

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 2 OF 2020

REPUBLIC

VERSUS

1. HARIRI MOHAMED HARIRI

2. MUNA SAID OMARY

JUDGMENT

22nd October & 15th December, 2020

BANZI, J.:

This case involves a husband and wife, Hariri Mohamed Hariri and Muna Said Omary; branded as the first and second accused person respectively. They both stand charged with the offence of trafficking in narcotic drugs contrary to section 15 (1) (a) of the Drug Control and Enforcement Act, No. 5 of 2015 ("the Drug Act"), read together with paragraph 23 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002] ("the EOCCA") as amended.

It is alleged in the information that on 2nd March, 2018 at Kinondoni Matitu area, within Kinondoni District in Dar es Salaam Region, the accused

persons trafficked in narcotic drug namely Heroin Hydrochloride weighing 214.11grams. Both accused persons pleaded not guilty to the charge.

At the trial, Ms. Mwahija Ahmed, learned Senior State Attorney, assisted my Ms. Batilda Mushi and Mr. Candid Nasua, learned State Attorneys represented the Republic, while Messrs. Majura Magafu and Nehemiah Nkoko, learned Advocates, represented the first accused person; Ms. Abbriaty Kivea, learned Advocate, represented the second accused person. I must sincerely thank the Counsel of both sides and everyone who took part in the proceedings for their tireless efforts towards assisting this Court in the determination of this case.

In a bid to prove the case against the accused persons, the prosecution side called in seven (7) witnesses to testify, namely, Elias Mulima (PW1), SSP Neema Andrew Mwakagenda (PW2), Inspector Hassan Zahoro Msangi (PW3), Mohamed Yahaya Abubakar (PW4), D.5648 D/SSGT Juma Suleiman Ally (PW5), Assistant Inspector Wamba (PW6) and Mwajua Mgobanya Ubaya (PW7). They also tendered six (6) exhibits, which were all admitted, thus: Exhibit P1, Form No. DCEA 001; Exhibit P2, Laboratory Analysis Report, Form DCEA 009; Exhibit P3, Envelope containing Heroin Hydrochloride; Exhibit P4, Certificate of Seizure, Form DCEA 003; Exhibit P5, Mobile Phone makes Nokia and Exhibit P6, Mobile Phone makes

Samsung. On the other hand, the first and second accused persons testified under oath as DW1 and DW2 respectively and they did not tender any exhibit.

In the main, the prosecution evidence presents a case that, on 1st March, 2018, PW3, an officer at the Drug Control and Enforcement Authority (DCEA) received an instruction from his superior, SSP Salmin to go and execute a search at the house of Hariri Mohamed Hariri located at Kisutu street, Kinondoni area, following an information about narcotic drugs activities therein. Upon that instruction, he took his colleagues, including PW5, Assistant Inspector Brown, D/C Jackson, D/C Zuweni and D/C Mollel and at about 2145 hours; with whom they went to the crime scene. On arrival, they knocked at the gate which was opened by the first accused person. They introduced themselves to him. PW3 told him about their intended search. The first accused person refused to let them in, claiming that there were no narcotic drugs in his house. PW3 insisted on their demand to search the house to satisfy themselves on their suspicion. He finally agreed; PW3 and D/C Jackson went to look for a local leader, who would act as an independent witness to the exercise. According to PW3, they managed to get one Mwajua Mgobanya Ubaya, (PW7).

On returning to the crime scene, PW3 asked the first accused person if he knows PW7; the latter acknowledged to know her. PW3 then nominated officers from his team who would enter the house for the search exercise; after that, each one of them inspected himself in the presence of the first accused person. They then entered the house to begin the search. According to PW3, the search began in a room of the second accused person's father, where nothing suspicious was found. They went on to a room used by children and the sitting room, likewise, nothing was found. In the master bedroom, they seized several documents, and two mobile phones, which were tendered and receives as Exhibits P5 and P6. Finally, they searched in the public toilet where PW5 saw a nylon bag in black and white stripes. That bag contained a transparent nylon bag with crumps powdered substance suspected to be narcotic drugs. PW3 seized the same and showed to everyone. Soon thereafter, the first and second accused persons began to shout claiming that, they knew nothing about the bag containing the suspected substance. Upon completing search in the house, PW3 prepared a certificate of seizure, Exhibit P4 which was signed by PW3 himself, and the independent witness, PW7. According to PW3, the first accused person refused to sign the certificate.

