

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
(TANGA SUB-REGISTRY)**

ECONOMIC CASE NO. 1 OF 2020

REPUBLIC

VERSUS

1. YANGA S/O OMARY YANGA

2. RAHMA D/O ALLY JUMA

3. HALIMA D/O ANUARY MOHAMED

JUDGMENT

19th & 20th November, 2020

BANZI, J.:

This case involves three accused persons, Yanga Omary Yanga, Rahma Ally Juma and Halima Anuary Mohamed; branded as 1st, 2nd and 3rd accused person respectively. They all stand charged with the offence of trafficking in narcotic drugs contrary to sections 15 (1) (a) and (3) (1) (i) of the Drug Control and Enforcement Act, No. 5 of 2015 ("the Drug Act") as amended, read together with paragraph 23 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002] ("the EOCCA") as amended.

It is alleged in the information that on 1st October, 2018 at Bombo area within the District, City and Region of Tanga, the accused persons ***jointly and together*** trafficked in narcotic drug namely Heroin Hydrochloride weighing 1052.63grams. All accused persons pleaded not guilty to the charge.

At the trial, Messrs. Faraja Nchimbi, learned Principal State Attorney, Pius Hilla, learned Senior State Attorney, Constantine Kakula, Salimu Msemu and Ms. Donatha Kazungu, learned State Attorneys represented the Republic, while Messrs. Majura Magafu, Mohamed Kajembe and Nehemiah Nkoko, learned Advocates, represented the first, accused person; Messrs. Kahoza Nicholas and Denis Tumaini, learned Advocates, represented the second and third accused persons. I must sincerely thank the Counsel of both sides and everyone who took part in the proceedings of this case for their tireless efforts towards determination of this case.

In a bid to prove the case against the accused persons, the prosecution side called in seven (7) witnesses to testify, namely, Elias Zakaria Mulima (PW1), Inspector Daniel Mteweale (PW2), Assistant Inspector Johari Issa Msirikale (PW3), Hassan Alex Kivanda (PW4), D.7266 D/C William Massawe (PW5), Miriam Kiwambo (PW6) and Inspector Hassan Zahoro Msangi (PW7). They also tendered a total of ten (10) exhibits, which were all admitted, thus: Exhibit P1, Form DCEA 001 Sample Submission Form; Exhibit P2, Government Chemist Analysis Report dated 3/10/2018; Exhibit P3(a) and P3(b), Two envelopes and Heroin Hydrochloride within; Exhibit P4(a) and P4(b), Two envelopes marked "C" and "D" with their contents; Exhibit P5, Certificate of Seizure dated 01/10/2018; Exhibit P6, Handing over Certificate dated 01/10/2018; Exhibit P7, Motor Vehicle with Reg. No. T325 DJX make Toyota Land Cruiser V8 and Exhibit P8, Court Exhibits Register of DCEA.

On the other hand, the first, second and third accused persons testified under oath as DW1, DW2 and DW3 respectively and tendered two exhibits, *viz.*, previous statement of Hassan Alex Kivanda (PW4) and previous statement of PW7, Inspector Hassan Zahoro Msangi which were both admitted as Exhibits D1 and D2 respectively.

In the main, the body of evidence by the prosecution side presents a case that, on 30th September, 2018, PW2, the investigation officer at the Drug Control and Enforcement Authority (DCEA) received instructions from his superior, Commissioner for Operations, SSP Salmin Shelimo to go to Tanga to conduct an operation following a tip from an informant about a suspect by the name of Yanga Omary Yanga, who was involving himself in trafficking in narcotic drugs. Upon that instruction, he prepared a team and tools of work, including evidence bag and certificate of seizure. At around 1900 hours PW2 and his team left Dar es Salaam for Tanga. Upon arriving, PW2 called the informant for purpose of getting further details and better particulars. The informant confirmed about the information he gave to his superior and further that, the first accused person, Yanga Omary Yanga was about to traffic in narcotic drugs to a certain house at Bombo area by using his motor vehicle with Registration number T325 DJX Toyota Land Cruiser, (Exhibit P7). On request, the informant took PW2 to the said house.

