IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 13 OF 2019

REPUBLIC

VERSUS

1. **AYUBU MFAUME KIBOKO**
2. **PILLY MOHAMED KIBOKO**

Date of Last Order: 14/12/2020

Date of Judgment: 18/12/2020

MASHAKA, J.:

JUDGMENT

The first accused Ayubu Mfaume Kiboko and second accused Pilly Mohamed Kiboko stand together and jointly charged with the offence of trafficking in narcotic drugs contrary to section 15(1)(a) of the Drugs Control and Enforcement Act No. 5 of 2015, read together with Paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act [CAP 200 R.E 2002] as amended by the Written Laws Miscellaneous Amendment Act No. 3 of 2016.

According to the amended information, it is alleged that, Ayubu Mfaume Kiboko first accused and Pilly Mohamed Kiboko second accused on the 23rd day of May 2018 at Tegeta Nyuki, Masaiti area within Kinondoni District in Dar es Salaam region trafficked in narcotic drugs namely heroin hydrochloride weighing 251.25 grams.

During trial of this case, the Republic was represented by Ms. Tully Helela, State Attorney, Mr. Salim Msemo, State Attorney. Mr. Constantine Kakula, State Attorney and Mr. Candid Nasua, State Attorney. The first and second accused persons were represented by Mr. Majura Magafu, learned Advocate and Mr. Nehemia Nkoko, learned Advocate. I extend my appreciation to the team of members of the bar for the commitment and hard work in representing the interests of your clients.

The first and second accused persons entered their respective plea to the offence charged on the 17th day of March 2020. In their plea, both the 1st and 2nd accused persons denied the count and a plea of not guilty was entered to both accused persons. On the same day, preliminary hearing was conducted. Facts of the case were read over to the accused persons and the 1st accused person admitted his name and his three (3) Tembo Cards.

The 2nd accused admitted her name, her arrest, her Tembo card and was arraigned in court.

Briefly, the facts of the case alleges that on the 23rd May 2018 officers from the Drugs Control and Enforcement Authority (hereinafter referred as DCEA) received information from an informant that the 1st and 2nd accused persons are dealers in narcotic drugs and that the 1st accused person on that particular day had narcotic drugs in his house and was preparing to distribute the said drugs. The officers from the DCEA did search the house of the accused persons at Tegeta Nyuki, Masaiti area, Kinondoni District, Dar es Salaam region. The search was conducted by the officers and witnessed by independent witnesses, Raymond Kimambo and Christina Macha. During the search several items were seized as follows; a transparent tin containing a powder substance suspected to be narcotic drug, a transparent plastic bag suspected to contain a powder substance suspected to be narcotic drug, a black plastic bag suspected to contain a substance to be narcotic drug. Also, four (4) ATM TEMBO CARDs with the No. 0211009152100 and No. 011100915200 in the name of Kiboko Investment Ltd, no. 0150245914400 in the names of Hanizz Hotel and No. 06700011640 in the name of Pili

Mohamed Kiboko. The officers also seized three (3) motor vehicles together with copies of the respective motor vehicle registration cards for motor vehicle registration no. T 828 CTJ make Toyota PRADO, motor vehicle registration No. T 299 CGL make Toyota Alphard and motor vehicle registration No. T 975 AUL make Toyota Hilux in the name of Ayubu Mfaume Kiboko. Other items seized are as listed in the certificate of seizure. A certificate of seizure was prepared, filled and the first and second accused persons, independent witnesses and the officer who executed the search and seizure all items signed the said certificate. The first and second accused persons were placed under arrest and some of the exhibits seized were placed under the custody of the Exhibits keeper.

The seized items suspected to be narcotic drugs were packed and sealed in the presence of an independent witness, the first and second accused persons and were later sent to the Government Chemist Laboratory Authority (herein referred as GCLA) for further analysis. The items were sent to the GCLA - DSM office for analysis and the Government Chemist/Analyst prepared a chemist report that in the black plastic bag marked 'C' contained a narcotic drug namely heroin hydrochloride weighing 251.25 grams. The exhibit above mentioned was packed, labelled, sealed by

the Government Chemist/ Analyst and handed over to the DCEA officer for custody. Both the first and second accused persons were interrogated and arraigned in the court for an offence of trafficking in narcotic drug under section 15(1)(a) of the Act No. 5 of 2015.

