know who opened it. PW2 identified the accused in the dock.

In his testimony, John Jacob Muhone PW3, stated that he works as a cleaner with Kuche Enterprises at the DCEA Office Upanga. That on the 30/08/2017 afternoon hours while at his place of work, one lady went to him and introduced herself as Neema (PW2). PW2 requested PW3 to follow her to her office. PW3 followed PW2 to her office where he found other people. PW3 was introduced to one Said Shabani Malikita and PW2 informed him to witness the packing of the exhibit, which was on the table. That PW2 commenced to pack the exhibit by taking the suspected narcotic drug khaki in color which was in a nylon packet and placed it into an envelope then closed the envelope with a red cello tape in the presence of the accused. After packing the nylon packet, PW2 told the accused and PW3 to sign on the envelope. That the envelope was to be taken to the Government Chemist for tests. After the packing PW3 was allowed to leave the office. PW3 identified Exhibit P3 collectively and the accused in the dock.

A/Insp. Hassan Msangi PW4 testified that on the 29/08/2017 while at the DCEA office he and other DCEA officers were informed there was a special operation on drug dealers and drug users to be conducted in Kinondoni area around 7.30pm. At around 9.00pm they were at Ufipa



Street, Kinondoni area. As they were driving through the said area, they saw a guy seated outside a house, they got out of the motor vehicle called him and asked him questions. He was worried and they suspected him, due to the fear he exuded. The guy introduced himself as Malikita (accused person) after being asked by PW4, and when asked more questions the guy got worried and tried to run. PW4 restrained and told him that, he suspects and intends to search him. The accused was informed by the DCEA officer the need to get an independent witness to witness the search. PW4 directed his fellow officer called JUMA to go and get the independent witness. He came back with an independent witness called MARTIN LUAMBO. PW4 informed the independent witness the purpose of his presence to witness the body search of Malikita, and if found with anything concerning narcotic drugs, he will arrest him. The independent witness agreed to witness the search.

A body search of Mr. Malikita the accused person was conducted by PW4 and in the trouser pocket on the back side found a nylon packet, which contained a powder substance khaki and whitish in color, that PW4 suspected was a narcotic drug. PW4 also found 3 mobile phones; two make NOKIA and one make HUAWEI, a handkerchief red and white in color,

together with TZS. 6200/=; a 5,000/= note and the 1,200/= was in coins 500/= and 200/=.

PW4 seized the items found on Mr. Malikita the accused and filled a seizure certificate listing all the items found. The certificate of seizure was signed by the accused, the independent witness MARTIN LUAMBO and the arresting officer PW4. PW4 tendered the seizure certificate in court, was admitted and marked Exhibit P4. After the body search, PW4 asked him his place of residence and the accused showed him. PW4 went with the independent witness, the accused and DCEA officers to the accused's place of residence to conduct search. PW4 commenced search of the accused's motor vehicle and his house where he found nothing suspicious.

PW4 left together with his colleagues and the accused person around 10.30pm to continue with the operation in other areas while the accused was in the motor vehicle under arrest until at 3.00am, the 30/08/2017 they returned to the DCEA office. PW4 took the exhibits and kept them under safe custody in his office cabinet. He was also with the accused person who was under the custody of two DCEA officers who participated in the operation. Later the accused was taken for an interview and to record his statement in another room where PW4 kept monitoring the suspect that he does not escape from custody.

During morning hours on 30/08/2017, PW4 handed over the accused person to A/Insp. Johari Msirikale (PW6) the investigator of this case. PW4 identified the Exhibit P3 and stated further that he did not mark the exhibit found in the possession of the accused person. PW4 identified Mr. Malikita is the accused in the dock.

In his testimony, on the 04/09/2017 around 9.00 am while at the DCEA office Upanga, PW5 F 6763 PC Deodatus Leonard Masare was directed by his supervisor SSP. Salmini to take an exhibit to the GCLA. PW5 went to the Exhibits room and SP. Neema Mwakagenda (PW2) handed the exhibit to him. The exhibit was a brown envelope sealed with a red cello tape, on top of the envelope was written the names and signatures of the accused Said Shabani Malikita and PW2, together with a letter to take the exhibit to the GCLA.

The Form no. DCEA 001 was filled by PW5 for the purpose of taking the exhibit to the GCLA. When PW5 reached the GCLA office, went to the reception where he handed over the letter PW5 received from PW2 for registration of the exhibit and to get a laboratory number. Another form was filled by a GCLA officer on duty at the reception called Henji in the presence of PW5 at the reception, while the envelope exhibit was in the possession of PW5 at all times. After registration, the reception officer

requested for the exhibit to place the laboratory number on the exhibit, the Laboratory No.2412/2017 was placed on the envelope and returned to PW5. GCLA Officer Henji gave the filled form to PW5 to follow-up the results of the tests at the reception. After receiving the form, PW5 with the exhibit left the reception area with another officer escorting him to the laboratory. When PW5 reached the laboratory, a Government Chemist (PW1) went through the Form No. DCEA 001 to check the particulars and took the exhibit, he opened it to check the particulars if correct compared with the exhibit then signed the Form No. DCEA 001 to acknowledge receipt of the exhibit.

After opening the exhibit, PW1 weighed the powder substance which was the exhibit; it was khaki color. The powder substance weighed 238.24 grams. That PW1 took sample from the powder for tests. The test was conducted by PW1 in the presence of PW5. After the test PW1 found the powder substance was a narcotic drug known as heroin hydrochloride. The Government Chemist (PW1) took another sample to conduct a confirmatory test. That PW1 returned the powder found to be heroin hydrochloride into its nylon package and returned it into the envelope and sealed it using a cello tape with GCLA logo. PW1 placed his name and signature on the envelope exhibit, together with the GCLA official stamp. Then PW1 handed

over the envelope exhibit back to PW5 who returned back to the DCEA office and handed the exhibit over to PW2 as sealed by PW1.