Following which step, PW2 returned to where his colleagues were stationed, while the informant kept an eye to the first accused person movements. At about 0130 hours on 1st October, 2018, the informant informed PW2 that, the first accused person was heading to his house at Bombo area. PW2 with his colleagues hurriedly rushed to the relevant house. On arrival, he instructed one Inspector Beatus Tuyanywe and WP Christina to look for a local leader, who would act as independent witness to an intended search. After about fifteen to twenty minutes later, the duo returned with the chairperson of Raskazone street, one Miriam Kiwambo (PW6). After the introduction, they informed her of their mission and proceeded to knock at the gate of the intended house, which was opened by a security guard by the name of Charles. They introduced themselves to

the security guard and briefly told him of their mission while heading to the front door. The security guard knocked the door while calling "boss" "boss". The first accused person opened the door while holding a gun, make pistol. There followed the second and third accused persons. PW2 told him that, they are officers of the DCEA, therefore, he should surrender his gun. He complied and surrendered it to PW2. He told him about their intended search to be carried out in the house. After he agreed, PW2 nominated officers from his team who would enter the house for the search exercise; after that each one of them inspected himself in the presence of the accused persons. After that, they entered the house; the first accused person closed the main door behind them, and the search began.

In the course of searching, at the third accused person's room, underneath the bed, they found a clothed pink bag containing a black nylon bag and, in the wardrobe, they also found three transparent and one black nylon bags. All five bags contained powdered substance suspected to be narcotic drugs. In the cupboard near the room of the first accused person, they found one black sock containing black with pink flower bag and another black nylon bag both containing crumps powdered substance suspected to be narcotic drugs. Beside the same cupboard near the door heading to the first accused person's room they found a pistol's bag. Upon completing search in the house, PW2 labelled the black nylon bag with pink flowers inside the sock as "A" and black nylon bag as "B". Both bags were also labelled with case file number, TANGA/DCEA/IR/01/2018. He further labelled the nylon bag inside the pink clothed bag as "C" and the four bags as "D1", "D2", "D3" and "D4". Likewise, he labelled them with case file number, TANGA/DCEA/IR/01/2018. Thereafter, they searched in the motor vehicle, Exhibit P7 but they could not find anything suspect or relating to narcotic

drugs, besides cash money amounting to Tshs. 5,340,000/=, ATM cards and cheque books of various banks as well as a motor vehicle registration card. Then PW2 seized all exhibits via Exhibit P5 which was signed by PW2 himself, Assistant Inspector Wamba, independent witness PW6, the first and the third accused persons. After that, they took the first and third accused persons together with the seized exhibits to Chumbageni Police Station and later, they then all travelled back to Dar es Salaam, together with the first and the third accused person. According to PW2, from the search exercise and throughout the journey, all seized the exhibits seized were under his custody. On arriving at their offices in Dar es salaam, PW2 handed over all the seized exhibits to PW3, the custodian of exhibits via Exhibit P6. After she received, PW3 recorded them in Exhibits Register (Exhibit P8) and stored them in the exhibits' room.

On 2nd October, 2018 in the morning hours, PW3, took the seized bags with mark "A", "B", "C", "D1", "D2", "D3" and "D4" for packing. According to PW3, packing exercise was conducted in the presence of PW4, PW5, the first and the third accused person. The bags marked "A" "B" and "C" were packed in envelopes marked "A", "B" and "C" respectively, while bags "D1", "D2", "D3" and "D4" were all packed in envelope "D". All four envelopes were sealed and then signed by PW3, independent witness PW4, the first and the third accused person. Upon completion, she stored all the four envelopes in the exhibits' room until 1400 hours when she handed them over to PW5 so that they could be submitted to the Government Chemist Laboratory Authority (GCLA) for examination.

Then PW5 went to GCLA offices and on arriving there, he handed over the exhibits to PW1 who registered them by laboratory number 2765/2018. According to PW1, he received four sealed envelopes via submission form,

Exhibit P1. Upon receiving and confirming, PW1 opened Envelope "A" and found sock and within the sock, he found a nylon bag containing powder substance. He weighed the powder and drew sample for preliminary test. He conducted preliminary test by mixing the sample with Mecke reagent whereby it changed colour into dark green indicating that, it was heroin. Then he drew sample for confirmatory test and repacked the exhibits. Thereafter, he went on to open envelope "B" which contained a black nylon bag containing powder substance. He weighed the powder and conducted the same procedure. Likewise, the sample changed colour to dark green indicating that, it was heroin. He then drew sample for confirmatory test and repacked the exhibit. PW1 conducted the same procedure for envelopes "C" and "D", but there was no indication of heroin or any narcotic drug. He thus drew samples for confirmatory test and repacked the exhibits.

