

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

ECONOMIC CASE NO. 04 OF 2019

*(Originating from Tanga District Court,
Economic Case No.04 of 2018)*

THE REPUBLIC

Versus

MUSSA s/o HATIBU SEMBE

JUDGMENT

Date of last order: 02/07/2020

Date of Judgment: 06/07/2020

Mashaka, J.

The accused person Mussa Hatibu Sembe stands charged with one offence of trafficking in narcotic drug contrary to section 15(1)(a) and (3)(1)(i) of the Drug Control and Enforcement Act No. 5 of 2015 as amended and read together with Paragraph 23 of the First Schedule to and sections 56(1) & 60(2) of the Economic and Organized Crime Control Act [hereinafter referred as EOCC] [Cap, 200 RE 2002] as amended. The particulars of offence allege that, on the 20th day of November 2018, at Street No. 12, within the City, District and Region of Tanga the accused person was found trafficking in narcotics drugs to wit; 351.99 grams of heroin hydrochloride.

I recognize the assistance of members at the bar. The prosecution was represented by Ms. Donata Kazungu, learned State Attorney and Mr.

Waziri Magumbo, learned State Attorney. The accused throughout enjoyed the services of Mr. Tumaini Omari Bakari, learned Counsel and Mr. Omari Mambosasa, learned Counsel. I extend my appreciation to the team of members of the bar for the commitment, hard work in representing the interests of your clients, dedication and cooperation for the pursuit of justice in this case.

On the 23rd day of June 2020 the accused person entered his respective plea to the information filed. In his plea the accused person denied the charge and a plea of not guilty was entered. On the same day, a preliminary hearing was conducted and the facts of the case were read over to the accused person. The accused admitted his names, his arrest and arraignment before the court.

The brief facts of the case are that the accused Mussa Hatibu Sembe stands charged with trafficking in narcotic drug namely heroin hydrochloride. It is alleged that, on the 20th day of November 2018, within the City, District and Region of Tanga at the 12th Street at the old bus stand, the police officers successfully arrested the accused person Mussa Hatibu Sembe after being informed by an informant that the accused person was carrying narcotic drugs taking them to DSM. The accused was searched together with the nylon bag he was holding in his hands. Inside the nylon bag there were red rubber sneakers and in these red rubber sneakers there were two nylon parcels, which were suspected to be narcotic drugs.

After the search on the accused and the two nylon parcels found; a certificate of seizure was prepared and signed by the accused person. The accused person and the two nylon parcels, which were seized were taken to

the Police Station Chumbageni. The suspected narcotic drugs were sent to the Government Chemist Dar es Salaam for analysis. A report issued by the Government Chemist confirmed it was narcotic drugs namely heroin hydrochloride weighing 351.99 grams.

The prosecution paraded six witnesses in their bid to prove their case. The witnesses were PW1 Joseph J. Ntiba, PW2 H.6499 D/C Japhet, PW3 G.4488 D/C Simai, PW4 SP. Oscar Joshua Ngumbulu, PW5 F.6698 D/CPL Godfrey and PW6 F7299 D/CPL Andelile. A total of eight (8) exhibits were tendered and admitted namely, the Government Chemist laboratory report Form No. DCEA 009 dated 27/12/2018 Exhibit P1, two brown envelopes Exhibit P2 and Exhibit P3, 2 (two) parcels containing narcotic drug namely heroin hydrochloride Exhibit P4 (a) and (b) collectively, red sneakers "converse all-star" Exhibit P5, bus ticket Exhibit P6 dated 20/11/2018, travelling passport Exhibit P7 and a certificate of seizure dated 20/11/2018 Exhibit P8.

In his testimony, PW1 Joseph J. Ntiba testified that on the 27th day of November 2018 he was in his office at the Government Chemist Laboratory Authority (hereinafter referred as GCLA) doing his duties. He received the exhibits which was a brown envelope together with form No. DCEA 001 and PF180 from D/C Japhet (PW2) for laboratory analysis. He inspected the form No. DCEA 001 and PF 180 to satisfy himself that what was written in the forms were correct and the same as what is in the sealed envelope. On the form No. DCEA 001 and PF180, it was filled 2 (two) '*vifurushis*' parcels which contained a powder suspected to be narcotic drugs. He opened the sealed brown envelope and inside there was another brown envelope inside it there were these 2 (two) parcels suspected to contain narcotic drugs.

Having confirmed, PW1 registered the Laboratory No. 3377/2018 which was given by the reception office to PW2. After the registration he proceeded to do a preliminary test in the presence of PW2. He weighed the powder substance in the 2(two) parcels together, and both the two parcels containing the powder weighed 351.99 grams. He took a small sample from each parcel and placed on a spot tile, each on its own space for testing. He took a reagent called MECKE and placed few drops on the spaces where he placed the powder. Immediately after placing the reagent on the powder placed on the spot tile, the colour changed to green. That this signifies the sample powder which was placed on the spot tile was either heroin hydrochloride or morphine. He explained the changes of colour to PW2.

PW1 then took some more sample from the same 2(two) parcels and closed by tying the two (2) parcels after taking the second sample, placed them in the brown envelope and returned this envelope into the brown envelope which had the laboratory number on top of it. PW1 sealed this brown envelope which was admitted as Exhibit P2 by a GCLA seal cello tape, he signed on the part he sealed and stamped the official stamp of the GCLA. He handed over the brown envelope to PW2 for custody on the 27/11/2018 after he completed the preliminary test.

PW 1 testified further that he took the second samples for purposes of conducting a confirmatory test with a machine known as liquid chromatography mass spectrometer to know exactly what type of narcotic drugs is the powder. That the said confirmatory test result proved the specimen powder taken from the two parcels was heroin hydrochloride, which was admitted by the Court as Exhibit P4 (a) and (b) collectively. PW1 prepared a report by filling the Form no. DCEA 009 dated 27/12/2018

tendered by PW1 before this court and the same admitted and marked Exhibit P1. The report was complete after being approved by the Chief Government Chemist Dr. Fidelice M.S. Mafumiko.

