IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 07 OF 2021

THE REPUBLIC

Versus

WOLFGANG SYLIVESTER LWAMTONGA

JUDGMENT

05/05/2022 & 19/05/2022

E.B. LUVANDA, J.

The indictment of the accused person above named was sanctioned by the fiat of the Director of Public Prosecutions, who warranted by way of consent for the accused person to be prosecuted for trafficking in narcotic drugs contrary to section 15(1)(a) of the Drugs Control and Enforcement Act No. 5 of 2015 as amended, and paragraph 23 of the First Schedule to, and sections 57(1) and 60(2) both of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002.

It is alleged in the particulars of offence that on 22/07/2018 at Julius Nyerere International Airport (JNIA) Terminal Two within Ilala district in Dar es Salaam region, the accused person trafficked in narcotic drugs,

namely heroin hydrochloride weighing 2.49 kilograms. The accused person denied the information.

The question for determination is whether the prosecution have proved their case on the standard.

The facts of this case are simple and straightforward, Steven Mwaisela Kagosi (PW3) who was a security officer at JNIA on a night shift at the scanning machine (for x-ray baggage) for departure (passengers), stated that at about 03.30 hours (on 22/7/2018) when the accused bag was passing at the x-ray showed suspicious image of something like a substance on the edge of both sides of a bag. PW3 summoned Said Adam Magohe (PW4) who also confirmed those image on the screen machine being doubtful. Thereafter, they let a bag to pass at the x-ray machine, which was immediately collected by the accused person. PW4 confirmed by asking the accused person if it belongs to him, then asked to inspect using hands and the accused acceded to the demand. PW4 inspected but those images seen on the screen were not detected by physical hands inspection. PW4 removed all clothes inside a bag, then took an empty bag to the x-ray machine, re-screened it where those images were still visible in the empty bag. They summoned Khalid Abdulahi Muhumbila (PW2) who is an

Assistant Superintended of Police (ASP). PW2 conducted search in the bag which was doubtful for containing suspicious substance, where PW2 opened its zip, inside there was another bag, removed it, and started to inspect it and nothing was found. PW2 inspected a large bag, removed all clothes, detected inside that bag aside on both sides of that bag there was something and there was a piece of cloth or patch (which was not part of the bag) which was fixed or mend by sewing inside in a way that one could not know or discover what was contained or covered inside. PW2 pierce a hole on the left side of that bag, where he saw a packet wrapped by khaki sellotape. PW2 pierce a hole on the right side of that bag saw another packet resembling the first one also wrapped by khaki sellotape. PW2 drilled those two packets, poured substance of powder form milk colour. PW2 seized those two packets which contained substance of powdery form (exhibit P1) via a seizure certificate form No. DCEA 003 (exhibit P4). This fact regarding search and seizure was supported by Evance Gang Liganga (PW5), who put that PW2 tore the accused's bag by using a knife where two packets were hiden on the right and left side of the bag. That PW2 pierced the two packets using sharp object saw something like flour brown in colour presumed to be narcotic drugs.

On defence, essentially the accused (DW1) did not dispel a fact that on the material night he showed up at the scanner or x-ray machine at departure area JNIA, his bag was screened on the scanner thereafter physically searched, although he twisted by alleging his black (back pack) bag exhibit D4 purported was the only bag in his possession which was screened and searched. In other words, the accused (DW1) was attempting to distance and disown a bag where exhibit P1 was discovered. However, the testimony of PW3 and PW4 implicate him, as they testified coherently that after they had suspected images on that bag, shortly thereafter the accused picked or collected the suspicious bag, meaning it was his bag. Even on cross examination, both PW3 and PW4 maintained and stick to the same fact that they managed to identify the owner of that bag containing exhibit P1, upon seeing the accused collecting a bag after passing on the screen or x-ray machine and claimed ownership. As much the credibility of PW3 and PW4 was not shaken, it is taken that the prosecution had managed to prove that the accused was the owner of a bag where exhibit P1 was impounded. As such a defence by the accused that he had only one back pack bag exhibit D4, is untenable. This is because PW6 stated that on 27/7/2018 when PW6 was escoting the

accused to Kisutu Court, he handed over to the accused one bag via exhibit register PF16, which was not necessary to this case, to assist the accused to carry his attire. On cross examination, PW6 maintained the same position. A fact that one bag was returned or handed over back to the accused on 27/7/2018 was also supported by DW1.

A defence and argument by the defendant side that a bag alleged contained exhibit P1 was not tendered in court, is unmerited. This is because on cross examination, when PW3 was tasked as to why he did not tender a bag, responded that he explained orally how exhibit P1 was packed in that bag. To my view, this is a correct legal position, that all facts except contents of a document may be proved by oral evidence. To be precisely, it is not the rule that every physical object must be strictly proved by tendering it formally for appraisal by the court. See sections 61 and 62(1)(a) of the Evidence Act Cap 6 R.E 2019.