Following preliminary the tests, PW1 sealed all four envelopes with GCLA seals, marked the same with Lab. No. 2765/2018, signed and handed them over to PW5, who upon returning to the office, he handed them over to PW3. PW3 stored them in the exhibits room until when they were brought and tendered before this Court. On 3rd October, 2018, PW1 proceeded to conduct confirmatory test over all the samples he drew. He used a machine called Liquid Chromatography Mass Spectrometer. According to him, during the analysis, he used reference standard to ensure the machine was working properly. After analysis, samples from envelopes "A" and "B" were confirmed as narcotic drugs, namely heroin hydrochloride. On the other hand, samples from envelopes "C" and "D" were confirmed not to be narcotic drugs. After getting the results, he prepared a report which was approved by laboratory supervisor, David Elias as Acting Chief Government Chemist. The report was admitted as Exhibit P2.

Apart from that, the investigator of this case, PW7 told this Court that on 26th September, 2018 he came to Tanga with other four officers on an assignment to keep the first accused person under surveillance following an information that the latter will import drugs through an informal port located at Mwambani area. According to him, he followed him up and realised that, the first accused person is a wealthier with a lot of properties including exhibit P7 and a house at Mwambani. He also claimed to have seen the first accused person receiving a parcel from a young man who arrived with a white boat at the said port, which he carried in his motor vehicle, Exhibit P7. Moreover, it was also the testimony of PW7 that, during the investigation, the first accused person made oral confession before him about dealing in narcotic drugs. He further realised that the second and third accused persons were also involved by distributing narcotic drugs. During the cross examination of PW7, the defence side tendered his previously recorded statement, Exhibit D2 in a bid to impeach his credibility. Basically, this is all about the prosecution's case.

In their defence, the accused persons categorically refuted to have committed the alleged offence; although they all admitted about the search that was conducted at the material house on 1st October, 2018. They claimed that the seized items were some medicines for poultry chicken and not narcotic drugs. They also denied to have engaged themselves in the business of narcotic drugs. DW1 told the Court that he is a businessman involved in wholesale shops in Tanga. DW2 is the wife of DW2 engaging herself in poultry business and she was also the employee of Auric Air, while DW3 was a mere hired house maid.

In the main, the evidence by the defence side reveals that on 1st October, 2018, DW1, DW2 and DW3 were in the house sleeping. In the mid

of the night, DW1 was awoken by his security guard by the name of Charles who informed him that, some persons were looking for him. DW1 took his gun, woke up DW2 and DW3 and headed to the front door. After reaching there, he saw a number of police officers with guns surrounding the premises. Upon inquiry, they told them that they are officers from the DCEA and they were there with a "mjumbe" to conduct search as he was alleged to be dealing in narcotic drugs. On request, DW1 handed over his gun to them. He also saw two elderly men sitting on the chairs within the compound. Since he had nothing to hide, he allowed them to conduct the search. According to his testimony, he did not search them before they entered the house.

Upon entering, the search began at the sitting room and proceeded to the dining and kitchen but nothing suspect was found. In the first bedroom, they also found nothing. When they entered into the second bedroom, DW3 was called to join them because that was the room she was using. According to DW3, underneath the bed and in the wardrobe, they found a pink clothed bag and black nylon bag respectively. On inquiry, DW3 told them that, those were medicines for poultry chickens. After a long conversation, the officers seized them. As per the testimony of DW2, she did not see the parcels in question as during the search in the said room she remained behind. The search proceeded to the master bedroom where nothing was found. In the cupboard located at the corridor, they also found parcels, which according to DW1, DW3 told them that were medicines for poultry chickens. Once again, after long conversation, they seized it. However, according to DW2, while they were in the master bedroom, she was asked about the keys for the motor vehicle and went with one female officer to fetch the same in the sitting room. So, the two went to the sitting room while others proceeded

with the search. By the time they returned, she found the officers arguing whether to seize or leave some things they found in the cupboard. On her side, DW3 claimed to be involved in the search conducted in her bedroom. It was also her testimony that, when they moved to the cupboard at the corridor, she was standing behind near the door to her bedroom and hence, she could not remember what transpired.

After completion the exercise in the house, according to DW1, the search proceeded in the motor vehicles; Land Cruiser T325 DJX which belongs to him and RAV4 belongs to his wife, DW2. In the Land Cruiser, they seized cash money Tshs. 5,000,000/=, cheque books of various banks, ATM cards, motor vehicle registration card and firearm licence book. On the other hand, nothing was seized from the RAV4. On completing the exercise, certificate of seizure was filled by Inspector Wamba which DW1 and DW3 signed it. After signing, DW1 and DW3 left with the officers to Chumbageni Police Station while DW3 remained at home. DW3 left with his little baby. On arrival at Chumbageni Police Station, DW1 and DW3 wrote their statements and later began their journey to Dar es Salaam where they arrived at DCEA office around 1800 hours.