On the 08/09/2017, PW5 went to collect the analysis report from the GCLA office and delivered it to the investigator (PW6) of the case. PW5 identified Exhibit P1 and Exhibit P2. PW5 stated that, this is the second time he has come before the Court to testify in this case. That the first time he came to testify in this case, the Exhibit P3 in this case had been opened by the Government Chemist who testified in Court before he testified. Even now, when PW5 testified, the Exhibit P3 was not sealed. PW5 emphasized that Exhibit P3 is the same as the one he was shown in the first case and is exactly the same exhibit, which was tendered in the first case. PW3 stated that said exhibit had the same marks, the label DCEA/IR/08/2017.

PW6 A/Insp. Johari Issa Msirikale, testified that, on the 30/08/2017 she was in her office at the DCEA and her boss SSP. Salmini Shelimoh assigned her the investigation of case file no. DCEA/IR/08/2017 involving trafficking narcotic drugs and the suspect was Said Shabani Malikita and instructed to continue with the investigation of the case. On the same day between 7.15 am and 7.30am A/Insp. Hassan Msangi (PW4) handed over to PW6 the following exhibits, powder substance suspected to be narcotic drug in a transparent plastic bag, 3 mobile phones, Tshs.6200/= and one

handkerchief for wiping sweat known as '*leso*'. That all the items were properties of Said Shabani Malikita concerning the case file no. DCEA/IR/08/2017. PW6 kept them in her office, in a locked cabinet and kept the key of the cabinet in her custody until on 30/08/2017 at 9.30am when she handed the exhibit powder substance suspected to be a narcotic drug over to PW2.

Further PW6 testified that, the same day around afternoon hours, she witnessed the packing of the suspected powder to be narcotic drug. The packing was done by PW2 in the presence of the accused person Said Shabani Malikita, independent witness PW3, PW6 herself and other DCEA officers. The exhibit which was a powder substance was placed in a khaki envelope and the envelope was sealed by a red cello tape with the words on it '*sealed by*'. After the sealing of the exhibit, the accused Said Shabani Malikita, the independent witness PW3, the Exhibits Keeper PW2 and PW6 signed on the top of the khaki envelope. After completion of packing and sealing of the exhibit by PW2, PW6 instructed A/Insp. Wamba Msafiri (PW7) to record additional statement of the accused person on how he witnessed the packing of the exhibit. PW6 continued with investigations of the case by recording statements of the independent witness PW3.

On the 04/09/2017, PW6 was at the DCEA office, she received 2 forms Form no. DCEA 001 showing proof that the exhibit sent to the Government Chemist has been received. The second form was from the Government Chemist showing the registration of the exhibit is Laboratory no.2412/2017. On the 08/09/2017, PW6 received a copy of the report of scientific analysis from the Government Chemist stating that the exhibit sent to them proved to be a narcotic drug known as heroin hydrochloride weighing 238.24 grams. During her testimony PW6 identified the Exhibit P3 by its khaki envelope, red cello tape seal, signatures of the suspect, independent witness PW3, PW2 on the red seal, her own signature, and the transparent plastic packet with the two knots tied on each side containing a cream color powder substance. PW6 identified the said suspect is the accused sitting in the dock.

PW6 stated that, the accused was taken to Court for the first time on the 12/09/2017, before that he was in the lock-up since his arrest. That according to Section 48(2)(c)(iii) of Act No.5 of 2015 states that a suspect should not be detained for more than 48 hours unless there is further extension of time made in writing by the officer. That there is no form for extension of time, which has been tendered in this Court.

When recalled under section 147(4) of the Evidence Act, [CAP 6 R.E.2019] to testify before the court, PW6 stated that on the 30/01/2019,

she received summons from the office of the DPP for service on Mr. Martin Luambo who was the '*Mjumbe*' of Ufipa Street. After receiving the summons, she called Mr. Martin Luambo through his phone number which was on the summons that was given to her, but she could not get the number. PW6 went to Ufipa Street to look for the office of the Local Government Authority for the said street where she met the '*Mwenyekiti*' of the Local Government Office known as Mr. Mussa Abdallah Embe and requested for his assistance to get the witness Mr. Martin Luambo. The '*Mwenyekiti*' told her that Martin Luambo who was the '*Mjumbe*' wa *Shina Na.2*' cannot be found and his whereabouts are not known. That due to his absence led to an emergency election to elect another '*Mjumbe*' to take the position of Mr. Martin Luambo. That the same was written by the said '*Mwenyekiti*' on the back of the said summons and PW6 returned the summons to the office of the DPP.

PW7 A/Insp. Wamba testified that on the 30/08/2017, he was at the office around 3.45 am and assigned a task by SSP. Salimini to interview a suspect Said Shabani Malikita and record his cautioned statement. PW7 secured a calm room to conduct the interrogation of the accused person. When PW7 commenced recording of the accused's statement, the accused was in good health condition that is, he was walking properly, talking and in



good spirit, joking and had no injury on his body. That the room is an office, had 2 chairs and a table together with an office cabinet, which stores files. The interview of the accused commenced at 4.00 am and completed at 5.00 am. Before PW7 commenced to interview the suspect, he introduced himself to the accused person, his rank A/Insp. and informed the suspect the reason for being in the room is to interview him on the allegations facing him for trafficking narcotic drugs. PW7 informed the suspect that he is not required to say anything, only if he is willingly to do so he can provide a statement or not, the right to have a lawyer or relative or anyone to be present during the interview and recording of his statement, and told him that if he is willing and agrees to say anything it will be recorded in the statement and can be used as evidence against him in Court.