To prove the case against the first and second accused persons, the prosecution called six (6) witnesses, PW1 Shimo Peter Shimo, PW2 Insp. Hassan Msangi, PW3 Insp. Emmanuel Ambilikile, PW4 SSP Neema Mwakagenda, PW5 Insp. Lubambe Kanyumbu and PW6 Raymond Kimambo. And tendered sixteen (16) exhibits namely, Form no. DCEA 009 admitted and marked Exhibit P1, Government Chemist Report admitted and marked Exhibit P2, one envelope admitted and marked Exhibit P3, khaki envelope labelled 'A' admitted in evidence and marked Exhibit P4, transparent tin containing a white powder substance admitted and marked Exhibit P5(A) and (B) collectively, khaki envelope labelled 'Kielelezo A1 and A2' admitted and marked Exhibit P6, two plastic tins containing a white powder substance admitted and marked Exhibit P7(A) and (B) collectively, khaki envelope labelled 'Kielelezo B' admitted and marked Exhibit P8, the transparent nylon bag containing a black powder substance labelled 'B' admitted and marked Exhibit P9(A) and (B) collectively, the khaki envelope labelled 'Kielelezo C'

admitted and marked Exhibit P10, the nylon black bag containing an off – white powder substance labelled 'C' admitted and marked Exhibit P11(A) & (B) collectively, Exhibit P12 certificate of seizure, Exhibit P13 motor vehicle registration no. T 828 CTJ make Toyota PRADO silver in colour, Exhibit P14 motor vehicle registration no. T 975 AUL make Toyota Hilux golden in colour, Exhibit P15 motor vehicle registration no. T 229 CGL make Toyota Alphard colour black and the statement of Frank Niko Alex dated 29/05/2018 admitted and marked Exhibit P16.

The defence case called up two witnesses namely Ayubu Mfaume Kiboko DW1 and Pilly Mohamed Kiboko DW2 and tendered two exhibits namely the original motor vehicle registration card no. 5390991 for T 229 CGL type Toyota Alphard admitted and marked Exhibit D1 and the motor vehicle registration card no. 6146503 for T 828 CTJ make Toyota PRADO admitted and marked Exhibit D2.

Having thoroughly gone through the evidence both oral and documentary adduced by the Prosecutions and the Defence as well as the final submissions made orally by both parties before the court, there are four issues drawn for the determination of this case as follows. **Firstly**, whether

the powder substance contained in the black plastic bag Exhibit P11A and P11B collectively is a narcotic drug. **Secondly**, whether a search was conducted and a powder substance contained in a black plastic bag Exhibit P11A and P11B collectively was seized from the house of the 1st and 2nd accused persons. **Thirdly**, whether or not the chain of custody of Exhibit P11A and P11B collectively was broken. **Lastly**, whether the defence case raised any reasonable doubt against the prosecution case.

Commencing with the first issue, it is the evidence adduced by the prosecution through PW1 that the powder substance contained in the black plastic bag Exhibit P11A and P11B collectively is a narcotic drug namely heroin hydrochloride. This evidence is corroborated by documentary evidence the Chemist Report Exhibit P1. The Exhibit P1 confirms PW1 conducted preliminary and confirmatory tests of the powder substance contained in the black plastic bag and confirmed to be a narcotic drug. Also the learned State Attorney submitted that section 48A (2) of Act No. 5 of 2015 as amended by the Act No. 15 of 2017 provides that notwithstanding anything contained in any other law for the time being in force, any document purporting to be a report signed by a Government Analyst shall

be admissible as evidence of the facts stated therein without formal proof and such evidence shall, unless rebutted, be conclusive.

It is my considered view that PW1 is an expert a Government Chemist/ Analyst who conducted the preliminary and confirmatory tests which proved the powder substance contained in the black plastic bag Exhibit P11A and P11B is heroin hydrochloride, which is a narcotic drug. Therefore, in the light of evidence of PW1 which in my view is relevant to prove this issue at hand together with the Government Chemist Report Exhibit P1, this court finds the powder substance contained in the black plastic bag Exhibit P11A and P11B collectively is a narcotic drug namely heroin hydrochloride.

Advancing to the second issue, whether or not a search was conducted and a powder substance contained in a black plastic bag Exhibit P11A and P11B collectively was seized from the house of the 1st and 2nd accused persons. The testimonies adduced by PW3 and PW6 was to the effect that a search was conducted in the house of the 1st and 2nd accused persons and under the staircase going upstairs there is a space where a shoes stand is kept near the wall. The house of the first and second accused persons is a two-storey house has two floors, upstairs and ground floor. During the search downstairs after completing the search upstairs in the bedrooms,

PW3 found a black plastic bag which contained the powder substance with particles Exhibit P11A and P11B. After conducting search and seizure, PW3 filled the certificate of seizure Exhibit P12 which was signed by the first and second accused persons, the two independent witnesses one of them is PW6 and PW3 the seizing officer. It is the contention of the prosecutions that, the testimony of PW3 was corroborated by the testimonies of PW6, DW1 and DW2 who signed the Exhibit P12 to acknowledge the search and seizure of Exhibit P11A and P11B after being found in the house of the 1st and 2nd accused persons on the 23rd day of May 2018. Learned State Attorney submitted that, PW3 and PW6 proved that Exhibit P11A and P11B was found at the place were shoes were kept; the shoes stand and they identifed the Exhibit P11A and P11B was the same exhibit found in the house of the 1st and 2nd accused persons. That the signing of Exhibit P12 certificate of seizure by the first and second accused persons meant that both accused persons agreed on what was filled in the said exhibit as stated in the case of **Song Lei Vs DPP**, Consolidated Criminal Appeal No. 16A of 2016 and No. 16 of 2017, CAT at Mbeya (unreported) at page 20.