On 2nd October, 2018, DW1 and DW3 witnessed the packing of exhibits which was conducted by PW3 around 1400 hours but other officers were also there. DW3 claimed to sign on the envelopes because of the things which were retrieved from her room. According to her, later on that day she was released on bail. On his part, after packing, DW1 was blindfolded and taken to another room for interrogation about dealing in narcotic drugs. By the time he returned, DW3 had already been released on bail. On 3rd October, 2018, DW1 was taken back to Tanga and on 4th October, 2018, he was arraigned before the court and charged accordingly. On the other hand,

on 4th May, 2019, search was conducted in DW2's house located at Usagara on the allegation of dealing in narcotic drugs but nothing suspicious was found. They seized two phones and arrested DW2 together with DW3. They travelled to Dar es Salaam and stayed at Central Police Station until 23rd May, 2019 when they were taken to their offices and thereafter headed back to Tanga. On 24th May, 2019, they were arraigned to court and joined DW1 on the same charge. All the accused persons maintained their innocence and prayed to be acquitted.

In a nutshell, that was the evidence of the Prosecution and Defence. The final submission was made orally. In their submissions the counsel for both sides raised various issues including about the chain of custody, inconsistency and discrepancies on prosecution's evidence and the status of oral confession of the first accused person before the investigation officer, PW7. I will consider these issues in the course of this judgment.

Having carefully considered the evidence on record and submissions by Counsel of both sides, the issues before the Court for determination are, **one**, *whether Exhibits P3(a) and P3(b) were found and seized in the accused persons' house*; **two**, *whether substance contained in Exhibits P3(a) and P3(b) is narcotic drugs*; **three**; *whether chain of custody was maintained* and **four**, *whether the accused persons acted jointly and together*.

Before determining the issues at hand, it is vital to underscore here that, according to Section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2002], in criminal matters, a fact is said to be proved when the court is satisfied by the prosecution beyond reasonable doubt that such fact exists. That is to say, the guilt of the accused person must be established beyond reasonable doubt. Generally, and always, such duty lies with the prosecution except

where any statute or other law provides otherwise. One of such exceptions is Section 28 (1) of the Drug Act. According to this section, in drugs cases, the accused person has the duty to prove that the possession, dealing in, trafficking, selling, cultivation, purchasing, using or financing is in accordance with the licence or permit granted under the Drug Act. However, it is trite law that, when the burden shifts to the accused person, the standard of proof is on balance of probabilities. See the case of **Said Hemed v. Republic** [1987] TLR 117.

Starting with the first issue, there is no dispute that on the night of 1st October, 2018 the search was conducted in the house where the accused persons were residing. This is established by the evidence of PW2 and PW6 as well as Exhibit P5. The same is corroborated by the evidence of DW1, DW2 and DW3. According to PW2, he seized two parcels in the cupboard located at the corridor within the house. The parcels were black sock containing black with pink flowered bag and another black nylon bag. Both parcels contained crumps powdered substance suspected to be narcotic drugs. It was also his evidence that, upon completion search in the house, he labelled black nylon black bag with pink flowers inside the sock as "A" and black nylon bag as "B". Both bags were also labelled with case file number TANGA/DCEA/IR/01/2018. The independent witness, PW6 also saw one black sock containing black with pink flowered bag and another black nylon bag both containing crumps powdered substance retrieving from the cupboard located at the corridor. It was also her evidence that, upon completion search in the house, PW2 labelled seized exhibits and after completion of search exercise, the certificate of seizure was prepared and she signed together with the first and third accused persons. The two witnesses have managed to identify Exhibits P3(a) and P3(b) as the ones

which were found and seized in the house of the accused persons. Although the first and third accused persons claimed to sign Exhibit P5 without reading the same but in the considered view of this Court, they signed it to acknowledge the seizure of exhibits found in the house. See the case of **Song Lei v. The Director of Public Prosecutions and Others**, Consolidated Criminal Appeals No. 16 A of 2016 & 16 of 2017 [2019] TZCA 265 at www.tanzlii.org where it was insisted that upon signing the certificate of seizure, the accused person acknowledges to be found with the exhibit in question. Thus, in the light of the position of the law, it is clear that the certificates of seizure, Exhibits P5, is valid, and it proves that the search was conducted in their house on 1st October, 2018 at Bombo area where Exhibits P3(a) and P3(b) were found therein. Basing on the evidence on record, there is no possibility of those exhibits to have been planted to incriminate the accused persons. Hence, the first issue is answered in affirmative.