PW7 stated further that on the right to have a lawyer or relative or a person present, the accused person wrote and stated that he does not need a lawyer or relative to be present and he was ready to give his statement and be recorded. To prove that, the suspect did sign at the end of the caution given and PW7 also signed. After completing the recording, PW7 gave the cautioned statement to the suspect to read it, go through and make any corrections or add or alter anything in the statement which he finds not to be correct or was left out. After the suspect completed reading the

cautioned statement, he stated that the statement was correctly recorded and had no corrections or additions to make then the suspect signed by writing his name after the confirmation on what he had done and PW7 also signed after his confirmation on what he did. That the suspect narrated what he knew with regard to the allegations against him for trafficking narcotic drugs and PW7 recorded what the suspect stated.

PW7 further stated that, on the same day 30/08/2017 at around 2.30 pm in the afternoon, PW7 was given the task to record additional statement of the suspect on how he witnessed the packing exercise of the exhibit which was found during search and the packing exercise was done being preparations to send the exhibit to the Government Chemist for scientific tests.

That before PW7 commenced to record the additional cautioned statement, PW7 introduced himself again to the accused and the purpose to record his additional cautioned statement on how he witnessed the packing exercise of the exhibit. PW7 commenced to record the additional statement at 2.30 pm and completed at 3.30 pm. After that the suspect read the additional cautioned statement and agreed the statement was correct, then he signed and PW7 also signed. PW7 stated that he was also involved in taking the accused to the Central Police Station and escorted him to the

Kisumu Court, in relation to this case against the accused. PW7 identified the suspect is the accused in the dock.

In his testimony PW8 S/Sgt Juma Suleiman stated that, on the 29/08/2017 at around 9.30 pm at Ufipa Street, Kinondoni after the suspect Said Shabani Malikita was arrested he was instructed to go and call the 'Mjumbe' Martin Luambo to come and witness the search of the accused. After the search PW8 recorded the statement of Martin Luambo the independent witness at the Ufipa Street Kinondoni around 10.20 pm at night. PW8 tendered the said statement of Martin Luambo, was admitted and marked Exhibit P5. PW8 stated that the handwriting of Exhibit P5 is his and he is able to read it correctly although he could not read the words written by Martin Luambo. The evidence of PW8 shows that the said Martin Luambo was nowhere to be found thus he could not testify before this court. The prosecution tendered and relied on the said statement of independent witness Martin Luambo.

After close of the prosecution case, the court found on the basis of the evidence both oral, documentary and physical adduced by the prosecution, a prima facie case was established against the accused person and had a case to answer. The accused person was called upon to defend himself and three witnesses testified for the defence case.

The defence case commenced with the testimony of DW1 Said Shabani Malikita, the accused that on the 29/08/2017 he had finished his prayers at the mosque and was heading home. When he reached the place of Bi Asha Halfani where there is a shop and a bench, one Mama Oga called him. He went and sat together with Mama Oga talking at Bi Asha Halfani's place. That a motor vehicle type Noah passed without its lights on and stopped at the shop where DW1 sat. From the motor vehicle, police officers disembarked from the motor-vehicle, some were dressed in uniform others in plain clothes. DW1 stated that the two officers dressed in plain clothes went to DW1 and attacked him. One of them Hassan Msangi (PW4) is the one who placed something in his trouser pocket when they attacked him.

DW1 testified that an officer called by his colleagues Masai, hit him with the butt of his gun thus DW1 was shouting calling Bi. Amina Saidi Mdoka and Bi. Asha Halfani telling them that something has been placed in his pocket. DW1 was handcuffed when he was arguing with the police refusing to get into the motor vehicle. After DW1 got into the motor vehicle, they went to the house of Remina Omari. That when they reached Remina's house, they took DW1 out of the motor vehicle and rolled him in mud and continued to beat him. That Martin Luambo the '*Mjumbe*' came from Remina's house and other police officers were also at Remina's house and

together with the police officers, Martin Luambo and DW1 went to DW1's house.

When they reached the house of DW1, Martin Luambo searched the accused person DW1's back pocket of his trouser. Martin Luambo took out from DW1's pocket trouser the thing which DW1 earlier claimed was placed in his pocket. They also searched in the motor vehicle of DW1's brother, which was parked at DW1's house. After finishing the search of the motor-vehicle they entered the house of the accused person. The officers did not find anything in the motor vehicle and in the house. After the search, they went together with other people who were arrested to the Central Police Station and not taken to the office of the DCEA.

In the morning of 30/08/2017, DW1 was taken by the officers to the DCEA office at Upanga, taken upstairs and kept in a room where he took off all his clothes as ordered by one Police Officer. That he was tortured by the officers and beaten on his feet, buttocks and other parts of his body. They wanted him to show them who are selling drugs. That they showed DW1 the pictures of people to identify them then he was taken into a motor-vehicle and returned to the lock up at the Central Police Station.

DW1 stated that the exhibit envelope brought to Court suspected to contain narcotic drugs was opened twice in this Court. For the first time it

was opened on the 08/05/2018 in the Economic Case No.2 of 2018 before Hon. Matogolo, J. For the second time, the same envelope which was brought before the Court was sealed. This meant that the envelope had never been opened, as DW1 expected the said envelope to be brought before the Court opened and not sealed by PW2 herself without the presence of any witness. That the size of the exhibit which was opened in court in Economic Case No.2 of 2018 and before this Court, differ because the size of the envelope opened before this Court was bigger in size.