On the other hand, it was evidence of the defence by DW1 and corroborated by DW2 that, the search was not conducted in the place where

the shoes stand was kept and they DW1 and DW2 never saw the Exhibit P11A and P11B on the material date, thus the said Exhibit P11A and P11B was not found and seized from their house. They saw it for the first time in court when tendered as exhibit.

Learned Counsel for the accused persons argued that to prove the narcotic drug was found in the house of the first and second accused persons there must be a certificate of seizure prepared under Section 48(2) (c) (vii) of the Act No. 5 of 2015 together with Form No. DCEA 003 of the Act. In this case at hand, the certificate of seizure was admitted and marked Exhibit P12. Though learned Counsel for the accused persons strongly contends that the said Exhibit P12 is not a genuine document and it lacks authenticity; the evidence of PW3 and corroborated by the testimonies of DW1 and DW2 that the items seized from their house are listed on the first page of Exhibit P12, witnessed and signed by the independent witness PW6 and the first and second accused persons. Learned Counsel contends that the said first page of Exhibit P12 lacks the signature of PW3, the second page has no signature of PW3, PW6, DW1 and DW2 and the signature of PW3 is on a separate page.

It is factual the certificate of seizure is a legal document governed by section 48 (2) (c) (vii) of the Drugs Control and Enforcement Act, Cap 95 R.E 2019 and is provided in the Third Schedule to the Act prescribed as Form No. DCEA 003; which is the legal format. The Form No. DCEA 003 has ten prescribed blank spaces to list down the seized items. In this case, the seized items from the search conducted were more than ten (10), they were a total of twenty-eight (28) items, more than the ten prescribed blank spaces provided in the Form No. DCEA 003. The law does not provide on what to be done when items seized were more than ten. The seizing officer applied his ingenuity, turned over the first page and listed the items 11 to 28 and named the said page to be page 2 of Exhibit P12. This Exhibit P12 at page 1 provides blank spaces for the names and signatures of persons searched and of the two witnesses to the search. At page 3 there is a blank space for the seizing officer who conducted the search and seizure to record his name and place his signature. All the persons who were required to sign the said Exhibit P12 signed in the prescribed provided spaces, the two witnesses, the two accused persons and the seizing officer, they each wrote by own handwriting, signed and provided their mobile numbers save for the DCEA officer. It is worthy to note that PW3 did record the following words on the

first page after item 10, I quote '*ORODHA INAENDELEA UKURASA -2-*', to show the continuation of the listed seized items on page 2. Therefore, it is my considered finding the certificate of seizure Exhibit P12 is a genuine document and it is valid before the eyes of the law.

It is the evidence of PW3, PW6, DW1 and DW2 that the certificate of seizure was signed at the place where the search and seizure was conducted, the house of the first and second accused persons in the presence of an independent witness PW6. In the case of **David Athanas@ Makasi** and **Joseph Masima@ Shandoo 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...*'

This is also provided under section 38(3) of the Criminal Procedure Act, [CAP 20 R.E 2019]. In this case the certificate of seizure Exhibit P12 complied with the legal format provided by the law, was signed at the house of the first and second accused persons where search and seizure was conducted in the presence of PW6 an independent witness.

In the case of **Song Lei (supra)** referred to by the learned State Attorney, the Court of Appeal held that;

> *'Moreover, having signed the certificate of seizure which is in our considered view valid, he acknowledged that the horns were actually found in his motor vehicle.'*

In this case, PW3 and PW6, testified that a transparent nylon bag containing a black powder substance Exhibit P9A and P9B collectively was found in the room used by the house girl in the house of the first and second accused persons. Also, DW1 and DW2 testified that a transparent nylon bag containing a black charcoal powder Exhibit P9A and P9B collectively was found in the room of the house girl at their house. The said exhibit was listed on the second page of certificate of seizure Exhibit P12, also the first and second accused persons admitted Exhibits P13, P14 and P15 to have been found in their house and compound are listed on the said second page which is disputed, to have a list of items found in the house of the accused persons. I find the documentary evidence Exhibit P12, the first and second accused persons signed the first page to acknowledge the listed ten (10) items on the first page to be the only items found and seized from their house has no weight, considering that the black powder substance contained in a black plastic bag Exhibit P9A and P9B was alleged by the accused persons to be

charcoal was found in the room of their house girl in the house of the 1st and 2nd accused persons. They had knowledge and knew about this item containing black charcoal used by their house girl. This Exhibit P9A and P9B was listed as item no. 21 in Exhibit P12. The first and second accused persons admitted in their defence case that it was found in their house girl's room. Therefore, Exhibit P12 is a genuine and valid document in this case, both the first and second accused persons signed to acknowledge the search of their house on the 23rd May 2018 and all (28) twenty-eight items listed were seized from their house at Tegeta Nyuki, Masaiti area, Kinondoni District, Dar es Salaam region. This proves a search was conducted and a powder substance contained in a black plastic bag Exhibit P11A and P11B listed in Exhibit P12 as item no. 20 was among the items seized from the house of the first and second accused persons.