I now turn to the second issue whether the substance in Exhibits P3(a) and P3(b) is narcotic drugs. It was the submission by counsel for the Republic that, the two exhibits were confirmed by PW1 to be heroin hydrochloride which according to section 2 of the Drug Act is narcotic drug. According to them, the evidence of PW1 is supported by Exhibit P2. On the other hand, the defence counsel insisted that the exhibits analysed by PW1 are not the ones seized from the house of the accused persons. For the sake of consistence, I will discuss this concern by the defence in the course of determining the third issue.

Reverting to the issue at hand, it is on the evidence of PW1 that, after receiving exhibit P3(a), he weighed the same and according to him, the same has weight of 489.37 grams. Thereafter, he drew sample and conducted preliminary test whereby after mixing sample with Mecke reagent, it changed

its colour to dark green which is preliminary result of narcotic drug namely heroin. He did the same to Exhibit P3(b) which weighed 563.26 grams. After drawing sample, he conducted preliminary test by mixing with Mecke reagent. The sample from envelope changed its colour into dark green indicating narcotic drug namely heroin. After preliminary tests, he drew samples from each exhibit for confirmation test. PW1 proceeded to conduct confirmatory test by using the machine called Liquid Chromatography Mass Spectrometer. According to him, during the analysis, he used reference standard to ensure the machine was working properly. After analysis, samples from envelopes "A" and "B" were confirmed as narcotic drugs namely heroin hydrochloride. PW1 concluded his analysis by preparing the report, Exhibit P2. Section 48A (2) of the Drug Act as amended provides as follows;

*"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.**"*

(Emphasis supplied).

From the evidence of PW1 there is no doubt that Exhibits P3(a) and P3(b) are narcotic drugs namely heroin hydrochloride. In the light of provisions of the law above, since there is no any evidence to the contrary, Exhibits P2 is conclusive proof that Exhibits P3(a) and P3(b) are narcotic drugs in the ambit of section 2 and the First Schedule to the Drug Act. Thus, the second issue is also answered positively.

Coming to the third issue regarding the chain of custody, in their final submission, the defence counsel challenged the prosecution evidence

claiming that, the same was marred with contradictions and inconsistencies which prove that what has been seized for the accused was not the one analysed by PW1. On this they referred the use of word "*chengachenga*" as appeared in the evidence of PW2, PW6, Exhibit P1, P5, P6 and P8 against the use of word "*unga*" as it appeared in the evidence of PW1 and Exhibit P2. In addition, they also attacked the testimony of PW3 and PW5 and Exhibit P1 and P8 against the testimony of PW4 and Exhibit D1 in respect of the time of packing of the exhibits. They cited the case of **Alberto Mendes v. Republic**, Criminal Appeal No. 473 of 2017 CAT at Dar es salaam (unreported) to support their argument on the issue of chain of custody. On the other hand, counsel for the Republic persisted that, through the testimony of PW1, PW2, PW3, PW5, DW1 and DW3, it was proved how Exhibits P3(a) and P3(b) were handled from seizure to the point they were brought before this Court. To them, these witnesses were credible, hence they should not be doubted. According to them the difference between the use of the word "*chengachenga*" and "*unga*" is very trivial and hence be ignored. They cited the cases of **Goodluck Kyando v. Republic** [2006] to support their submission.

It is settled that, in cases involving movement of exhibits from one point to another, the evidence concerning chain of custody is of utmost importance. As a matter of principle, it is well settled that as far as the issue of chain of custody is concerned, it is crucial to follow carefully the handling of what was seized from the accused person, is the same which was finally tendered in court. There is a mammoth of authorities giving guidance on chain of custody including the landmark case of **Paulo Maduka and Four Others v. Republic**, Criminal Appeal No.110 of 2007 CAT (unreported).

This case insisted on the proper documentation of the paper trail from the time of seizure up to the stage the exhibit is tendered in court as evidence.