PW1 further explained that the law which guides on the procedure is the Act No.8 of 2016 and for receiving drugs are guided by the Drug Control and Enforcement Act No.5 of 2015 as amended in 2017. That the brown envelope he received from the police officer had an IR number and it had a Police red seal cello tape and inside there was another brown envelope which was admitted as Exhibit P3, it had no signs or marks. PW1 stated that the difference between the heroin hydrochloride contained in Exhibit P4 (a) &(b), is that when it was brought to him for analysis, it was in powder form while today it has some solid form "*mabonge bongé*".

In his testimony PW2 H.6499 D/C Japhet, testified that, on the 27/11/2018 he was assigned a task by OC CID SP. Oscar Joshua Ngumbulu PW4 of Tanga District, to take an exhibit to the Chief Government Chemist in Dar es Salaam for analysis. PW2 received the exhibit a sealed brown envelope from the Exhibit Keeper G.4488 D/C Simai PW3 through an Exhibit Register which PW2 signed. That the said exhibit had been sealed by a red seal cello tape and had an Investigation register number TAN/IR/3535/2018. PW2 was given the exhibit together with form no. DCEA 001 and PF 18 and travelled to Dar es Salaam to the office of Chief Government Chemist using a police motor vehicle.

PW2 explained that, he commenced his journey at 2.00 am at night to Dar es Salaam and arrived at the office of the Chief Government Chemist at 8.00 am in the morning. PW2 went to the reception and was given a

Laboratory No.3377/2018. He was instructed to go to the Laboratory where he met one Joseph Ntiba PW1. PW2 gave PW1 the form no. DCEA 001 together with PF 180 together with the exhibit for inspection and to conduct analysis. The Government Chemist PW1 received the forms, PF18 and the exhibit which was a brown envelope. PW1 opened the envelope, inside this brown envelope Exhibit P2 there was another brown envelope Exhibit P3 inside, which inside it contained the 2(two)) 'vifurushis' parcels Exhibit P4 (a) and (b) nylon in texture and these nylon parcels contained a powder brownish in colour, which was for analysis. After being satisfied with what he saw is the same as the information on the form and PF18, PW1 registered the Lab. No. 3377/2018 on the envelope which carried the exhibits for analysis. That before taking samples for analysis, PW1 weighed the 2(two) parcels together and the weight was 351.99 grams. Then PW1 took samples from each of the 2 parcels to conduct preliminary test in the presence of PW2. That PW1 mixed the samples with the special water which was white changed colour and became green. PW1 informed PW2 that the change of colour indicates the sample could be heroin. Then PW1 took more samples from the exhibit for more tests. After that PW1 closed the two nylon parcels and repacked them into the brown envelope Exhibit P3 which had no writings on it and then repacked into the big brown envelope Exhibit P2 which had the Lab. Number 3377/2018 and the red seal of the Police.

PW2 described that, PW1 sealed the big brown envelope by a white seal cello tape, PW1 placed his signature on this white seal cello tape and stamped the official stamp of the Chief Government Chemist. That PW1 handed over the said envelope to PW2 who took the Exhibits P2, P3 and P4(a) and (b) and returned to Chumbageni Police Station Tanga where he

handed over the exhibit to the Exhibit Keeper PW3, through the Occurrence Book (OB) PF 51 according to the police procedure for handing over of exhibits. PW2 identified the Exhibit P2 and Exhibit P4(a) and (b).

PW3 G.4488 D/C Simai, in his testimony stated that he is an Exhibit Keeper at the Police Station Chumbageni. That on the 20/11/2018, he was at his work station at Police Station Chumbageni, when the OC CID ASP. Oscar Joshua Ngumbulu handed over to him an exhibit. The exhibit was in relation to an offence of trafficking in suspected narcotic drugs and the case file number was TAN/IR/3535/2018. The exhibits were handed to him through PF 51 the Occurrence Book (OB) which is also known as the Station Diary. The items handed over to him were in the bag it had the colour like milk; inside the bag there was a passport, in the name of Mussa Hatibu Sembe number AB 651256, a pair of shoes red in colour make "converse all star," inside the left shoe there was a powder substance suspected to be narcotic drugs. PW3 described that the said powder substance was in a black nylon bag, that if you remove the black nylon bag inside there was a khaki paper and inside it there was another black bag and inside it there was a white bag in which, there were two parcels packed in the one bag. There was also a bus ticket from Tayassar Coach dated 20/11/2018 in the name of Mussa Hatibu. PW3 received these exhibits from PW4 and kept them under custody in the Exhibit room. That in the Exhibit room, there is a book PF16 the Exhibits Register, which he registered the exhibits received into the PF16 and kept in custody until the 21/11/2018. That on the 21/11/2018, the investigator of the case D/CPL Godfrey PW5 requested for the exhibits, which were for the offence of being found trafficking narcotic drugs case file no. TAN/IR/3535/2018 for the purpose of packing the suspected narcotic drugs

and to be sent to the Chief Government Chemist. PW3 handed over the exhibit through Exhibit Register PF 16 to D/CPL Godfrey PW5. After D/CPL Godfrey completed the packing of the exhibit on the same day 21/11/2018, he handed over the exhibit to PW3 through PF 51 which is the Occurrence Book (OB) also known as Station Diary.

PW3 further stated that, when D/CPL Godfrey PW5 handed over the exhibits, there were two envelopes one of them was a big envelope in which the suspected narcotic drugs were packed in it, it was sealed by a red seal cello tape and written the IR Number TAN/IR/3535/2018 on top of the envelope. In the second smaller envelope, inside there were two forms, namely PF 180 a request by the Police to the Chief Government Chemist to conduct an analysis and form no. DCEA 001 for handing over the exhibit to the Chief Government Chemist. PW3 received the said exhibits and kept in custody until the 27/11/2018 when he handed over to PW2 the envelope which had the suspected narcotic drugs for the purpose of taking to the Chief Government Chemist in Dar es Salaam. PW3 also handed over to PW2 the smaller envelope, had inside the form no. DCEA 001, through PF 16.