DW1 testified that the envelope which was sealed by Neema (PW2) and taken to the Government Chemist was brown while the Government Chemist testified that he received a khaki envelope. DW1 testified that he knows and remembers Martin Luambo, he was the Ten Cell leader '*mjumbé*'. That he came to testify in Court in Economic Case No.2 of 2018 as shown at pages 34 - 37 of the committal proceedings where he stated that what was brought before the Court was not the same item he saw on the day of incident; the item is the exhibit.

The date stated by Wamba PW7 that he recorded DW1's statement at midnight, DW1 was at the Central Police Station lock-up where he stayed for 14 days from 29/08/2017 to the 12/09/2017 when he was taken to Court

for arraignment. That he was beaten and hurt, got treatment at Keko Prison on his eye, his body was swollen and his left leg had wounds caused by the torture at the office in Upanga. That it is not true Martin Luambo was promised money to testify in accused person's favor to get acquitted. That on the day of arrest, DW1 was arguing with the Police Officers for almost 30 minutes to get into the motor-vehicle. That Martin Luambo did not go to the place DW1 was arrested but DW1 was taken to where Martin Luambo was and he did witness the search in his person. DW1 does not know if the doctor's prescription wrote the cause of his medical problem and he did not tender the medical report from the Doctor as evidence and prays to the Court to set him free.

DW2 Asha Halfani Mohamed, testified that, on the 29/08/2017 at around 8.00 pm she was seated on a bench at the verandah of her house with the accused person and another woman she has forgotten her name since she is not familiar with her. While they were seated, Police Officers went and arrest the accused who is in the dock. DW2 does not know how they came; that the motor vehicle stopped and went to arrest Said the accused. That the Police Officers were kicking, beating and dragging the accused, while the accused person was complaining that *'you are placing something in my pocket and I only have 2 mobile phones'*. That the accused

called Bi Mdoka for help and Bi Mdoka went to help him. DW2 was just seated there on the bench, while accused was shouting. That the police officers left with the accused and went to his house. That the accused complained the police officers were placing something in his pocket but DW2 did not see what was placed in the pocket of the accused person since it was night time. DW2 testified that the accused person is her friend and does not want him to be convicted.

DW3 Amina Saidi Mdoka testified that, on the 29/08/2017 at around 8.00 pm she was seated at the verandah of her house. She saw a motor-vehicle, make Noah passed by her house and it reversed back and reached the shop of Bi. Asha (DW2). That DW3 heard words "*kaa chini*", and followed by beatings on Said (the accused person) who called DW3 for help. DW3 went to where the accused person was and saw 2 police officers holding guns, she requested one of the them to go and see the accused person, the police officer allowed her to see the accused. That the accused person told DW3 that something has been placed in his trouser pocket but she did not see what was placed in his pocket.

That the accused was still beaten by police officers while DW3 could not do anything. DW3 stated that the motor vehicle left and went on to arrest others while DW3 and others remained outside looking at what was



happening. That, the accused was told to enter the motor-vehicle and he refused but she does not know the officers who told him to enter the motor-vehicle, because they wore plain clothes. That the arguing between the accused person and the police officers to enter the motor-vehicle took 10 minutes. That was the end of the defence case.

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 of this case. **Firstly**, whether the powder substance in the nylon packet and packed in an envelope Exhibit P3 collectively is a narcotic drug. **Secondly**, whether the search was conducted and nylon packet retrieved from the accused person. **Thirdly**, whether or not the chain of custody was broken or maintained. **Lastly**, whether the defence case raised any reasonable doubt against the prosecution case.

Stating the first issue, it is the evidence of prosecution through PW1 that the powder substance contained in the nylon packet packed in the envelope Exhibit P3 is a narcotic drug namely heroin hydrochloride. This evidence is supported by documentary evidence the Chemist Report Exhibit P2. The Exhibit P2 confirms that PW1 conducted preliminary and confirmatory tests of the powder substance and confirmed to be a narcotic drug. The Government Chemist PW1 testified that heroin substance is a

narcotic drug specified in the First Schedule to the Act No. 5 of 2015. Hence, heroin hydrochloride is a narcotic drug, which contains heroin substances. However, it is the contention of the Defence that, heroin hydrochloride is not a narcotic drug listed in the First Schedule to the Single Convention on Narcotic Drugs, 1961 as amended from time to time, which appears as the First Schedule to the Drugs Control and Enforcement Act, No. 5 of 2015.

Learned Counsel for the accused cited section 2 of the Act No. 5 of 2015 which stipulates that;

*'narcotic drug to mean any substance specified in the Schedule or anything that contains any substance specified in that First Schedule'.*

Thus, learned Counsel for accused argued that the substance contained in Exhibit P3 being heroin hydrochloride is not among the listed narcotic drugs in the First Schedule to the Act No. 5 of 2015, hence it cannot make an offence as required in Paragraph 23 of the First Schedule to the EOCCA, Cap 200. To support his contention, learned Counsel referred the case of **Oswald Abubakari Mangula Vs Republic [2000] TLR 271** where the Court of Appeal held that;

*'.... It is a salutary rule that no charge should be put to an accused person before the magistrate is satisfied inter alia that it discloses an offence known in law.....Since the charge*

*sheet disclosed no offence known in law the learned Judge of the High Court should have declared the proceedings a nullity...'*

Learned Counsel for the accused submitted that, since the information filed in this court disclosed no offence known in law as per Act No 5 of 2015, the proceedings in this Hon. Court has no value.