Nonetheless, I must hasten to state rightly that, the evidence of PW3 materially differs with that of the independent witness, PW7 on what transpired at the crime scene and how the search was conducted. According to PW7, it was the police officer by the name of Salmin who went to her house to inform her about the intended search; and not PW3. At the scene, she found several police officers with the first accused person handcuffed on pants only. She asked the police officers to let the first accused person to wear his clothes; which request, they accepted. Then, they searched in a room on the left hand side and found nothing. They went on to search a room on the right hand side where they found some local medicine. The search then followed in the sitting room and kitchen, where nothing was found. From there, they entered in the public toilet. They found a used baby diaper on the floor. They then went to the master bedroom where they found various documents. While they were in the toilet of the master bedroom, she heard one of the officers speaking over the phone; they were then told to go back to the public toilet. Upon returning to the public toilet, they found a parcel in a nylon bag in black and white stripes. Inside that bag, there was another nylon bag containing scrumps substance. Upon finding the said parcel, PW7 herself and the first accused person began to shout because that parcel was not there when they searched that locale earlier.

According to PW3, after finishing the search exercise, they took the first accused person to their office. On arriving, he stored the bag in his locker until 3rd March, 2018 when he handed over the seized exhibit to PW2, the custodian of exhibits. After she received the exhibit, PW2 registered it in the exhibits register; and labelled it with case file number DCEA/IR/11/2018. She then packed the exhibit in the presence of PW4, PW5 and the first accused person. She packed the bag in an envelope, sealed and labelled it with the case file number. She then signed on the envelope with PW4 but the first accused person instead of signing, he wrote the following words, "*Mimi Hariri Mohamedy sitambui mlichoweka kikafanya nisaini.*" Thereafter, PW2 packed it in another envelope, which she sealed and signed it with the independent witness, PW4 and the first accused person. Upon completing this exercise, she stored the envelope in the exhibits' room until 5th March, 2018 at about 0900 hours when she handed it over to PW5 so that it could be submitted to the Government Chemist Laboratory Authority (GCLA) for examination.

PW5 went to GCLA offices and on arriving there, he handed over the exhibit to PW1 who registered it with laboratory number 693/2018. According to PW1, he received a khaki sealed envelope via a submission form, Exhibit P1. Upon receiving, PW1 opened the envelope and found

another envelope within it, in which he found a nylon bag in white and black stripes. Inside that bag, he found another transparent nylon bag containing powder substance. He weighed the powder and got 214.11grams. Thereafter, he drew a sample for a preliminary test. He conducted the preliminary test by mixing the sample with Mecke reagent; it changed colour to dark green indicating that, it was heroin. Then he drew another sample for a confirmatory test. Following the preliminary test, PW1 repacked the exhibit, sealed the envelope, signed it and handed it over to PW5, who upon returning to the office, he handed it over to PW2. PW2 stored it in the exhibits room until when it was brought and tendered in this Court. Later on, PW1 proceeded to conduct confirmatory test over the sample he drew. He used a machine called Liquid Chromatography Mass Spectrometry; according to him, during the analysis, he used reference standard to ensure that the machine was working properly. After the analysis, sample was confirmed as narcotic drugs, namely heroin hydrochloride. After getting the results, on 13th March, 2018, he prepared a report which was approved by the Acting Chief Government Chemist. His report was received as Exhibit P2. Meanwhile, according to PW6, on 16th August, 2019, they arrested the second accused person and joined her in the case.

In their defence, the accused persons categorically refuted to have committed the alleged offence; although they both admitted that on 2nd March, 2018 the search that was conducted at their material house. DW1 told the Court that he is a businessman involved in a car wash and bakery business. DW2 testified that she is a house wife. Basically, their evidence reveals that on 2nd March, 2018, DW1, DW2 with other members of their family were home sleeping. DW1 heard a knock on their door. On waking up, he went to the entry door to attend the knock, where he saw a number of police officers who ordered everyone to get out of the house. They complied. They handcuffed him and a moment later, a police officer by the name of Salmin arrived with a woman (PW7) who was unknown to him. Since he was just on his night pants, upon a request by PW7, he was escorted in to put on clothes. The said Salmin informed PW7, and everyone who was there about the intended search. DW1 complained to Salmin that PW7 was not his local leader, as his leader, one Fatuma Msungi lives just three houses from there. Salmin ignored him and cautioned him not to teach him his job, as he went on to select four amongst his officers to carry out the search. According to DW1, he did not search the officers before they entered in the house.

Upon entering, DW1's toddler began to cry; DW2 was allowed to take care of it, she stayed at the sitting room, as the search continued. The search began at the bedroom beside the sitting room and proceeded to the sitting room. Thereafter, they went to a room of the house maid; in all these places, nothing suspicious was found. From there, they searched in the public toilet, which is opposite to the maid's room, where they also found nothing apart from a baby diaper on the floor. The search proceeded to the master bedroom. When they were in the master bedroom, PW5 picked a call on his mobile phone and went back alone to the toilet. He heard him saying "*nipo chooni mbona.*" Intermittently, PW5 walked out of the master bedroom, and a moment later, he returned in and told PW3 that, there is a parcel at the public toilet, where they had already searched and found nothing. They all went back to the public toilet where PW3 picked a parcel. On seeing that, PW7 complained aloud that it was not possible for that bag to be found there, as they had already searched the place and found nothing. They then got out of the house, while PW7 was still lamenting and the children were also crying. Upon seeing that, Salmin ordered one among the officers to take DW1 away and they left to DCEA offices.