On the same date 27/11/2018 during evening hours, PW2 handed back to him the exhibit which he had taken to the Chief Government Chemist, through PF 51 and he registered the exhibit in Exhibits Register PF 16. When PW2 returned the exhibit and handed over to PW3, on the said envelope there was a signature of the Government Chemist, a Lab. No. 3377/2018, also an official stamp of the Chief Government Chemist. There was also a white seal cello tape of the GCLA. PW3 kept the envelope exhibit in custody until the 25/06/2020, when he handed over the exhibit to the State Attorney for the exhibit to be used in court as evidence. PW3 identified Exhibit P2 and

Exhibit P4(a) &(b) collectively. To support his testimony, PW3 tendered the red sneakers labeled "converse all-star", bus ticket in the name of Musa Hatibu dated 20/11/2018 and a passport No. AB 651256 in the name of Mussa Hatibu Sembe which were admitted as Exhibits P5, P6 and P7 respectively.

In his testimony, PW4 SP. Oscar Joshua Ngumbulu the OC CID of Chumbageni Police Station stated that on the 20/11/2018, afternoon hours he was at his work station monitoring and supervising the parade exercise of police officers at the Chumbageni Police Station grounds. That he received information from an informant that at the 12th Street along the old bus stand for "*daladalas*" and other buses here in Tanga, there is a male person intending to travel to Dar es Salaam is carrying narcotic drugs inside a bag he was holding in his hands. PW4 was given a description that he is male, tall, dark in complexion, wearing jeans and he was carrying a bag cream in colour.

PW4 took it as an urgent information decided to leave the Police Station accompanied with D/CPL. Andelile and drove to the 12th Street. When PW4 reached there, opposite the office of Tayassar Coach booking office, PW4 saw a male person with the description that was given to him holding a bag cream in colour. PW4 went to the male person touched his shoulder and introduced himself as ASP. Oscar Joshua Ngumbulu and the male person introduce himself as Mussa Hatibu Sembe. PW4 informed him that he suspects him to be carrying narcotic drugs and wants to search him. The male person stated that he was not carrying narcotic drugs.

PW4 instructed D/CPL. Andelile to look for an independent witness to assist to witness the search but he could not find a person who was ready to witness since people there were travelers they did not cooperate. PW4 decided to search the accused person in the presence of D/CPL. Andelile in order not to waste time of the accused person who was travelling and wanted to satisfy himself if the accused person is not carrying the said narcotic drugs to let him continue with his trip. PW4 took the bag which the accused was holding and inside there were red sneakers make converse all star, inside the left foot of the red sneaker, he found one 'kifurushi' parcel covered by a khaki paper. After opening the khaki paper, PW4 found a black bag. PW4 opened it and found another black bag again. After opening the second black bag, he found two parcels in a nylon soft bag.

He also found clothes in the said bag; one pair of pants, a shirt and a t-shirt. After finding the two parcels containing a powder substance brownish in colour, he took the accused person and the bag containing the narcotic drugs to the Police Station at Chumbageni. At the Police Station, PW4 in his interrogation of the suspect confessed that he was trafficking narcotic drugs, that he had travelled to Mombasa to sell them, but could not successful and he returned to Tanzania through Horohoro border on the 19/11/2018. That he was travelling to Dar-es-Salaam on transit to Zambia to go and sell the narcotic drugs. That the accused confessed before PW4 and in the presence of D/CPL. Andelile.

PW4 further stated that he filled the certificate of seizure in the presence of D/CPL. Andelile and the accused person and both signed it when he reached the Police Station Chumbageni and not at the bus stand where he arrested the accused person. PW4 identified the accused in the dock as

the male person he arrested on the material date. PW4 also identified Exhibits P5 and P4(a) & (b) respectively.

PW4 then registered the case at the charge room office (CRO) case no. TAN/IR/3535/2018. He searched the accused person in order for him to be placed in police lock up. On conducting the search, PW4 found the accused with a passport Exhibit P7; it had an Immigration stamp dated 19/11/2018 entering Tanzania from Mombasa Kenya at the Horohoro border. PW4 also found a bus ticket Exhibit P6 issued by Tayassar Bus company showing that he was travelling on the 20/11/2018 to Dar es Salaam. PW4 found these items in the right side of the accused's front pocket of his jeans. A Prisoner Property Register (PPR) was filled in respect of these two exhibits, which later were handed over to PW3 through PF 51 the Station Diary or Occurrence Book (OB) to keep in custody in the Exhibit room on the 20/11/2018. PW4 identified Exhibits P6 and P7 respectively, to support his evidence. PW4 tendered the certificate of seizure dated 20/11/2018 which was admitted and marked Exhibit P8.

He clarified that, in his statement recorded on the 20/11/2018, he did not state that he directed D/CPL Andelile to go and get an independent witness since the statement was recorded in short. Therefore, he prayed to the court to consider his testimony before the court. PW4 insisted that he did follow the PGO requirements when he handed over the exhibits to the Exhibit Keeper (PW3) and he sent the report to his boss through the investigator of the case file.