It is not disputed that heroin hydrochloride is not directly listed in the First Schedule to the Act No. 5 of 2015 as a narcotic drug. Nevertheless, the same Schedule listed heroin is a narcotic drug and in heroin hydrochloride there are substances of heroin which is a narcotic drug, thus heroin hydrochloride is a narcotic drug. Also, the provisions of section 15 (2) of the Act No. 5 of 2015 provides that;

*'Any person who produces, **possesses**, transports, exports, imports into the United Republic, sales, purchases or does any act or omits **anything in respect of drugs or substances not specified in the Schedule to this Act but have proved to have drug related effects**, commits an offence...'* [Emphasis is mine].

It is my considered opinion the evidence of an expert carries more weight than that of an ordinary witness. PW1 is an expert a gazette Government Analyst/Chemist under GN No. 519 of 2010 who conducted the preliminary and confirmatory tests which proved the Exhibit P3 contained

heroin hydrochloride and heroin is a narcotic drug provided for in the First Schedule to the Act No. 5 of 2015. Thus, the first issue is answered in the affirmative. Hence the contention by learned Counsel for accused person that the charge does not disclose an offence, has no merit. The information discloses an offence against the accused as charged. Subsequently, the powder substance contained in the nylon packet packed in the envelope Exhibit P3 collectively is a narcotic drug namely heroin hydrochloride.

Going to the second issue, whether the search was conducted and Exhibit P3 the nylon packet with heroin hydrochloride retrieved from the accused person. The evidence adduced by PW4 supported by Exhibit P4 certificate of seizure and Exhibit P5 statement of independent witness Martin Luambo that Exhibit P3 collectively the said nylon packet was retrieved from the accused person. It is the contention of the prosecution that, the Defence case was full of lies and cited the case of **Daudi @ Senga Sadrack and Another Vs Republic**, Criminal Appeal No. 25 of 1998, CAT at Mbeya held that;

*'.... Lies of an accused person have been taken to corroborate the case of prosecution...'*

That, in this case the lies of the accused have strengthen the prosecution case as the accused had knowledge that he was committing the offence.

On the other hand, learned Counsel for the accused argued there was noncompliance of section 48(1), (2) (a) (ii) (iii) and (b) (iv) of the Act No. 5 of 2015 during the arrest and confinement of the accused person. Learned Counsel for the accused contended that, the officer who arrested the accused person did not apply the law strictly as required. That the DCEA officers did not inform the accused person the reason (s) for his arrest, that they assaulted and planted a substance in the pockets of the accused as alluded to by DW1, DW2 and DW3. Further he argued that the accused person was confined for 13 days which is equal to 312 hours without any reasonable cause contrary to section 48(2) (iii) of the Act No 5 of 2015, that the accused was assaulted and did not sign a seizure certificate.

Learned Counsel for the accused strongly contended that, the DCEA officers applied section 10(3) of the Criminal Procedure Act (CPA), Cap 20 to certify the statements recorded in this case, which is contrary to section 48(2)(a) and (x) of the Act No. 5 of 2015. That the officers were bound to apply the CPA where there is a lacuna as provided under section 48(6) of the Act No. 5 of 2015. To support his argument, learned Counsel referred

the court to the cases of **Thobias Mbilinyi Ngasimula Vs Republic [1980] TLR 129** and **Malik Suleiman Hassan Vs Serikali ya Mapinduzi [2005] TLR 236**, where the Court of Appeal held that noncompliance with legal format subscribed form by the law itself is fatal. Therefore, learned Counsel concluded that the accused was illegally arrested and there was no search conducted at the place of arrest. On this issue raised by learned Counsel for the accused, on the recording of a statement, according to the format provided under section 48(2)(a) and (x) of Act No. 5 of 2015 Form No. DCEA 007 as provided, cites section 10(3) of the CPA. That is the format provided by the law, hence there was compliance to the law.

It is noted that 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'.*

The provisions of section 48(2) (a) (ii) (iii) (c) (ii), (v) and (vii) of the Act No. 5 Of 2015 were observed, implemented and complied with in the search, confinement, seizure and the record of the certificate of seizure Form no. DCEA 003 as required under the Third Schedule to the Act No. 5 of 2015 and was duly signed by both the accused DW1, executing officer PW4 and independent witness his statement Exhibit P5. The prosecution witnesses denied vehemently to have violated section 48(2) (b) (iv) of Act No. 5 of 2015. There was no request for further extension of time of time to detain the suspect for further investigation as provided for under section 48(2)(c)(iii) of Act No. 5 of 2015. The investigators admitted that the accused was detained for more than 48 hours. Nevertheless, being an economic offence under section 29 (1) of the EOCCA, CAP 200 provides that;

*'after a person is arrested or upon the completion of investigations and the arrest of any person in respect of the commission of an economic offence shall as soon as practicable ...not more than 48 hours of his arrest be taken before the district court ... for him to be dealt with according to the law'.*

It was upon the investigators to comply with the law. They did not state why they failed to comply with the provisions of the law. The court finds the investigators failed to comply with the said provisions of law though

it does not invalidate the case against the accused when looking at the entire evidence adduced by the prosecution.

In his testimony, PW4 searched the accused person in his body in the presence of the independent witness Martin Luambo whose statement was admitted and marked Exhibit P5. Both PW4, accused person and Martin Luambo signed the seizure certificate; this signifies the accused person acknowledged the body search was conducted and the seizure of his items including Exhibit P3. Other items seized from the body search of the accused included three mobile phones; two were make NOKIA, one type HUAWEI, cash money TZS. 6,200/- and a handkerchief red and white in color.