The third issue is whether or not the chain of custody was broken. The prosecution evidence established that the Exhibit P11A and P11B collectively was seized at the scene of incident explained by PW3 who labelled the same with the letter 'C' and the said exhibit taken to the DCEA office under the custody and care of PW3 who handed it over to PW4 the Exhibits keeper

through an exhibit register. PW4 testified that she packed, labelled and sealed the said exhibit with the red cello tape with the words 'EVIDENCE' and dated 23/05/2017 in the presence of the first and second accused persons and an independent witness one Frank Niko Alex whose statement was tendered, admitted and marked Exhibit P16 after failure to find him to testify in court. PW4 labelled the Exhibit P11A and P11B by writing the case file no. DCEA/IR/16/2018 and they both signed on the khaki envelope Exhibit P10 where the Exhibit P11A and P11B was packed into. PW4 handed the said exhibit to PW2 who took the same to PW1 for analysis. PW2 handed the Exhibit P11A and P11B to the PW1 using a Sample Submission Form No. DCEA 009 Exhibit P1. After completion of the analysis by PW1, he packed, sealed with GCLA seal cello tape and placed a GCLA official stamp on the Exhibit P10 and handed over to PW2 who took the Exhibit P10 containing Exhibit P11A and P11B collectively and handed it over to PW4 who remained with the exhibit until PW4 handed over the exhibit to PW1 for the purpose of tendering in evidence before this court.

It is the contention by the prosecution that all witnesses who were involved in the chain of custody of Exhibit P11A and P11B testified before the court except one Frank Niko Alex whose statement Exhibit P16

corroborated the testimonies of PW1, PW2, PW3, PW4 on chain of custody and the learned State Attorney referred this court to the case of **Marceline Koivogui Vs Republic,** Criminal Appeal No. 469 of 2017, CAT at Dar es Salaam (unreported) at page 35. In this cited case, the Court of Appeal held on the importance of a witness to testify in respect of chain of custody. And in the case at hand all witnesses who testified to prove the chain of custody of Exhibit P11A and P11B are credible witnesses and there is no reason not to believe their testimonies as held in the case of **Marceline Koivogui Vs. Republic (Supra)** at pages 17, 18 and 35. The testimonies of PW1, PW2, PW3, PW4 were coherent and corroborated by the testimonies of Exhibit P16, DW1 and DW2.

On the other hand, the Defence evidence contends that DW1 and DW2 did not witness the packing of Exhibit P11A and P11B which was done by PW4 in the presence of Frank Niko Alex. Also, the learned Counsel for the accused persons submitted that in the case of **Zainabu d/o Nassoro@ Zena Vs Republic,** 2017 Tanganyika Law Society Law Reports at page 83, the Court of Appeal emphasized the importance of chronological documentation on the movement of an exhibit must be shown from the time seized until tendered before the court. Further, learned Counsel for the

accused persons submitted that there is no evidence of handing over of Exhibit P11A and P11B from PW3 handed over to PW4. That there is no evidence showing PW4 handed over the said exhibit to PW2 who took it to the Government Chemist PW1 for analysis and finally there is no evidence showing the said exhibit moved from PW1 to PW2 to PW4 after being analyzed by the Government Chemist. Learned Counsel for first and second accused persons concluded that the chain of custody of Exhibit P11A and P11B collectively was broken, there is no proof that the narcotic drug seized by PW3 at the house of the accused persons is the same exhibit handed over to PW4 SP. Neema and is the same, which was handed over to PW2 and later to PW1.

In determination of this issue it is important to note the principle of chain of custody was well established in the case of **Paulo Maduka & Four Others Vs the Republic,** Criminal Appeal No. 110 of 2007, CAT at Dodoma (Unreported), where the principle emphasized on the chronological documentation of an exhibit from time of seizure to the time the same is tendered before the court. However, the principle has developed due to the circumstances of the cases on items which cannot be changed easily and consideration of oral evidence in explaining chain of custody when the court

regards all witnesses on the matter are credible witnesses and circumstances show there is no possibility at any point in time the exhibit in question has been tampered with.

In the case of **Abdallah Rajabu Mwalimu Vs. Republic,** Criminal Appeal No. 367 of 2017, CAT at Dar es Salaam (Unreported), the Court of Appeal stated that;

> *'.....as rightly submitted by Ms. Mkunde, even in the absence of paper documentation on how the pellets were handled from the time of arrest until when they were tendered in court, the oral evidence of witnesses who described how the pellets were handled from arrest to the time the same were tendered in court was sufficient proof. We reiterate the position we stated in our decision in* ***Kadiria Kimaro*** *(supra) concerning the importance of oral evidence in explaining the chain of custody depending on the circumstances like the one obtaining in this* case.'