PW5 F.6698 D/CPL Godfrey testified that, on the 21/11/2018, morning hours while he was in the CID Unit office Chumbageni Police Station he was

called by SP. Oscar Joshua Ngumbulu who is the OCCID of Tanga District and he was assigned to carry out the investigation on the case file no. TAN/IR/3535/2018 concerning the offence of trafficking in narcotic drugs. That he read the file where he found the recorded statements of the complainant SP. Oscar Joshua Ngumbulu and D/CPL Andelile. PW5 testified that there was also a certificate of seizure and a recorded statement of the suspect Mussa Hatibu Sembe a cautioned statement. Thus, he realized that the suspect of the case file is Mussa Hatibu Sembe,

PW5 then prepared a room for packing the exhibit. He went to take the accused person from the remand and took him to the room he had prepared. PW5 introduced himself to the suspect as F.6698 D/CPL Godfrey the investigator of his case. PW5 reminded the accused the offence against him. That he went to the Exhibits Room where PW3 handed over the exhibits to him through the Exhibit Register. The exhibits handed over to PW5 was one bag cream in colour inside it were red sneakers one pair labelled converse all-star, a passport and a ticket. PW5 had prepared two envelopes for packing the exhibit suspected narcotic drugs, which was in 2(two) parcels concealed in the left foot red sneaker. PW5 explained that these 2(two) parcels were packed in a black bag, when he opened the black bag, he found a khaki paper and inside it there was another black bag containing the 2(two)parcels which were in soft nylon bags white in colour. PW5 asked the accused, if these are the parcels he was arrested for and he replied that these were the parcels he was caught with on the 20/11/2018.

PW5 informed the accused person the purpose for packing the two parcels is to send them to the Government Chemist for further analysis. That the accused agreed the 2(two) parcels can be sent to the Government

Chemist. Before PW5 commenced packing the exhibit, he explained to the accused person on his right to call a relative or advocate be present during the packing. That the accused stated he had no relative and he was ready for PW5 to proceed with packing of the exhibits. PW5 had 2 envelopes the size A4 envelope and a smaller envelope than size A4. PW5 placed the 2(two) parcels nylon soft bags in the smaller envelope. He folded this smaller envelope and closed it using a stapler machine. PW5 placed the smaller envelope into the size A4 khaki envelope and placed a red seal cello tape on the size A4 envelope. PW5 wrote the number of the case on the size A4 khaki envelope which is TAN/IR/3535/2018, also he wrote the address of the Government Chemist on the said envelope. He gave the size A4 envelope to the accused to sign, who signed on the said envelope and PW5 also signed the same envelope.

PW5 prepared two forms to submit the exhibit to the Government Chemist, the first form was PF180 and the second form was Form No. DCEA 001, after that he took the Occurrence Book (OB) and he handed the exhibits to PW3 through the Occurrence Book (OB). The Exhibit Keeper PW3 received the exhibits after signing the OB and kept the exhibits under his custody so later can be sent to the Government Chemist. After PW5 completed the handing over, he returned the accused to the lock up to remain in custody. PW5 completed investigation of the file and returned the case file to OC- CID for his necessary action. PW5 identified the accused person in the dock, Exhibits P2, P3, P4(a) & (b), P5, P6 and P7 respectively.

PW5 further testified that, according to his recorded statement it shows that on 20/11/2018 ASP. Oscar handed the suspect to him to record

his caution statement. That PW5 recorded the statement of the suspect under section 48 of the Drug Control and Enforcement Act 2015 as amended in 2017. That he interrogated the suspect and recorded the answers. He read to him his rights to voluntarily record his statement, have a relative or advocate present during the recording of his statement before commencing recording. That after recording the said statement, they are both signed on it.

PW5 testified that he did not have the cautioned statement of the accused because it was not in his hands, it being important it is in the police case file. PW5 also stated that he applied PGO 286 and 229 in compiling the case file, which provides for the compilation of statements of a complainant, witnesses and suspect(s) together with the marking for identification of each statement, the handing over and control of exhibits. That he did not contravene the PGO 229 paragraph 15 since he wrote the time, date, the PF. No. and rank and name of the officer Exhibit Keeper, the case file No. TAN/IR/3535/2018 in the OB and both signed the Occurrence Book PF 51.

In his testimony, PW6 F7215 D/CPL Andelile, on the 20/11/2018 around 1.00pm he was at the Chumbageni grounds for exercises and parade. That he was called by SP. Oscar Ngumbulu PW4 and told to get into the motor vehicle they were going to work at a certain place. That they went straight to the 12th Street, near the office of Tayassar Transport Company. When they reached there, SP. Oscar was talking with the mobile phone. He was directed that there was a person holding a cream bag in his right hand and was directed to arrest the person he was carrying narcotic drugs. That PW4 got out of the motor vehicle and went to the person described to him and arrested him. After Pw4 SP. Oscar arrested the person, PW6 got out of

the motor vehicle and went to the place where PW4 arrested the person. PW4 directed PW6 to look for a Chairperson or "mjumbe" of the area or any business person in the area to be a witness during the search of the suspect but he could not get the Chairperson or "Mjumbe". That PW6 failed to get cooperation from the business people in the area to be a witness.

He stated further that, he witnessed PW4 take the bag which the person was holding and opened it. Inside there were some clothes, one pair of shoes it was red sneakers with the words converse all-star. That PW4 continued with the search in the red sneakers and he found a black bag in the left foot of the red sneaker. PW4 opened the black bag and inside there was a khaki paper, inside the khaki paper there was a black bag. He opened this black bag inside it were 2 parcels containing a powder substance in a transparent bag. After the search PW6 and PW4 together with the accused person left the place while PW4 was holding the cream bag and PW6 led the suspect (accused), they entered the motor vehicle and went back to the Chumbageni Police Station. When they reached the Police station, PW4 prepared a certificate of seizure which, was signed by the accused person, PW4 and PW6. Thereafter PW6 record his own statement. While at the Police Station, PW4 interviewed the suspect who stated his name to be Mussa Hatibu Sembe, that on the 19th November 2018, he arrived in Tanga from Mombasasa and he was travelling to Dar es Salaam on transit to Zambia to sell the narcotic drugs. During the interview, the seized items were in custody of PW4. PW6 identified the accused in the dock, the Exhibits P4(a) & (b) collectively, P5 and P8 respectively.