In the case of **David Athanas@ Makasi Joseph Masima@ Shando Vs the Republic**, Criminal Appeal No. 168 of 2017, CAT at Dodoma (unreported), the Court of Appeal held that,

*'...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...'*

In the present case the contention by the accused person that he failed to sign the seizure note (a certificate of seizure) and the Exhibit P3 was implanted on him does not hold any weight. The seizure certificate corroborates the fact that the accused was searched in the presence of PW4



and according to Exhibit P5 statement of the independent witness, after he was placed under arrest. The accused signed the seizure certificate after the search. DW1 also signed Exhibit P3 after it was packed by PW2 at the DCEA office in the presence of PW3 another independent witness. The fact though not true that, the accused person was not informed the reasons for his arrest and detained for 13 days contrary to the law does not invalidate the fact that the Exhibit P3 collectively was seized from the accused person. PW4 restrained DW1 and informed him that he suspects him and intends to search him in the presence of an independent witness (Exhibit P5). This was corroborated by PW8 who was sent to call the independent witness. The accused was properly searched, the search was conducted in the presence of an independent witness and the accused, PW4 and independent witness Exhibit P5 signed the seizure certificate after the search. Hence, the search was conducted and the nylon packet with heroin hydrochloride (Exhibit P3 collectively) was retrieved from the accused person.

The third issue is whether the chain of custody was broken or not. The prosecution evidence established that the Exhibit P3 collectively was seized at the scene of incident by PW4 and taken to the DCEA office under the custody and care of PW4 who handed it to PW2 the exhibits keeper. PW2 testified that she sealed the exhibit in the presence of the accused person

and PW3 an independent witness. PW2 remained with the exhibit until she handed over the exhibit to PW5 who took the same to PW1 and returned the same to PW2 sealed. It is the submission by learned State Attorney for Republic that to prove the chain of custody, the prosecution relied upon oral testimony of the witnesses and referred the court to two cases; the case of **Goodluck Kyando Vs. Republic [2006] TLR 363**, where the Court of Appeal held that;

*'every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. Moreover, good reasons for not believing a witness include the fact that the witness given improbable or implausible evidence or the evidence has been materially contradicted by another witness or witnesses '.*

The second case is **Marceline Koivogui Vs Republic**, Criminal Appeal No. 469 of 2017 (unreported) where the Court of Appeal held that;

*'in the present case we thus cannot fault the trial court in having relied on the credible oral account of the prosecution witnesses which was not impeached considering that documentation is not the only requirement in dealing with an exhibit and it will not fail the test merely because there was no documentation'.*

Learned State Attorney therefore reasoned that, on the basis of findings in the two cases the prosecution established the proper maintenance of chain of custody of the Exhibit P3 from the time it was seized until brought and tendered before the court.

It was the contention by learned Counsel for accused that the Exhibit P3 was opened twice by PW1 that is on 08/05/2018 when he did not close or write anything on the envelope after tendering and 19/02/2019 when he testified that he does not know the exact weight of the Exhibit P3. Learned Counsel argued that he fails to understand how Exhibit P3 has features, which are the same as which existed when it was opened on 08/05/2018 while the same has not shown if it had already been tendered before the court since has no court stamp. Further learned Counsel contended that there is no single witness who witnessed the Exhibit P3 was closed by PW2 and referred the court to the case of **Shiraz Mohamed Shariff Vs Mkurugenzi wa Mashtaka [2005] TLR 387** where the Court held that;

*'... mixing up of exhibits even if it appears as a minor defect has to be used to the benefit of the accused person'.*

That, the handling of the Exhibit P3 which contained the narcotic drug namely heroin hydrochloride by PW2 raises doubts.

To determine this issue, it is important to take note that, the Exhibit P3 was previously tendered and admitted as Exhibit P3 in Economic Case No. 2 of 2018 which was partly heard and subsequently the Republic entered *nolle prosequi* and later refiled before this court. Section 91(1) of the Criminal Procedure Act, Cap 20 R. E. 2019 does not bar the institution of a new charge against the accused person in respect of the same facts, same offence, which includes the same evidence. This is what transpired in this case.

It is clear on the evidence of PW1 that the Exhibit P3 was tendered on 08/05/2018 before the Court in regard of the Economic Case No. 2 of 2018. The existence of unique features such as the signature of the accused, signature of PW1, GCLA official stamp and cello tape with GCLA logo shows that, the prosecution did not bring in new evidence apart from that tendered in the previous case. The closing of the said exhibit was done purposely for its safety while in the custody of the Exhibit Keeper PW2 and obviously to maintain the *status quo* of the Exhibit P3. This Exhibit P3 was not used in any case as evidence, therefore its features remained intact. There was no need for the court clerk to testify on the closing of the exhibit in question, for PW2 explained she closed the Exhibit P3 in the presence of the court clerk who handed over the exhibit to her to keep in custody. It is the

evidence of PW1 that the weight of the Exhibit P3 is 238.24 grams. This is the weight of the substance taken to PW1 at the first instance after being seized from the accused, packed and sealed by PW2 in the presence of PW3 and the accused.

According to evidence adduced before the court and the Exhibit P3, there is no mixing of Exhibit P3. The marks and labels placed on the exhibit tendered in Economic Case No. 2 of 2018, stamped by the court as Exhibit P3 and signed by the presiding Judge Hon. Matogolo J, is the very same Exhibit P3 in this case comparing the marks and labels on the exhibit itself the nylon packet and envelope, the names, signatures of the accused, PW1, PW2, PW3, PW6, red seal placed by DCEA, and white seal placed by the GCLA. DW1 raised that the envelope exhibit sealed by PW2 was brown while the PW1 testified that he received a khaki envelope. This issue of color is just a matter of semantics, khaki and brown are similar colors, therefore it is the same envelope as per the marks and labels on it.

The positions laid out in the cases of **Goodluck Kyando (supra)** and **Marceline Koivogui (supra)** cited by learned State Attorney are binding on this court to the effect that this court believes the witnesses and there is no cogent reason for not doing so and the chain of custody can be proved orally. It cannot be held that the absence of chronological documentation

of paper trail on the handling of Exhibit P3 collectively automatically causes the chain of custody to be broken.