Also, in the case of **Abas Kondo Gede Vs Republic,** Criminal Appeal No. 472 of 2017, CAT at Dar es Salaam (Unreported), the Court of Appeal explained that;

> *'It is also noted that the desirable method of establishing the chain of custody is documentation of the chronology of events in the handling of exhibit from seizure, control, transfer until tendering in court at the*

trial as stated in ***Paulo Maduka and 4 Others*** *(supra) which was followed in other decisions...'*

The Court of Appeal expounded further that;

'However, documentation will not always be the only requirement in dealing with exhibits. Thus, the authenticity of exhibit and its handling will not fail the test merely because there was no documentation. It follows that depending on the circumstances of every particular case, especially where the tempering of exhibits is not easy oral evidence will be taken to be credible in establishing the chain of custody concerning the handling of exhibits.'

In this case, the prosecution produced four witnesses PW1, PW2, PW3 and PW4 and tendered three documentary exhibits namely Exhibit P1, Exhibit P12 and Exhibit P16 to explain the chain of custody of Exhibit P11A and P11B collectively. It is my considered opinion that the absence of an exhibit register has not prejudice the rights of the first and second accused persons in this case. The witnesses PW1, PW2, PW3 and PW4 testified before this court to prove the chain of custody of Exhibit P11A and P11B, they are credible witnesses and there is no reason not to believe them. The Exhibit P10 the envelope used to pack in Exhibit P11A and P11B has the names and signatures of the 1st and 2nd accused person who signed to acknowledge that both of them witnessed the packing, labelling and sealing

of Exhibit P11A and P11B. Though the exhibit register was not tendered in evidence, it is not fatal because the persons who handled the exhibit were paraded before the court and testified to that effect.

I accord weight to the prosecution evidence and submission with regard to chain of custody of Exhibit P11A and P11 B collectively, therefore the third issue is answered in the affirmative. The chain of custody of Exhibit P11A and P11B collectively the narcotic drug contained in the black nylon bag was maintained and not broken or tampered with.

The fourth issue is whether the Defence case raised any reasonable doubt (s) against the prosecution case. It is the evidence of DW1 that on 23/05/2018 at night between 2.00am and 3.00 am the police officers knocked on his door of his house, he went to open the door armed with his BROWNING pistol. That after the police officers identified themselves, the DW1 went back to his bedroom to collect the keys of the door. After opening the kitchen door, the said police officers placed DW1 under arrest at the kitchen door, his wife the second accused together with his children Hanifu Ayubu Kiboko aged 20 years, Zahra Ayubu Kiboko aged 29 years and the house girl Zulfa Juma aged 20 years, while one John Mhehe aged more than 30 years who was outside the main house in the compound. DW1 testified

that he was informed that the officers want to search his house for narcotic drugs. The search was conducted in his house in the presence of *'Mjumbe'* one Christina Macha and an independent witness Raymond Kimambo. The search was conducted in the presence of the DW1 and DW2, in their bedroom, the bedrooms of their children and the house girl which was on the ground floor. In the bedroom of DW1 and second accused person were found and seized one pistol, its case and magazine, four ATM bank cards, two mobile phones make NOKIA and files. The bank ATM cards two of them were in the name of Kiboko Investments Ltd, one in the name of HANIZZ HOTEL and the other one in the name of PILLY MOHAMED KIBOKO, his wife the second accused. Among the items seized was a transparent nylon packet containing a black' chenga chenga' substance Exhibit P9A and P9B from the bedroom of the house girl. After the search, PW3 listed the things seized on the Form and DW1 signed on the 1st page of the said Form Exhibit P12 and was taken to the DCEA offices. DW1 stated that when he signed the said Exhibit P12 the list of items at page 2 was not written and Exhibit P13, P14 and P15 were at his residence when he was taken to the DCEA offices. DW1 also stated that the Exhibit P11A and P11B was not found in his house, has

never seen it before and he did not see any police officer enter his house with the Exhibit P11A and P11B.

DW2 testified that the 1st accused person is her husband. That on the 23/05/2018 between 2.00 am and 3.00 am her husband DW1 woke her and he went downstairs to open the door, while she was in her bedroom two police officers came to her bedroom and took her downstairs where the first accused person DW1 was and placed where the first accused person was seated. That other three officers went to take their children who were in their rooms upstairs and the house girl who was in her room downstairs. After all were placed in the kitchen, the police officers went to call the 'Mjumbe' Christina Macha and Raymond Kimambo PW6 the independent witness. DW2 stated that after arrival of PW6 the police officers commenced to conduct search starting in their bedroom where different items which are not connected to this case were seized, went to the children's and house girl's bedrooms. In the house girl's bedroom, the charcoal powder substance in a nylon packet Exhibit P9A and P9B was found and seized. The search went on at the kitchen where there was nothing found after that they all went outside at the verandah where the certificate of seizure Exhibit P12 was filled by listing the items found in her house and she signed on it after

being shown one page where the items were listed and her husband also signed. DW2 stated that Exhibit P11A and P11B was not found in their house and she has never seen it before. Also, DW2 stated that the Exhibits P13, P14 and P15 were in their compound during their arrest.