PW6 explained that in his recorded statement he did not state that PW4 directed him to go and look for an independent witness. Also, he did

not state in his statement that the certificate of seizure Exhibit P8 was prepared at the Police Station Chumbageni. PW6 stated that he witnessed the arrest of the accused while he was in the motor vehicle and also witnessed the search conducted by PW4 while he was out of the motor vehicle. He stated that the method Exhibit P4(a) & (b) was tied on the day of arrest and today are different.

After close of the prosecution case, the court found on the basis of the evidence adduced by the prosecution, a prima facie case was established against the accused and the accused person has a case to answer. The accused was called upon to defend himself and he was the only witness.

The defence case is based on the testimony of one defence witness, the accused person DW1 Mussa Hatibu Sembe. In his testimony, DW1 stated that he is a driver working in Dar es Salaam at the Deo Assenga Company. That he drives trucks transporting different product outside the country that is Zambia, Democratic Republic of Congo, Rwanda and Burundi and inside the country to Shinyanga and Mbeya. That on the 20/11/2018 around 12.00hrs he was in Tanga, had arrived from Mombasa where he transported a motor vehicle and he decided to pass home at Mwakizaro in Tanga District. While at home he received information that the Simba Mtoto Company needs drivers. As he wanted to change employment, he took his credentials a copy of passport, driver's license and passport size photograph needed by the Simba Mtoto Company, kept the same in an envelope. That he had to go to and get a photocopy and the passport size photograph from a studio in town.

That when DW1 got near "Mabanda ya Papa", there were people running around and he did not know what was going on. He continued with his trip minding his own business and realizes that there was a police car in

that area. Later he was shocked to be caught and placed in the police motor vehicle without being told the reason and saw other people being caught and placed in the same vehicle, which was moving going to the Police Station Chumbageni. When they reached there, the police who caught him took his envelope, removed his belt and placed him in the lock-up. While at the lock-up, the police officer came and told them that they were arrested for the offence of "uzururaji" and that if they want bail, they should give him money shs.100,000/= for each of them. DW1 stated that he did not have money with him and he could not communicate with his relatives, because the police officers had taken his mobile phone while he was in the car heading to the Police Station, Chumbageni.

DW1 further he stated that, PW6 took him out of the lock-up to another office behind the reception where he was given a paper to sign and he signed due to fear after being slapped by other three officers who were in the said office. DW1 stated that one of the police officers was named Oscar Joshua. He did not know what the paper was all about and after signing he was returned back to the lock-up. That the next day D/CPL Godfrey PW5 took him out of the lock-up to another different office behind the reception where there were other officers together with D/CPL Godfrey who told him to sign on an envelope and a document. That DW1 asked the offence against him, for him to sign the paper and envelope, he did not get any answers. Therefore, he signed the document and envelope due to the force exerted on him and the beatings. After signing, DW1 was taken back to the lock-up.

That after three weeks on the 14/12/2018, he was arraigned in court, for an offence trafficking in narcotic drugs before a Magistrate. That he remained in remand at the Prison, until investigations were completed. On

the 31/12/2019, he went for committal. DW1 identified the Exhibits P7, P2 and P8 as his passport, the envelope and document he was forced to sign. These Exhibits P3, P4(a) & (b), P5 and P6 were shown to DW1, he did not identify them.

He went on stated that, he does not remember if his Advocates asked a question on whether DW1 voluntarily signed the Exhibit P8 and Exhibit P2 or asked about a place of his arrest or the red sneakers were not his or ask on the said Exhibit P4(a) & (b) to be found in his possession or he was found with the bus ticket Exhibit P6 or not. And stated that, he did not make up his defence after listening to the prosecution case.

Having gone through the evidence adduced oral and documentary by the prosecution and the Defence, as well as the final written submissions filed on time by both parties, the issues for determination are as follows. **Firstly**, whether the accused was arrested by the Police at the 12th Street, City, District and Region of Tanga. **Secondly**, whether the powder substance contained in two parcels Exhibit P4(a) and (b) is narcotic drugs. **Thirdly**, whether the chain of custody was in any way broken from the point of search, seizure, custody, control, transfer, analysis to tendering in court. **Lastly**, whether the Defence raised any reasonable doubt(s) against the prosecution case.

Commencing with the **first issue**, whether the accused person was arrested at the 12th Street within the City, District and Region of Tanga. Before determining this issue, it is important to note that, it is undisputed that the accused person was arrested on the 20th day of November 2018. It is the evidence and submission by the prosecution that on the material date the accused person was arrested at the 12th Street within Tanga district, on

the other hand the accused in his testimony stated that he was arrested at 'Mabanda ya Papa' within the District of Tanga. The exactly place where the accused person was arrested was not one of the issues disputed during trial and also in the Defence final submission. Therefore, I agree with learned State Attorney on the view that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence as held by the Court of Appeal in the case of **George Maili Kemboge vs the Republic**, Criminal Appeal No. 327 of 2017 at Mwanza (unreported) at page 4 where the Court applied the principle laid down in the case of **Damian Ruhele vs Republic**, Criminal Appeal No. 501 of 2007 (unreported). The accused was arrested on the 20/11/2018 at the 12th Street, within the City, District and Region of Tanga.

Coming to **the second issue** whether the powder substance contained in the two parcels Exhibit P4(a) and (b) is narcotic drugs. The testimony of PW1 being a Government Chemist, he conducted preliminary and confirmatory tests on the powder substances found in the two transparent parcels admitted as Exhibit P4(a) and (b) collectively and prepared the report admitted as Exhibit P1. That in this report (Exhibit P1) confirmed the Exhibit P4(a) and (b) is a narcotic drug namely heroin hydrochloride weighing 351.99 grams.

The testimonies of PW4 and PW6 confirmed to have conducted and witnessed the search on the accused person and seizure of Exhibit P4(a) and (b) as seen on the certificate of seizure Exhibit P8.