The position on the chronological documentation in a chain of custody in the case of **Chacha Jeremiah Murimi and 3 Others Vs Republic**, Criminal Appeal No. 515 of 2015, CAT at Mwanza (Unreported), the Court of Appeal expounded that;

*'..... An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked depending on the prevailing circumstances in particular case. For instance, in cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in **Paulo Maduka** (supra) would be relaxed'.*

In is my considered opinion, in the circumstances concerning Exhibit P3 collectively in this case there is no doubt that the said exhibit was not tampered with, all witnesses who dealt with and witnessed search, seizure, packing of the exhibit are credible witnesses and all of them testified on how they dealt with the said exhibit. The oral testimonies of PW1, PW2, PW3, PW4, PW5 and PW6 have not raised any doubt that, at any point in time in respect of the narcotic drug heroin hydrochloride Exhibit P3 collectively chain of custody got broken. Therefore, the chain of custody of the Exhibit P3 collectively was not broken.

On determination of the last issue whether the defence case raised any reasonable doubt against the prosecution case, it is significant to take note the court must only convict the accused person on the strength of the prosecution case and the burden of proof is on the prosecution side to prove beyond reasonable doubt and not otherwise. It is contention of the prosecution that, in a criminal case the prosecution is duty bound to prove its case beyond reasonable doubt. But this obligation does not extend the standard of disapproving every assertion made by the accused even if it does not cast reasonable doubt on the prosecution case. The learned State Attorney referred the court to the case of **Miler v Minister of Pension (1947)** 2 All ER 372, also the Court of Appeal cases of **Magendo Paul & Another Vs R [1993]** TLR 220 and **Chandrakant Joshubhai Patel Vs R**, Criminal Appeal No. 13 of 1998, CAT at Dar es Salaam where the Court of Appeal stated that;

*'Doubt about the guilty of an accused can count only if such doubt is reasonable. The circumstance must also be looked at, and considered in their totality....'*

The Court explained further that;

*'remote possibilities in favor of the accused cannot be allowed to benefit him. If we may add, fanciful possibilities are limitless, and it would be disastrous for the*

*administration of criminal justice if they were permitted to dispose solid evidence or dislodge irresistible inference.'*

The Court of Appeal held that;

*'The Republic has to prove the case beyond reasonable doubt and that the law does not require them to prove the case at certainty'.*

Basing on the cited cases, learned State Attorney for Republic in this case submitted that the prosecution sufficiently discharged their duty to the required standard.

However, it is the evidence of DW1 that the officers who arrested him placed a thing in his trouser pocket. That DW2 and DW3 each of them heard DW1 accused person shouting that there is something placed in his pocket trouser but none of them saw the said thing. The defence witnesses stated that DW1 the accused person was beaten by officers because he was resisting arrest and to get in the motor vehicle. Also, it is the submission by learned Counsel for the accused that the assault exerted on the accused person caused injuries which led the accused to attend treatment for 40 days.

Learned Counsel submitted that the search was not conducted at the place of arrest instead the same was conducted at the accused person's house and therefore the evidence of the witnesses has a lot of contradictions



and lies. That even the seizure certificate was not prepared at the place of arrest as this evidence contradicts with the statement of independent witness Martin Luambo Exhibit P5 where he stated that '*mbali na upekuzi huo, upekuzi uliendelea chumbani kwake*', while DW1 stated that he was searched near his residence and later preceded to the motor vehicle parked in his premises and residence. He stated that the prosecution did not dispute the fact that the substance Exhibit P3 collectively was planted to the accused person and it was the property of the Authority and therefore the defence raised the doubt over the evidence of the prosecution.

Apparently in this case the prosecution evidence proved that the powder substance contained in Exhibit P3 collectively is a narcotic drug namely heroin hydrochloride, and the same was seized from the accused person. It is evidence of DW1 himself that he was arrested and searched near his residence this shows that the Exhibit P4 was not signed out of the area where the arrest and search was conducted. The wording that '*mbali na upekuzi huo, upekuzi uliendelea chumbani kwake*', by the independent witness confirms that other than the body search, a search continued in the room of the accused. Also, the evidence established the unbroken chain of custody. The defence evidence contends that the substance contained in Exhibit P3 collectively was implanted on the accused person, a fact which

lacks corroboration from any other witness than DW1 himself, since no witness witnessed the alleged act. Apart from the evidence based on the alleged fact that the accused person was assaulted during the recording of his statement being after the facts in issue of this case, the said evidence and submission did not demonstrate a contradiction in the evidence adduced by the prosecution case.

The best test for the quality of any evidence is its credibility. In this case the court looks for quality of the evidence placed before it and the court is satisfied the defence evidence does not raise any reasonable doubt against the prosecution case.

In the light of the above finding, I hold the prosecution proved its case beyond reasonable doubt against the accused person. I find the accused person is not guilty of the first offence of trafficking in narcotic drugs c/s 15(1)(b) of the Drug Control and Enforcement Act, No. 5 of 2015 read together with Paragraph 23 of the First Schedule to and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002 as amended by Act No. 3 of 2016. The evidence adduced by the prosecution has proved beyond reasonable the second count in the alternative to the first count for unlawful possession of narcotic drugs c/s 15(1)(a) of the Drug Control and Enforcement Act, No. 5 of 2015 read together with Paragraph

23 of the First Schedule to, and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002 as amended by Act No. 3 of 2016.

I find the accused guilty as charged and I convict him for unlawful possession of narcotic drugs c/s 15(1)(a) of the Drug Control and Enforcement Act, No. 5 of 2015 read together with Paragraph 23 of the First Schedule to, and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002 as amended by Act No. 3 of 2016.