It is the contention of the learned Counsel for the accused persons in his final submission that, there is no evidence adduced by the prosecution to show that the first and second accused persons in this case had common intention to commit an offence charged with and in showing there was common intention must be shown that there was conspiracy to commit an offence, in this case the prosecution failed to show this.

Learned Counsel further stated that the prosecution evidence through PW3 and PW6 shows that the Exhibit P11A and P11B was found at the open space on the shoes stand used by all persons living in the said house. According to record the house had more than five adults and there is no evidence to show that the accused persons had knowledge on the existence of Exhibit P11A and P11B at the said place and the same should have been proved by the prosecution. To support his contention, the learned Counsel cited the persuasive case of **Mary Hutten Martin or Lees vs Her Majesty's Advocate** [2012] HCJAC 57 Appeal No. XC40/11.

On the other hand, the learned State Attorney Msemo for the Republic submitted that the prosecution has proven its case beyond reasonable doubt, that the Defence case did not raise any reasonable doubt against the prosecution case since the accused persons came with a general denial as their defence. That this general denial alleges that no search was conducted under the stairs at the shoes stand. Learned State Attorney further submitted that while PW3 and PW6 were testifying on where the Exhibit P11A and P11B was found they were not cross examined to suggest that the said place was not searched, therefore the Defence evidence raised is an afterthought. To support his contention, learned State Attorney referred the court to the case of **Athanas Ngomai Vs Jamhuri**, Criminal Appeal No. 77 of 2018, CAT at Dar es Salaam(unreported) at pages 18, 19 and 25.

It is an undisputed fact PW3 conducted search in the house of the first and second accused persons in the presence of PW6 the independent witness and a 'Mjumbe' and immediate after search the items were seized and listed in the certificate of seizure Exhibit P12 which was signed by the PW3, PW6, DW1 and DW2 to acknowledge the search and seizure of the items from their house, this led the court to arrive at the opinion that the search and seizure of exhibits was properly done and the Exhibit P12 is valid

as provided for in the Third Schedule to the Drugs Control and Enforcement Act No. 5 of 2015 as amended. The legal format of the said Form DCEA 003 certificate of seizure provides for the witnesses and the persons searched to record their names and signatures on the first page and on the second page is where the seizure officer fills his name, signature and date. However, Exhibit P12 had a continuation page 2 on the overleaf of page 1 and named page 2 by the seizure officer to list down the items 11 to 28.

According to the evidence and submission by the Learned Counsel for accused persons there were other adults who were living in the house and were not arrested or interrogated in connection to the existence of Exhibit P11A and P11B. It is undisputed the house which was searched and the Exhibit P11A and P11B found belongs to the first and second accused persons.

From the evidence it is observed that the 1st and 2nd accused persons are actual occupiers of the house searched and the Exhibit P11A and P11B was retrieved. The evidence shows the 1st and 2nd accused persons had control over the whole house as stated in the evidence of DW1 and DW2 that they kept the keys of the house in their bedroom, no one could enter or exit the house without the said keys. The Court of Appeal in the case of

Song Lei (supra) underscores the position held in the case of **Nurdin Akasha @ Habab Vs Republic,** (1995) TLR 227 where the Court of Appeal held that,

> *'Whether the drugs were hidden in the store by the appellant himself or by another person with the appellant's approval, the appellant was in possession of those drugs.'*

In this case PW3 was working on the intelligence information received that the first and second accused persons were involved in trafficking of narcotic drugs and on the material date it was alleged that the first and second accused persons had narcotic drugs in their house. Both first and second accused persons vehemently denied that the Exhibit P11A and P11B was found at the shoes stand under the stairs as testified by PW3 and PW6, they maintained that no search was conducted in the said area. This shows that the first and second accused persons had knowledge of the existence of Exhibit P11A and P11B and they exercised control over the said narcotic drug. Another Exhibit P9A and 9B found in the room of their house girl in their presence was a transparent nylon packet containing a black 'chenga chenga' substance, which the first and second accused person knew about it and acknowledged it was black charcoal used by their house girl.

The Exhibit P11A and P11B was found in their presence and the inference drawn by this court is the first and second accused persons were aware and knew the Exhibit P11A and P11B was hidden at the shoes stand where the said exhibit was retrieved by PW3. The fact there were other adults; two children of the first and second accused and house girl not arrested or interrogated on the presence of the Exhibit P11A and P11B is a minor omission which cannot cause injustice to the accused persons with consideration that there was prior information from the informant of the involvement of first and second accused persons as stated earlier by PW3. The case of **Mary Hutten Martin or Lees** (Supra) referred to the court by the Learned Counsel is merely persuasive and the circumstances are distinguishable from the case at hand. In the case cited of **Mary Hutten Martin or Lees (Supra),** explained that the husband who was not charged was the one who reacted and said there were drugs in the freezer in the kitchen while the wife the appellant who was charged failed to respond when the husband responded and said that there were drugs in the house. Hence these facts are distinguishable from this case.