Section 48 (2) (c) (vi) of *The Drug Control and Enforcement Act 2015* as amended by the Act No. 15 of 2017 provides that;

"an officer of the Authority and other enforcement organs who searches for an article used or suspected to have been used in commission of an offence shall record and issue a receipts or fill in the observation form an article or thing seized in a form set out in the Third Schedule to this Act"

In the instant case it is the evidence of the Defence that the certificate of seizure was signed by DW1 after being forced and there is no any other evidence to prove or to corroborate these allegations that PW4, PW6 and the accused person DW1 signed the seizure certificate Exhibit P8 to acknowledge the search conducted by PW4 on the accused. As a requirement of the law, the signatures of PW4 the officer executing search and seizure and the accused signify and acknowledge their presence at the place and time of search.

The court notes that the independent witness who signed Exhibit P8 is a Police Officer PW6 junior to PW4 the Officer who conducted the search and seized the items. An independent witness is a third person who does have an affiliation with either parties involved in the case and someone who can present an unbiased opinion. Such an independent witness does not have anything invested in the outcome of a case, meaning the witness will not profit from the results of the case. In this instant case, an independent witness would present the facts pertaining to the search and seizure conducted and the provide proof needed that the pair of red sneakers, bus ticket and Exhibit P4(a) and (b) are properties found in the possession of DW1. Also, that DW1 was forced or not to sign Exhibit P8. PW6 he has an affiliation with PW4 his boss involved in this case and cannot present an unbiased opinion. He was singled out to accompany his boss to the 12th Street. PW6 does have an invested interest in the outcome of this case,

meaning he will profit from the results of the case i.e get good recommendations from his boss. In the circumstance of this case, as discussed PW6 did not qualify to be an independent witness who later turned to be the arrest officer when he took the hand of DW1 and led him to the motor vehicle, though PW4 placed DW1 under arrest. PW6 had invested interest.

Coming to the **third issue**, whether the chain of custody was according to the standard required or broken. It is significant to note that under the Act No. 5 of 2015 as amended, there is no procedure for the handing over and maintenance of chain of custody laid down. The Act clearly allows the application of other procedural laws where the Act does not provide for. It was the submission of the Defence that the prosecution failed to establish unbroken chain of custody in this case since they failed to produce chronological documentation in respect of Exhibit P4 (a) and (b), P5, P6 and P7 and the witnesses failed to observe the provisions of the Police General Orders (PGO) No. 229 paragraph 15 which provides that "*Whenever an exhibit is passed from the custody of one officer to that of another, the officer who hands over the exhibit shall record in the presence of the latter officer the name, rank and number of the officer to whom he hands over the exhibit and the date and time of the handing over on the back of the Exhibit Label (P.F. 145).*" To support this contention learned Counsel for the accused cited the case of **Abuhi Omari Abdallah and 3 Others V. Republic**, Criminal Appeal No. 28 of 2010, CAT at Dar es Salaam (unreported) at page 19, where the Court emphasized "*the chronological documentation and /or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime*

rather than, for instance, having been planted fraudulently to make someone appear guilty.... The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that, it be provable that nobody else could have accessed it."

On the other hand learned State Attorney for the Republic submitted that despite that there is no documentation regarding the Exhibit P4(a) and (b) collectively, the chain of custody is not broken in the wake of the prosecution evidence of PW1, PW2, PW3, PW4 and PW5 all testified from what transpired from the arrest, search seizure, storage and safe custody to the police, packaging, transmission to the Chief Government Chemist (CGC) where they were given the laboratory number, examined and confirmed to be heroin hydrochloride and returned to the exhibit keeper. Learned State Attorney contended that these witnesses are credible and must be believed as held in the case of **Goodluck Kyando vs. Republic [2006] TLR**. Supporting their contention, learned State Attorney referred the court to the cases of **Sophia Seif Kingazi vs Republic**, Criminal Appeal No. 273 of 2016, CAT at Arusha(unreported), where the Court of Appeal cited the cases of **Vuyo Jack vs. Republic, Chacha Jeremiah Murimi and 3 Others** and **Kadiria Said Kimaro vs Republic**, Criminal Appeal No. 301 of 2017, CAT at Dar es Salaam (unreported), where the Court held that "*the integrity of chain of custody cannot be solely determined by the documentation rather by the credibility of the evidence*". Therefore, prays to the court to find PW1, PW2, PW3, PW4 and PW5 are credible witnesses as held by the Court of Appeal in the case of **Marceline Koivogui vs. The Republic**, Criminal Appeal No. 469 of 2017, CAT at Dar es Salaam (Unreported).

It is factual the chain of custody can be proved by oral evidence through credible witnesses. It is accurate in this case the prosecution did not produce paper trail to prove the chain of custody. They relied on the testimony of witnesses. However, the law governing narcotic drugs does not provide for the procedure and manner of handling exhibits. The PW2, PW3, PW4 and PW5 are police officers guided by the Police General Orders. The evidence disclosed that Exhibit P4(a) and (b) passed from PW4 the seizing and arresting officer to PW3 the Exhibit keeper then from PW3 to PW5 the investigating officer and vice versa, from PW3 to PW2 the officer who took it to the Chief Government Chemist (CGC) and vice versa. In all the transfers of this exhibit from one officer to another there is no any prosecution witness who testifies that the exhibits were labeled in the manner prescribed under the PGO No. 229 paragraph 15. PW3 and PW5 sturdily claimed that they observed and implemented the procedure under PGO 229(8), (12) and (15) while they knew they failed to do so. The Exhibits P4(a) and (b), P5, P6 and P7 had no exhibit labels (P.F.145) as required under PGO 229 (8). Even PW5 did not know what P.F. 145 was. PGO 229 (8) provides that, *"the investigating officer shall attach an Exhibit Label (P. F. 145) to each exhibit when it comes to his possession. The method of attaching labels differs with each type of exhibit. In general, the label shall be attached so that there is no interference with any portion of the exhibit which requires examination. PGO 229 (12) states that, "exhibits labels shall always be attached to the exhibit itself and not to any wrapping which may be used while transporting the exhibit from one place to another"*.