  
L. L. MASHAKA  
Judge  
18/09/2020

#### SENTENCE

The accused **SAID SHABANI MALIKITA** was found guilty and convicted with the second count in the alternative offence of unlawful possession of narcotic drugs c/s 15(1)(a) of the Drug Control and Enforcement Act, No. 5 of 2015 read together with Paragraph 23 of the First Schedule to, and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002 as amended by Act No. 3 of 2016.

Before sentencing, on previous conviction record Mr. Constantine Kakula, State Attorney for the Republic submitted to the Hon. Court that the accused person has no previous criminal record. The accused is a first offender. That the offence unlawful possession of narcotic drugs has increased in our community. However, learned State Attorney prayed to the Hon. Court to hand out a heavy sentence and severely punish the accused person accordingly so it can act as a deterrence to others who engage in narcotic drugs and abstain from such criminal acts.

In mitigation learned Counsel Senguji for the accused person prayed for a lenient sentence since the accused person is a first offender and has no criminal record. That the accused person has a family composed of a wife, two children and his 87 years old father are all dependent on him. That the accused has been remanded in custody for three (3) years before his conviction today. Learned Counsel Senguji argued that each case is to be decided on its own circumstances and the accused should not be sentenced due to the prevalence of the crime in the society. Counsel Senguji prayed to the Hon. Court to consider and impose a lenient sentence on the accused person because he deserves leniency of the court. That the accused was assaulted during the time of his arrest.

In allocutus, the accused person prayed to the court for a lenient sentence because he has two children aged 16 and 8 years old who are not going to school and both his parents (mother and father) who are old are dependent on him.

I have heard the prayer by learned State Attorney for Republic that a stiff punishment be imposed on the accused person who was found in possession of narcotic drug. I have also heard the mitigation by learned Counsel for the accused person and the allocutus by the accused person. I have considered the mitigation factors advanced and I am guided by the relevant legislations; the Drug Control and Enforcement Act No. 5 of 2015 read together with the Economic and Organised Crime Control Act, Cap 200 R.E 2002 as amended by Act No. 3 of 2016. The punishment for the offence committed by the accused person is provided under section 15 (2) of Act No. 5 of 2015.

Section 15(2) of Act No. 5 of 2015 stipulates that;

*'(2) Any person who produces, **possesses**, transports, exports, imports into the United Republic, sales, purchases or does any act or omits anything in respect of drugs or substances not specified in the Schedule to this Act but have proved to have drug related effects, or substances used in the process of manufacturing of drugs commits an offence, and upon conviction shall be sentenced to life imprisonment'.*

While Section 60(2) of the Economic and Organized Crime Control Act [CAP 200 R.E 2019] provides that: -

*"Notwithstanding provision of a different penalty under any other law and subject to subsection (7), a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measure provided for under this Act; Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence".*

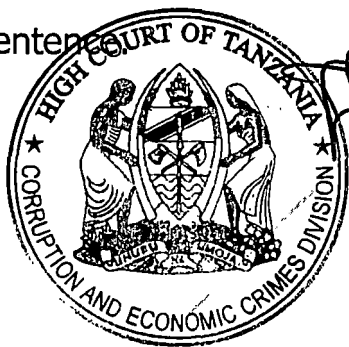
In consideration to the mitigating factors, the accused person is a first offender, I hereby sentence the accused person to serve 30 (thirty) years imprisonment.

The court considered the number of years the accused person spent in remand since he was arrested on the 29<sup>th</sup> day of August 2017 until today. In mitigation, Learned Counsel prayed for leniency that the accused has been remanded in custody for three (3) years before his conviction today. The accused person remained and was presumed innocent until proven guilty as it was well articulated in the case of **VUYO JACK Vs THE DPP**,

Criminal Appeal No. 334 of 2016, CAT at Mbeya (unreported), where the Court of Appeal held that;

*"on the aspect of sentencing we have this to say; since the appellant was at the time of arrest not yet convicted, bearing in mind a legal maxim that an accused person is presumed innocent before conviction, he could not be subjected to serve any sentence. The time spent by the appellant behind the bars before being found guilty, convicted and sentenced, would have been a mitigation factor in imposing the sentence....."*

The accused person was found guilty, convicted and sentenced. I accordingly order that the time spent in remand behind bars before this conviction is taken by the Prisons Service as time already served towards the sentence.

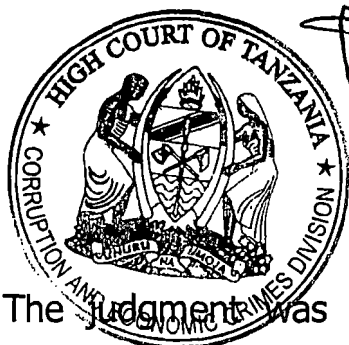


  
L. L. MASHAKA

**Judge**

**18/09/2020**

Right of appeal fully explained to the accused person and the Republic.



  
L. L. MASHAKA

**Judge**

**18/09/2020**

The judgment was read and delivered in the presence of State Attorney Constantine Kakula for the Republic, the accused person and

learned Counsel Hamza Senguji for the accused person in open court today the 18<sup>th</sup> day of September 2020.



  
L. L. MASHAKA

**Judge**

**18/09/2020**

**ORDER:**

1. The narcotic drug heroin hydrochloride Exhibit P3 collectively is confiscated and to be destroyed in accordance to Regulation 14 of the Drugs Control and Enforcement (General) Regulation, 2016, GN No. 173 of 2016 in the presence of responsible officers.



  
L. L. MASHAKA

**Judge**

**18/09/2020**