He further claimed that, while there, he was given a sealed envelope to sign but since he was tired and hungry, he took a pen and wrote on the said envelope "*Mimi Hariri Mohamed Hariri sifahamu kitu gani ambacho nimeambiwa nisaini kiko ndani ya bahasha hii.*" After that, PW2 put that envelope in another large envelope which he signed. He also claimed to have never seen a certificate of seizure at the scene of the crime. He denied to have been asked to sign it and refused. On the other hand, DW2 claimed that she was arrested on 16th August, 2019, within the premises of this Court, when she came to follow up hearing of her husband's case. After the arrest, she was taken to the Central Police Station together with her husband where they were remanded until 22nd August, 2019 when they were taken to Court and joined on the same charge. DW2's testimony is materially the same with that of DW1. Both the accused persons maintained their innocence and prayed to be acquitted. In a nutshell, that was the evidence of the Prosecution and Defence.

The counsel of both sides filed their final written submissions timely as it was ordered by this Court. It was the contention of the counsel for the Republic that, the oral testimonies of PW1 to PW7 and the documentary evidence tendered managed to prove beyond reasonable doubt that, 214.11grams of heroin hydrochloride was retrieved from the accused

persons and thus they trafficked in the said drugs. On the other hand, it was the contention of the counsel for defence that, the prosecution's evidence is full of inconsistencies which go to the root of the matter such that, there was a possibility that the drug in question was planted therein.

Having carefully considered the evidence on record and the submissions by the Counsel of both sides, the main issue before the Court for determination is whether the prosecution side has proved the case against the accused persons beyond reasonable doubt.

Before determining the issue at hand, it is worthwhile noting here that, in criminal matters, a fact is said to be proved when the Court is satisfied by the prosecution beyond reasonable doubt that such fact exists. This is provided under section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2019]. That is to say, the guilt of the accused person must be established beyond reasonable doubt. Generally, and always, such duty lies with the prosecution except where any statute or other law provides otherwise. Section 28 (1) of the Drug Act is among of such exceptions. According to this section, in drugs cases, the accused person has the duty to prove that the possession, dealing in, trafficking, selling, cultivation, purchasing, using or financing is in accordance with the licence or permit granted under the Drug Act. However, it is trite law that, when the burden shifts to the

accused person, the standard of proof is on balance of probabilities. See the case of **Said Hemed v. Republic** [1987] TLR 117. In that regard, and according to the principles underscored above, it is the duty of the prosecution to prove beyond reasonable doubt that the accused persons trafficked the alleged drugs and, particularly by proving the existence of narcotic drugs at the accused persons' house. Likewise, it is the duty of the accused persons to prove on balance of probabilities that, the traffic was in accordance with the licence or permit granted under the Drug Act.

As highlighted above, there is one main issue to be determined by this Court, that is, whether the prosecution has proved the case beyond reasonable doubt. However, the determination of this issue rests on other two specific issues, namely, **one**, *whether Exhibit P3 was in fact retrieved from the accused persons' house* and **two**, *whether the chain of custody was maintained to ensure the safety and integrity of the exhibit in question.*

In answering the first issue, I will consider the circumstances of the search appearing in the testimonies of PW3, PW5 and PW7. According to the evidence of PW3, upon arrival at the crime scene, it was him and D/C Jackson who went to look for a local leader who would act as independent witness to the search. It was also his testimony that, the search began at

the room of second accused person's father, proceeded to the children's room, then to the sitting room, the master bedroom and last in the public toilet where they found Exhibit P3. On the other hand, according to PW5, the search began at the room of second accused person's father, followed by the children's room, the sitting room, the kitchen, the public toilet where he spotted Exhibit P3 and last at the master bedroom. Nevertheless, the evidence of PW7 shows that, it was Salmin who went to her house to request her to witness the search. According to her, the search began at the room on the left hand side, proceeded to the room on the right hand side, followed by the sitting room, kitchen, and then to the public toilet where they found a baby diaper. From there, they proceeded to the master bedroom. While they were in the toilet to the master bedroom, she heard one officer speaking on the phone and then they were told to go back to the public toilet. Upon returning to the public toilet, they found a parcel in a nylon bag in black and white stripes.

From the evidence on record, there is inconsistency in the prosecution's evidence on how the police officers found the independent witness, how the search was conducted in the accused persons' house, especially how Exhibit P3 was found in the said public toilet.