However, whenever an exhibit is passed from the custody of one officer to that of another, the officer who hands over the exhibit shall record

in the presence of the latter officer the name, rank and number of the officer to whom he hands over the exhibit and the date and time of the handing over on the back of the Exhibit Label (P.F. 145) and not only in the Exhibit Register PF 16. It was expected for the PW3, PW4 and PW5 to comply with the above stated provisions, but they failed to do so. This has raised a doubt that there is a possibility for Exhibit P4 (a) and (b) to be tampered with. All exhibits were kept in custody and transferred from one officer to the other without being labeled. Hence the need for chronological documentation and paper trail showing the custody, control, transfer of the evidence as held in the case of referred to by Learned Counsel for accused **Abuhi Omari Abdallah & 3 Others vs. Republic (Supra)**.

It is clear from the testimony of PW4 that Exhibits P4(a) and (b), P5, P6 and P7 were handed over to PW3 while the accused person was in the police lock up. The accused did not witness the handing over of the items to PW3 for the accused to verify the items were found in his possession. Both PW3, PW4, PW5 and PW6 testified that the Exhibit P4 (a) and (b) was found in two black plastic bags and a khaki paper which were not produced before this court and no prosecution witness gave any explanation on the whereabouts of the same. In the case of **Abuhi Omari Abdallah and 3 Others vs. Republic**, Criminal Appeal No. 28 of 2010, CAT at Dar es Salaam (Unreported) the Court of Appeal held that,

"The absence of the evidence of Kenyela, Linus, the undisclosed cleaners, tester and the post office man, totally destroyed the essential chain of custody of the said pellets. This leads to a strong and irresistible suspicion that those pellets might have been tampered with. It was not for the defence to justify the suspicion. It was for the

prosecution to bring cogent evidence to dispel or rule out these lingering reasonable doubts or suspicions."

In the case at hand, absence of the two plastic black bags and a khaki paper which PW3, PW4, PW5 and PW6 testified before the court to have been used to wrap the Exhibit P4(a) and (b) collectively the packing materials and the absence of labels P.F. 145 on the exhibits raises suspicion, whether Exhibit P4(a) and (b) collectively are exactly the same exhibits, which were seized and retrieved from the accused before they were sealed and sent to the GCLA for laboratory analysis.

Likewise, the absence of the accused person during the first handing over by PW4 to PW3 and in the absence of an independent witness during the packing and sealing of the exhibits by PW5 raises reasonable doubts. The evidence shows that Exhibit P4(a) and (b) collectively were taken from PW3 the Exhibit keeper by PW5 D/CPL Godfrey who went to pack, label and seal the same in Exhibits P2 and P3, the doubts are whether the said exhibits packed, sealed and labeled by PW5 were the same exhibits handed over to PW3 by PW4 the day they were seized. There was no explanation by PW3 and PW5 where and why the two black plastic bags and the khaki paper were not tendered in court. The accused did not see what was packed in the brown envelope Exhibit P3 and he never signed the said envelope, he signed the brown envelope Exhibit P2. In the case of **Abuhi Omari Abdallah and 3 Others vs Republic (Supra)** the Court of Appeal held that it was upon the prosecution to bring evidence to dispel or rule out these lingering reasonable doubts. In the case of **Koivogui vs Republic (Supra)** the Court of Appeal held that "*..... the credibility of a witness is the*

monopoly of the trial Court but in so far as the demeanor is concerned'. During cross examination of PW4 the OC CID of Police Station Chumbageni, he was very evasive in answering questions put to him and at times he would keep quiet until reminded by the court to answer.

Therefore, it is my considered opinion that in this case the chain of custody was broken as the prosecution witnesses were not credible to establish the chain of custody, as several reasonable doubts were raised in the manner of the seizure, custody, control transfer, handing over, packing and labeling of Exhibits P4(a) and (b). Also, the Exhibits P5, P6 and P7 were not labeled.

Also, it was the prosecution submission that the accused person DW1 made an oral confession, confessing that he was trafficking in narcotic drug which was found in his possession. To cement this, learned State Attorney cited the case of **John Peter Shayo and Two Others vs Republic** [1998] TLR page 199 where the court held that; *"As a general rule, oral confession of guilt are admissible though they are to be received with great caution, sections 27(1) and 31 of the Evidence Act 1967 contemplate such confession"* and the case of **Patrick Sanga vs Republic**, Criminal Appeal no 213 of 2008 (Unreported) at page 7 where the Court of Appeal underscored section 3(1) (a),(b) (c) and (d) of the Evidence Act Cap 6 on the effect that the confession may be oral, written and by conduct. The circumstance of this case is that PW4 did not caution and read the rights accorded to a suspect DW1 on the effect of what he was stating before him. The alleged confession is received with great caution and subject to corroboration. However the prosecution did not tender a cautioned statement of the accused. Hence, this oral confession is disregarded.

On the **fourth issue** whether the defence raises any reasonable doubt against the prosecution case, it is the defence submission that there was no independent witness during the search of the accused person also for the certificate of seizure to be signed at Police Station Chumbageni, it is raised doubt that the exhibit have been planted fraudulently to make someone guilty. The prosecution stated that accused person was arrested by PW4 and PW6 who tried to find independent witness to witness the said search but in vain. To support the argument, learned State Attorney cited the case of **Tongora Wambura vs The DPP**, Criminal Appeal No. 212 of 2006 at Arusha (unreported) where the Court of Appeal held that "*as to there was no independent person to witness the arrest that in our considered view depends on the particular circumstances of each case. However, it should be emphasized that the absence of such people per se did not render the operation illegal or the prosecution case fail*". Therefore, the absence of independent witness in a prosecution case cannot render prosecution case fatal.