Furthermore, both first and second accused persons stated that the place under the stairs at the shoes stand was not searched, the Exhibit P11A and P11B collectively was not retrieved from the said place and none of the accused persons ever saw the said exhibit. However, the evidence strongly shows both accused persons stated that they signed the certificate of seizure Exhibit P12 to acknowledge items listed therein were seized from their house. The Exhibit P11A and 11B collectively listed in the Exhibit P12 and PW3 and PW6 testified to that effect. The evidence of DW1 and DW2 corroborate that, they signed the first page of Exhibit P12 but did not sign the pages 2 and 3 of Exhibit P12. In the case of **Felix Lucas Kisinyila Vs Republic,** Criminal Appeal No. 129 of 2002, CAT at Dar es Salaam (unreported), the Court of Appeal underscored what was stated in the case of **Kombo bin Khamis v. The Crown** 8 ZLR 122 and in the case of **Salum Yusuf Lilundi v. R,** Criminal Appeal No. 26 of 1984, CAT at Mtwara Registry (unreported), where the Court of Appeal explained that;

> *'Lies of an accused person, appellant here, may corroborate the prosecution case.'*

In the instant case the first and second accused persons testified on the search and seizure conducted in their house and the Exhibit P11A and

P11B in question was listed in Exhibit P12 on the 2nd page, which was signed by both accused persons and the relevance of signing the said Exhibit P12 is to acknowledge what has been listed are items seized from their house. The acknowledgement of the first and second accused persons that the spring files and three motor vehicles which were at their compound were seized from their house and listed in Exhibit P12, one spring file item no. 11, motor vehicles items 25, 26, 27 and the 'kitabu cha silaha' no. 00082843 item no. 28. But the first and second accused persons deny to have seen Exhibit P11A and P11B, was not found in their house, not listed in Exhibit P12 and did not sign it. The first accused has prayed to the court to return back the three motor vehicles listed on page 2 of Exhibit P12 for the reason that they belong to Kiboko Investments Ltd. The first and second accused confirmed before the court that the Exhibit P9A and 9B which is item 20 on the Exhibit P12 was not a narcotic drug but a black substance charcoal used by their house girl. It is not in dispute that the said exhibit was found not to be narcotic drug. Therefore, it is my considered opinion that this part of evidence has strengthen the prosecution case.

Another point to note as pointed earlier PW3 and PW6 testified on the search under the stairs at the shoes stand, where the Exhibit P11A and P11B

was found and seized, however the two witnesses were not cross examined by the Defence to establish the place alleged that the said Exhibit was found, that it was not searched and the said exhibit was not found there. No questions were raised by the Defence during cross examination of PW3 and PW6 on this vital issue. In the case of **Martin Masara Vs. The Republic,** Criminal Appeal No. 428 of 2016, CAT at Sumbawanga (unreported), the Court of Appeal held that,

'It is trite law in this jurisdiction founded upon prudence that failure to cross-examine on a vital point, ordinarily implies the acceptance of the truth of the witness evidence; and any alarm to the contrary is taken as an afterthought if raised thereafter.'

From the binding principle laid by the Court of Appeal of Tanzania, it is my considered opinion that in this case the 1st and 2nd accused persons accepted the fact that the Exhibit P11A and P11B was seized in the search at the shoes stand where it was placed under the stairs of the house of the first and second accused persons. Therefore, it is my opinion the Defence evidence did not raise any reasonable doubt against the prosecution case but corroborated the prosecution case. The Defence raised by the first and second accused persons is an afterthought.

In this regard I am of the opinion the prosecution case has proved beyond reasonable doubt against the 1st and 2nd accused persons in this case.

In the upshot, the cumulative evidence of the prosecution has proved beyond reasonable doubt the offence charged against the first and second accused persons. Consequently, I find the first and second accused persons guilty as charged and I convict them for trafficking in narcotic drug namely heroin hydrochloride under section 15(1)(a) of the Drugs Control and Enforcement Act No. 5 of 2015 read together with Paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act, Cap 200 R.E 2002 as amended by Act No. 3 of 2016.

L. L. Mashaka
Judge
18/12/2020

SENTENCE

Whereas 1st and 2nd accused persons were found guilty and convicted with the offence trafficking in narcotic drugs contrary to section 15(1) (a) of the Drug Control and Enforcement Act No. 5 of 2015, read together with Paragraph 23 of the First Schedule of the Economic and Organized Crime

Control Act [CAP 200 R.E 2002] as amended by the Written Laws Miscellaneous Amendment Act No. 3 of 2016.

Before sentencing, on previous record of conviction learned State Attorney Msemo for the Republic submitted that the first and second accused persons are first offenders hence have no criminal record. He prayed to the court to heavily sentence the accused persons for it to be a deterrent to the 1st and 2nd accused persons and others who involve themselves in trafficking narcotic drugs to stop indulging in trafficking narcotic drugs. That the narcotic drugs used by young men and women affects them and erode the 'nguvu kazi' expected to build this nation. That the money earned from trafficking narcotic drugs being proceeds of crime affects the national economy.