However, documentation is not the only way of establishing chain of custody. The jurisprudence on this area has been developed cautiously over time. In several cases such as **Chacha Jeremiah Murimi and Three Others v. Republic**, Criminal Appeal No.551 of 2015 [2019] TZCA 52 at www.tanzlii.org and **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 [2018] TZCA 361 at www.tanzlii.org demarcation was drawn between handling of exhibits which cannot change hands easily and those which can change hands easily. The position of the law is that, for exhibits which cannot change hands easily, oral testimony on handling the exhibit suffices to establish the chain of custody. On the other hand, for exhibits that can change hands quickly, such as narcotic drugs and the like, the most accurate method to establish chain of custody is documentation. However, with this jurisprudence, even in the latter type of exhibits, oral testimony is sufficient to establish the chain of custody. See the case of **Charo Said Kimilu and Another v. Republic**, Criminal Appeal No. 111 of 2015 CAT (unreported) which involved *cannabis sativa*. In another case of **Chukwudi Denis Okechukwu and Three Others v. Republic**, Criminal Appeal No. 507 of 2015 [2018] TZCA 255 at www.tanzlii.org which involved narcotic drugs namely cocaine hydrochloride, oral testimony was held to be sufficient to establish chain of custody. Also, oral testimony was held sufficient to establish chain of custody in the case of **Marceline Koivogui v. Republic**, Criminal Appeal No. 469 of 2017 [2020] TZCA 252 at www.tanzlii.org which involved narcotic drugs namely heroin hydrochloride.

In the matter at hand, the evidence on record shows that, the arrest of the first and the third accused persons and the seizure of the drugs in

question was made by the team of the DCEA officers, among them was PW2, in the presence of independent witness, PW6. The exhibits were seized through the certificate of seizure, Exhibit P5. Upon seizure, PW2 labelled the black bag in the sock as "A" and another black bag as "B". Furthermore, PW2 told this Court that, from time when the exhibits were seized, they remained in his control throughout the journey until when he handed them over to exhibits keeper, PW3 on 1st October, 2018 at 1800 hours through handing over certificate, Exhibit P6. On her side, PW3 testified that, after she had received Exhibits P3(a) and P3(b) from PW2, she recorded the same in the register, Exhibit P8 and kept them in the exhibits room. She further testified that, on 2nd October, 2018 in the morning, she took the exhibits from the exhibits room and showed the same to the first and second accused person before she packed them in the envelopes and sealed. Thereafter, she kept them in the exhibits room until 1400 hours when she handed them over to PW5 so that he could send them to the Government Chemist.

PW5 upon receiving the exhibits from PW3, he went to GCLA and handed them over to PW1 through Exhibit P1. According to Exhibit P1, PW1 received those exhibits at 1444 hours. After preliminary analysis, PW1 repacked the exhibits and handed them over to PW5 who on the same day, handed them over to PW3. Then PW3 took them back to the exhibits room and stored them until they were brought and tendered before this Court. PW2 and PW6 identified Exhibits P3(a) and P3(b) before this Court as the same ones they saw and seized from the crime scene. Likewise, PW3 identified Exhibits P3(a) and P3(b) before this Court as the ones she received from PW2 and packed on 2nd October, 2018. Apart from that, PW4 and PW5 successfully identified before this Court Exhibits P3(a) and P3(b) as the ones they witnessed during

packing exercise conducted by PW3. Finally, PW1 also identified Exhibits P3(a) and P3(b) as the same one he received from PW5 and analysed.

Concerning the issue raised by defence on use of the word “*chengachenga*” and “*unga*” (crystals or powdered), save for Exhibit P2 and PW1 who referred the substance in Exhibits P3(a) and P3(b) as “*unga*”, other witnesses, PW2, PW3, PW4, PW5 and PW6 referred the same as “*chengachenga*” or “*unga wenye chengachenga*”. The same word is appearing in Exhibits P1, P5, P6 and P8. I had the opportunity of looking at Exhibits P3(a) and P3(b). In the main, the substance in these exhibits is a mixture powder and crumps. However, this fact was cleared by PW1 when he was re-examined by counsel for the prosecution. According to his testimony, the technical name used in analysis is, “unga” and not “*chengachenga*”. As for contradiction in the testimonies of PW3 and PW5 against PW4, there is no dispute that PW4 in his testimony claimed to witness the packing of exhibits at 1400 hours. However, he was consistently insisting to have forgotten some other things due to lapse of time. It is a settled principle that not every discrepancy or contradiction in the prosecution’s evidence will cause their case to flop. This was stated in the case of **Said Ally Ismail v. Republic**, Criminal Appeal No. 249 of 2008 CAT (unreported) thus:

“It is not every discrepancy in the prosecution case that will cause the prosecution to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled.”