I start by appreciating the cited case, however the circumstances in the case of **Tongora Wambura vs the DPP (Supra)** is distinguishable with the circumstances in the case at hand. In **Tongora Wambura's** case involved government trophies, while this case involves narcotic drugs. In this case the accused was arrested during the day time at the bus stand, there was no urgency after the accused was placed under arrest therefore the arresting officer had ample opportunity to find any person to be an independent person to witness the search and fill the certificate of seizure at the place where the search was conducted. None of the prosecution witnesses informed the court that their lives were in danger, or there was

any complication in the investigation, hence the urgency to not involve an independent witness and fill the certificate of seizure at the Police Station. In the case of **David Athanas@ Makasi Joseph Masima@ Shando Vs the Republic**, Criminal Appeal No. 168 of 2017, CAT (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. considering that there was no independent witness present as required by law, the said certificate cannot be accorded weight.*

In the case at hand the prosecution witnesses PW4 and PW6 testified to the effect that, the accused person was arrested at the 12th Street at the bus stand for 'daladalas', was searched there without an independent witness and later the certificate of seizure was prepared and signed at the Chumbageni Police Station. The certificate of seizure Exhibit P8 was filled by PW4 that the independent witness who signed Exhibit P8 was PW6 a junior Police Officer who accompanied PW4 to the scene of crime. Bearing in mind the seniority precedence in the Police Force, the testimony of PW6 has to align to the statement of PW4, being an interested party and having an affiliation. In the light of the case of **David Athanas@ Makasi Joseph Masima@ Shando Vs the Republic (Supra)**, I find this is a serious irregularity. Thus, the court do not accord weight to the certificate of seizure Exhibit P8, which was not filled and signed in the presence of an independent witness, as explained.

The court notes that, there are material contradictions in the witnesses' statements when compared to their oral testimonies of PW4, PW5 and PW6. It is the evidence of PW4 and PW6 that PW4 is the one who interrogated the

accused person and recorded his statement. On the other hand, PW5 stated that he found the cautioned statement of the accused person at the time he was given a case file, later in his testimony stated that he PW5 was the one who interrogated the accused and recorded his statement. The court observed further that the said accused statement is not found in any record of the court or subordinate court for this court to satisfy itself. In the case of **Mohamed Said Matula Vs. R** [1995] TLR. 3, the Court of Appeal held that, *"where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

It is worthy to note that PGO 286 provides for the contents of a case file that, *"the contents of each Case File shall be numbered in blue pencil and arranged in order in the file by the officer responsible for its preparation, in accordance with the following procedure. The Statement(s) of the Accused shall be numbered D, D1 etc., and placed next to the witness 's statements"*. It is my considered opinion that, PW5 did not comply with PGO 286 in compiling the case file by omission of the statement of the accused, though he testified that he followed the requirements of PGO 286 in compiling the case file TAN/IR/3535/2018.

Another inconsistency is in relation to the testimony of PW3, PW4, PW5 and PW6 about the two black plastic bags and the khaki paper which contained the Exhibit P4(a) and (b). None of them explained to the court where these items are or what happened to the said packing materials.

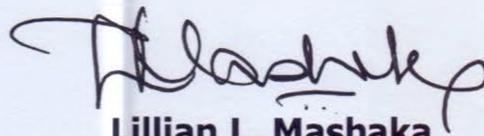
The contradiction on witnesses' evidence before the court as to who interrogated the accused person and recorded his statement, in my view these contradictions cannot be termed minor, as they go to the very root of the case. As held in the case of **Alberto Mendes vs. the Republic**, Criminal Appeal No. 473 of 2017, CAT at Dar es Salaam (unreported), that *“deducing the evidence of the above witnesses, there is no doubt that their statements at the police differ with the oral evidence they gave in court..... Such contradictions have tainted their credibility hence they cannot be believed”*. I subscribe to the position above, the contradictions have tainted the credibility of PW2, PW3, PW4, PW5 and PW6.

I noted that PW2, PW3, PW4, PW5 and PW6 being police officers constantly referred on the use of OB (Observation Book) or Station Diary in the handing over of exhibits at the Police Station. Under PGO 286, it provides that a Station Diary or OB is maintained at the Charge room and the officer of the Charge room duty shall be responsible for maintaining the Station Diary which contains complete record of everything that takes place in the Station concerning police administration, excluding events which are recorded in other official Stations Books or records. It provides the types of events to be recorded in the station diary, and handing over of exhibits is not one of the events. They are operating in violation of the purpose of PGO 286, hence oblivious of the intended use of the OB or Station Diary vis a vis the Exhibit Register for handing over of exhibits.

The prosecution has the duty to prove its case beyond reasonable doubt against the accused before the court finds the accused person guilty and convict on the proved charges. Further, the court must only convict the accused person on the strength of the prosecution case without considering

much the strength of the Defence evidence. The burden of proof is on the prosecution side to prove beyond reasonable doubt and not otherwise. Having discussed above, there are reasonable doubts against the prosecution case, which I hold in favor of the accused. "*Settled law is to the effect that in such a situation, an accused person is entitled of right to the benefit of the doubt or doubts*", held in the case of **Abuhi Omari Abdallah & 3 others vs. Republic (Supra)**.

I find the prosecution have failed to prove the charge of trafficking in heroin hydrochloride contrary to section 15(1)(a) and (3)(1)(i) of the Drug Control and Enforcement Act No. 5 of 2015 as amended and read together with Paragraph 23 of the First Schedule to and sections 56(1) & 60(2) of the Economic and Organized Crime Control Act [Cap. 200 RE 2002] as amended against the accused person beyond a reasonable doubt. The accused MUSSA HATIBU SEMBE is acquitted from the charge against him. Consequently, the accused be released from prison custody forthwith unless otherwise lawfully held.



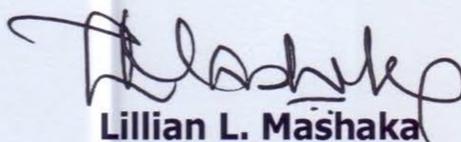
Lillian L. Mashaka

JUDGE

06/07/2020



Right of appeal explained to both parties.



Lillian L. Mashaka

JUDGE

06/07/2020