I pray to refer the court to section 15(1) (a) of Act No. 5 of 2015 read together with section 60(2) of Cap 200 to impose the maximum sentence of 30 years imprisonment to the first and second accused persons.

In mitigation learned Counsel Nehemiah Nkoko for the 1st and 2nd accused persons prayed for a lenient sentence for the accused persons that they are parents and since they were arrested their children have been living

alone. That their last born is 14 years old and needs care of both parents. That the 1st and 2nd accused persons are first offenders and have no criminal record as submitted by SA for the Republic That they have been carrying on a legal business the hotel business and the company they had. From the evidence adduced before the court it has not been shown that their business was ran by the proceeds of crime.

Learned Counsel prayed to the court to consider the case of **Tabu Fikwa vs. Republic** (1988) TLR p. 3 and 4 where Hon. Samatta J,(as he then was) considered the principles for sentencing. That a sentence should heal the society, the convict be reformed and become a good example to the society. Learned Counsel for the accused persons prayed to the court to consider the provisions of Cap 200 applied to determine this case.

In Allocutus, the 1st accused person prayed to the court for a lenient sentence because he does not involve himself in trafficking narcotic drugs. That he is a first offender. The second accused submitted that she is a parent, and has not seen her children since she was arrested and they live on their own. She prays for a lenient sentence being a first offender and

that will not affect her and her children aged 27 years, 18 years and 14 years.

I heard the prayer by learned State Attorney for Republic that a stiff punishment be imposed on the 1st and 2nd accused person because of the nature or offence trafficking in narcotic drugs. I have also heard the mitigation by learned Counsel for the accused persons and allocutus by 1st and 2nd accused persons. However, the case of **Tabu Fikwa vs. Republic** (supra) cited by Learned Counsel for the accused persons, is distinguishable to the case at hand; in the cited case the accused person pleaded guilty, while in this case at hand the 1st and 2nd accused persons plead not guilty and the case went to full trial.

I have considered the mitigation factors advanced and I am guided by the relevant legislations; the Drugs Control and Enforcement Act, Cap 95 R.E 2019 and the Economic and Organized Crime Control Act [CAP 200 R.E 2019] on the punishment provided for an offence committed under section 15 (1) (a) of Cap 95 R.E 2019 by the 1st and 2nd accused persons.

Section 15 (1) (a) of Cap 95 R.E 2019 provided that;

(1) Any person who

(a) trafficks in narcotic drug or psychotropic substance;

(b) N/A..,

(c) N/A..,

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".

The court has considered the time the 1st and 2nd accused persons have spent in remand since they were arrested on the 23rd May 2018 until today. In the case of **Livinus Uzo Chime Ajana V Republic,** Criminal Appeal No. 13 of 2018, Court of Appeal of Tanzania at Dar es Salaaam (unreported), the Court of Appeal stated that;

*'On our part, we cannot be precise more than reproducing what we stated in **Vuyo Jack Vs the Director of Public Prosecutions,** Criminal Appeal No. 334 of 2016 (unreported), where on being encountered with an akin situation, we stated thus: -*

....since the appellant was at the time arrest not yet convicted, bearing in mind the 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 bars before being found guilty, convicted and sentenced, would have been a mitigating factor in imposing the sentence but not (as erroneously imposed by the trial Judge) to commence from the time of arrest as erroneously imposed by the trial Judge.'

In this case at hand the 1st and 2nd accused persons were arrested two years ago and spent all two years behind bars, this is regarded as one of the mitigating factors for this court to determine and impose a sentence to the 1st and 2nd accused persons. Bearing in mind that narcotic drug poses great danger to the society and affects the economy of the country and in consideration that the 1st and 2nd accused persons are first offenders, have a family which is dependent on them being father and mother, I hereby sentence the 1st and 2nd accused persons to each serve 20 (twenty) years imprisonment.

The first and second accused persons are found guilty, convicted and sentenced.

HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION

L. L. Mashaka
Judge
18/12/2020

Right of appeal fully explained to both 1st and 2nd accused persons and the Republic.

L. L. Mashaka
Judge
18/12/2020

The sentence was read and delivered in the presence of Mr. Salim Msemo, State Attorney and Mr. Constantine Kakula, State Attorney for the Republic, the first and second accused persons and Mr. Nehemiah Nkoko, learned Counsel for the first and second accused persons in open court today the 18th day of December, 2020.

L. L. Mashaka
Judge
18/12/2020

ORDER:

1. The heroin hydrochloride Exhibit P11A and P11B weighing 251.25 grams be destroyed as provided under Regulation 14 of the Drugs Control and Enforcement (General) Regulations 2016, GN No. 173 of 2016.

2. The items listed on the Exhibit P12 namely Exhibit P4, P5A & 5B, P6, P7A & 7B, P8, P9A & 9B, P13, P14 and P15 be returned to the 1st and 2nd accused persons, they are not connected to this case.

L. L. Mashaka
Judge
18/12/2020