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

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

The gist of evidence of PW4 was about packing of exhibits that was conducted by PW3. He stated to witness PW3 packing the exhibits in envelopes. He personally signed on the envelopes and claimed to witness PW3, DW1 and DW3 signing the same. As I said earlier, PW4 insisted to have forgotten some of the things due to lapse of time as he said not to remember if it was conducted in the morning or in the afternoon. The contradiction on PW4's evidence is based on details and not on basic matter concerning the whole packing exercise. In my view, the contradiction on PW's evidence in respect of time is minor and did not go to the root of the matter considering the fact that, he was testifying after expiry of two years from the day the exhibits were packed. He also admitted to forget some of the things. It can be recalled that, human recollection is not flawless since a witness is not expected to be right in minute details when retelling his story. See the case of **Marceline Koivogui v. Republic** (*supra*). It was also held in the case of **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1991 (unreported) that;

"Due to frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies."

I had the opportunity of observing the demeanour of PW1, PW2, PW3, PW5 and PW6 and I see nothing to question their credibility. Therefore, I find nothing material to discredit the evidence of PW1, PW2, PW3, PW5 and PW6 which I find credible on how the exhibits were handled from seizure to

the time they were brought before this Court. Thus, there is no shadow of doubt that, the substance that were seized, they are the very one which were examined by the Government Chemist and tendered in evidence in this court. Thus, the third issue is also answered positively.

Turning to the last issue, it is alleged in the information that, the accused persons **jointly and together** trafficked in the narcotic drugs. The issues to be determined is whether they acted jointly and together to execute common purpose or common scheme. From the evidence on record, a tip from the informer about drugs allegation involved the first accused person only. On reliance of such information, search was conducted in his house where Exhibits P3(a) and P3(b) were retrieved. He signed the certificate of seizure to acknowledge the seizure. Although he disassociated himself with Exhibits P3(a) and P3(b) found in the cupboard claiming to be medicine for chickens, but DW3 in her evidence did not remember if they stored such medicine there. Moreover, he claimed that DW3 was asked about those exhibits and replied that, they were medicine for chickens. Surprisingly, DW3 in her evidence denied about that fact. Nevertheless, she insisted that, DW1 lied when he said she saw those exhibits while she did not get the opportunity to see the same because during the search in the cupboard, she was standing behind, near the door to her room. Taking these facts together, it shows that the first accused person had knowledge and was aware of the presence of the said narcotic drugs in the cupboard, although he was trying to throw the burden to the third accused person. If Exhibits P3(a) and P3(b) were really medicine for chickens as claimed by the first accused person, it would have been easier for the third accused person to volunteer such information like she did when Exhibits P4(a) and P4(b) were found in her bedroom which were confirmed by PW1 not to be narcotic drugs. Hence, the

first accused person stored narcotic drugs in the said cupboard and was also found in possession of the same. These acts amount to trafficking as per definition of the trafficking under section 2 of the Drug Act.

On the other hand, the tip and investigation in the preliminaries did not involve the second accused person. For the third accused person, first and foremost, she was just a house maid. Exhibits P4(a) and P4(b) retrieved from her bedroom are not narcotic drugs as confirmed by PW1. Apart from that, PW7 admitted during cross examination that, after her arrest she was released on bail while the first accused person was arraigned before the court. The only evidence against second and the third accused person is the purported oral confession alleged to be made by the first accused person before PW7.

I am much aware as it was submitted by counsel for the Republic that, oral confession made by a suspect before or in the presence of reliable witnesses may be sufficient by itself to form a basis of conviction provided that it is voluntarily made. Refer the cases of **John Shini v. Republic**, Criminal Appeal No. 573 of 2016 [2020] TZCA 1747 at www.tanzlii.org and **Patrick Sanga v. Republic**, Criminal Appeal No. 213 of 2008 CAT (unreported). However, the first accused person, denied to have made such a confession to PW7. In the two cited cases, the confessions were made before the persons other than police officer. PW7 being the police officer and officer of the DCEA, he was required to reduce such confession into writing as dictated under section 48 (2) (a) (v) of the Drug Act as well as section 57 (1) (2) of the Criminal Procedure Act [Cap. 20 R.E. 2019]; on this see the case of **The DPP v. Sharif Mohamed @ Athumani and 6 Others**, Criminal Appeal No.74 of 2017 CAT (unreported). Worse enough, this fact of oral confession does not feature in his statement, Exhibit, D2. Furthermore,

the testimony of PW7 concerning the surveillance on the accused persons made prior to the incident does not also feature in Exhibit D2. There is no single highlight on Exhibit D2 about anything he did prior to the incident as he claimed to do. If it was part of the investigation he conducted as he claimed, according to his response to questions from the court, such investigation commenced on 2nd October, 2018 and not before that. In those premises, disregard the testimony of PW7 about the alleged oral confession and what he did prior to 2nd October, 2018 because, on my view is nothing but an afterthought. Thus, I find it safe to conclude that, there is no tangible evidence to establish that the second and third accused persons acted jointly and together with the first accused person to execute a common purpose. In my view, the first accused person committed the alleged offence alone.