I am much aware that, not every discrepancy or contradiction in the prosecution's evidence will cause their case to flop. This was stated in the case of **Said Ally Ismail v. Republic**, Criminal Appeal No. 249 of 2008 CAT (unreported) thus:

*"It is not every discrepancy in the prosecution case that will cause the prosecution to flop. **It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled.**"*(Emphasis is mine).

In another case of **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007 CAT (unreported) it was stated that;

*"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. **The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter.**"*(Emphasis is mine).

See also the case of **Mohamed Said Matula v. Republic** [1995] TLR 3. From the above authorities, the only question to be determined is whether the inconsistencies go to the root of the matter. Proving trafficking in

narcotic drugs begins at the stage of searching. In addition, search and seizure are the first steps in the process of establishing the chain of custody. In that regard, whenever there is inconsistency or contradiction at the stage of search and seizure, that must go to the root of the matter.

The inconsistencies pointed out earlier cast strong doubt as to whether the drug in question was actually in the public toilet within the accused persons' house prior to the search. There is an obvious inconsistency as when the said public toilet was searched and found with Exhibit P3. Can it be said it was searched and found with Exhibit P3 after the master bedroom was searched as stated by PW3? Or, can it be said it was searched and found with Exhibit P3 before the master bedroom was searched as stated by PW5? Or, was it searched and found with nothing before the master bedroom was searched as stated by PW7? In my considered view, these questions give credence to defence's evidence that Exhibit P3 was not in the said public toilet when it was searched first. The possibility that the said Exhibit P3 was planted into the public toilet cannot be overruled in the particular circumstances of the case. Besides, the evidence of PW3, PW5 and PW7 shows that, when PW3 and his colleagues entered the house to search, other officers remained outside within the compound. There is no evidence from the prosecution or defence showing

that after they entered the house, the entrance door was closed behind them. The possibility of anyone entering and planting anything while the search was being conducted is very high. Thus, it is the finding of this court that, the inconsistencies spotted here go to the root of the matter, that is, how Exhibit P3 was found and retrieved from the said public toilet. Moreover, irrespective of these contradictions, I have also carefully considered the evidential value of the testimony of PW7 who is supposed to be independent witness, called to testify by the prosecution. Her evidence concerning how the parcel was found is plausible and relevant to understand the circumstances of the search.

In the case of **Mathew Stephen @ Lawrence v. Republic**, Criminal Appeal No. 19 of 2007 (unreported), the Court of Appeal of Tanzania faced a similar situation. In that case, a search at the appellant's small room was conducted at night and it was also coupled with inconsistencies. The Court of Appeal, after considering those circumstances concluded that, there was a possibility of the exhibits to have been planted there by the police basing on the tendency of trailing the accused person on suspicion that he was a habitual criminal. See also the case of **Sylvester Stephano v. Republic**, Criminal Appeal No. 527 of 2016 [2018] TZCA 306 at www.tanzlii.org. Therefore, in the considered view of

this court, the above-mentioned flaws cast strong doubt on the prosecution's evidence if at all Exhibit P3 was actually inside the accused persons' house before the search was conducted. It can be recalled that, neither the first accused person nor the second accused person signed the certificate of seizure, Exhibit P4. In other words, they did not acknowledge to be found with the drugs in question from the first instance.

In the main, the circumstances of how Exhibit P3 was found cast strong doubt, which as a matter of right, the same is resolved for the benefit of the accused persons. In view thereof, the first specific issue is answered negatively. Since the first issue is answered negatively, it suffices to hold that, the prosecution side has failed to prove the case against accused persons beyond reasonable doubt. Thus, the second specific issue dies automatically and the main issue is negatively answered.

In the upshot, the accused persons are accordingly acquitted of the charged offence of trafficking in narcotic drugs and are hereby set free. It is so ordered.

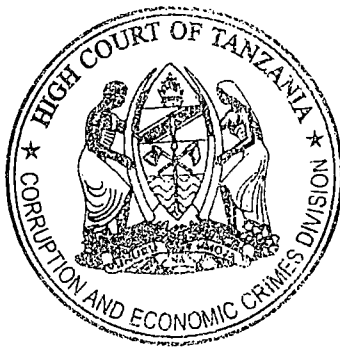
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I. K. BANZI

JUDGE

15/12/2020

Delivered this 15th day of December, 2020 in presence of Mr. Adolf Ulaya, learned State Attorney for the Republic; Mr. Nehemiah Nkoko, Ms. Yusra Islem and Ms. Abbriaty Kivea, learned Advocates, for the first and accused person respectively, who are also present. Right of Appeal fully explained.



I. K. BANZI
JUDGE
15/12/2020

ORDER

Exhibit P3 is hereby confiscated and the same to be disposed of in accordance with the Drug Control and Enforcement Act, No. 5 of 2015 and its Regulation. On the other hand, Exhibits P5 and P6, two mobile phones to be restored to the accused persons.



I. K. BANZI
JUDGE
15/12/2020