Having said so and from the foregoing reasons, it is the finding of this Court that, the prosecution side has failed to prove the case beyond reasonable doubt against the second and the third accused persons. Thus, I find Rahma Ally Juma and Halima Anuary Mohamed, the second and the third accused persons respectively not guilty and they are accordingly acquitted of the offence charged of trafficking in narcotic drugs and are hereby set free.

So far as the first accused person is concerned, for the reasons stated above, it is the finding of this Court that, the prosecution side has managed to prove the case against him beyond reasonable doubt. Besides, there is no evidence from him to prove trafficking was lawful as he was required under Section 28 (1) of the Drug Act. Therefore, I find the first accused person, Yanga Omary Yanga guilty and I hereby convict him with the offence of trafficking in narcotic drugs contrary to section 15 (1) (a) of the Drug Control and Enforcement Act, No. 5 of 2015 as amended, read together with

paragraph 23 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002] as amended.



I. K. BANZI
JUDGE
20/11/2020

SENTENCE

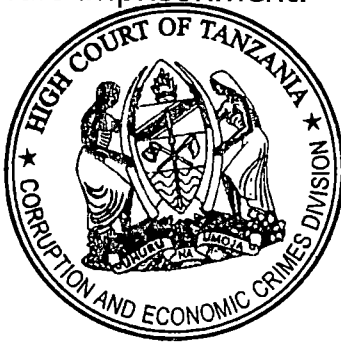
I have considered the prayers by counsel for Republic as well as mitigation factors submitted by the counsel for 1st accused person. This offence was committed in 2018 after the 2017 amendments of the Drug Control and Enforcement Act No. 5 of 2015.

Before the amendment, section 15 (1) (b) by then has the sentence with wording "shall be liable to life imprisonment". After the amendment the sentence appearing at the foot of subsection (1) via Act No. 15 of 2017 is "shall be sentenced to life imprisonment". However, despite the amendment, the legislature has retained the sentence of "shall be liable to life imprisonment" under subsection (1) (a) of section 15. It is obvious that, the legislature has intended for that offence not to carry a mandatory life sentence.

Since the retained sentence under subsection (1) (a) carries the words "shall be liable to life imprisonment" this court has discretion to impose other sentence other than life in the light of the definition of the word "liable" in sentence as discussed in the case of **Tabu Fikwa v. Republic** [1988] TLR 48. With this discretion, I find it prudent to resort into the provisions of

section 60(2) of the Economic and Organised Crime Control Act which has minimum sentence of 20 years and maximum of 30 years.

In that regard and considering the adverse effect of heroin hydrochloride on human kind, I hereby sentence the 1st accused person to 30 years imprisonment.

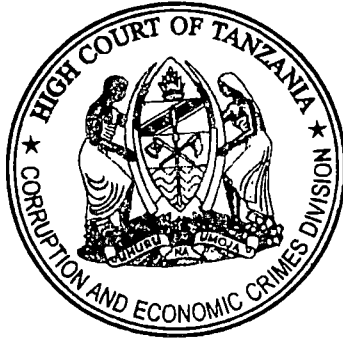


I. K. Banzi
JUDGE
20/11/2020

Order:

Exhibits P3(a), P3(b), P4(a) and P4(b) are hereby confiscated to the government of the United Republic of Tanzania and the same to be disposed of in accordance with the Drug Control and Enforcement Act No. 5 of 2015 as amended together with its Regulations. GN No. 173 of 2016. As for exhibit P7, motor vehicle makes Toyota Land Cruiser T 325 DJX I find no evidence to prove the same was used as instrumentality for the drugs subject matter of this case. Save for evidence of PW7 which I disregarded in my judgment for being an afterthought, there is no other evidence to prove the same being used as instrumentality for the drugs which are subject matter of this case. Had it been an instrumentality, yet still, the same could not have been confiscated without complying the provisions of section 49A (3) of the Drug Control and Enforcement Act, as amended because the available evidence shows it does not belong to the 1st accused person. Thus, I order the same to be restored to its rightful owner, Omary Yanga Omary as shown on the evidence unless otherwise held for other lawful purpose. Since other seized

exhibits as prayed by Advocate Kajembe were not tendered in evidence, I don't make any order to that effect.



I. K. Banzi
JUDGE
20/11/2020

Court:

Right of appeal against the conviction, sentence and order is fully explained.



I. K. Banzi
JUDGE
20/11/2020