In the case of **Livinus Uzo Chime Ajana vs Republic,** Criminal Appeal No. 13 of 2018, Court of Appeal of Tanzania sitting at Dar es Salaam (unreported), cited by the learned prosecuting officer, at page 29 the apex Court had this to say;

'With regard to the argument by Mr. Mtobesya that the socks and shoes in which the pellets had been wrapped were not tendered in evidence, we are in agreement with the learned Senior State Attorney, that their presence would have added nothing to the value of the evidence obtained from the direct oral testimonies of PW5, PW11 and PW12 who eye-witnessed the recovery of the narcotic drugs the subject of the charge, from the bag of the appellant'

In our case at hand, it was not necessary for the bag to be brought physically before the court, rather the direct oral testimony of PW2, PW3, PW4 and PW5 who were the eye witnesses to the search and seizure, is sufficient. PW2, PW3, PW4 and PW5 explained consistently how exhibit P1 was retrieved in the edge of both side of the accused person's bag where it was skillful or aptitude covered by a patch mend by sewing.

The accused person (DW1) stated that there was breakage of chain of custody from Khalid Abdulahi Muhimbila (PW2) to DSgt Jesias (PW6), where handing over delayed for five hours. Also that PW6 said he arrived to the chemist at 11.00 hours while in the form 001 reflect time for handing over was 15.00 hours. It is true that there was delay of handing over between PW2 and PW6, but PW2 explained that after seizure at

Terminal Two Outpost Police, he conducted an exercise of packing in respect of the two packets exhibit P1, which involved packing it into one envelope, caused witnesses to sign, then packed it into evidence bag and sealed with sealing wax ready for submitting the exhibits to the chemist. Then took all exhibits proceeded to Terminal One Central Police, where he opened case number JIA/IR/107/2018 then recorded it into evidence bag, thereafter summoned the exhibit keeper PW6 for handing over. As such the delay was accounted for by PW2 as demonstrated above. In other words, there is no evidence indicating that PW2 had diverted anywhere from Out Post Police at Terminal Two to Terminal One Central Police where handing over was done.

Equally it is true that PW6 stated that he arrived to the chemist at 11.00 hours, while the submission form 001 exhibit P3 indicate handing over was done at 15.00 hours. But PW1 stated that he recorded acknowledgement at 15.00 hours because receiving exhibit is proceded by inspection and confirming the exhibit submitted. Regarding an argument that the testimony of PW1 contradict with his previous statement exhibit D1, even if the discrepancy is there but it cannot be said that it occasioned breakage of a chain of custody. As there is no dispute that PW6 arrived to the

chemist (PW1) at 11.00 hours. Even if handing over suggest to have been done at 15.00 hours, it is immaterial. The story could be different if PW6 could say that from JNIA Terminal One Central Police where he took the exhibit for submitting to the chemist, he travelled for five hours from 10.00 hours when he departed at JNIA up to 15.00 hours when it is alleged formal handing over was officiated in paper or submission form exhibit P3. This could be held to be problematic and questionable to the chain of custody. But so far PW6 stated that he arrived to the chemist at 11.00 hours and delayed to handover, because the chemist was executing other duties, to my view the chain of custody remained intact. This is because there is no evidence suggesting that PW6 had made a detour or swerved anywhere on the main enroute from JNIA to the chemist.

Regarding an argument of the accused person that prosecution witnesses differed regarding colour of exhibit P1. It is true that PW1 said powdery substance in both packets was off white; PW2 said it was milk colour; PW3 and PW4 said it was cream colour; while Evance Gang Liganga (PW5) said brown colour. To my opinion off white, milk colour, cream and brown connote and portray the same colour. To be precisely there is no material contradictions between the colours mentioned above.

Mr. Dominicus Nkwera learned Counsel for the second accused, in his closing written submission raised an argument that the information is incurable defective on account of failure to state clearly kind of trafficking in narcotic drugs. The learned Counsel cited section 1 of the Drugs Control and Enforcement Act No. 5 of 2015; sections 132, 135(c)(11) of the Criminal Procedure Act, Cap 2o R.E. 2019; **Amiri Juma Shabani and others vs Republic**, Criminal Appeal No. 290 of 2015 CAT at Arusha (unreported) at page 5; **Aziz Abdallah vs R**, (1991) TLR 71 at page 72; **Ezekiel Kwihuja vs R**, Criminal Appeal No. 559 of 2016 CAT at Shinyanga (unreported) at page 12 and **Hamis Mohamed Mtou vs R**, Criminal Appeal No. 228/2019 CAT at Dar es Salaam (unreported). With due respect to the learned defence Counsel apart from a fact that his argument is misconceived for raising an argument of defectives of the information at the verge of closing submission which amount to a game of hide-and-seek. But also the cited provision of section 1 of Act No. 5 of 2015 alleged to have been offended, is a wrong citation. This is because the definition section is under the provisions of section 2, nevertheless the same were amended by Act No. 15 of 2017 of the Drug Control and Enforcement (Amendment) Act, section 3(g) amended section 2 in the

definition of the term "trafficking", by deleting the opening phrase and substuting for it the following:

> *"trafficking" means the importation, exportation, buying, sale, giving, supplying, storing, possession, production, manufacturing, conveyance, delivery or distribution, by any person of narcotic drug or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer..."*

The learned defence Counsel did not say how his client was prejudiced. Indeed, at the opening statement of his defence, DW1 stated clearly the accusation leveled against him. Meaning that he was aware of the particulars of offence on his trial and was able to stage his defence. Therefore, the argument melt away.

The learned defence Counsel submitted that the accused was interrogated after elapse of four hours from the time he was apprehended and detained at Julius Nyerere International Airport, citing sections 50(1) and 51(1) of the Criminal Procedure Act, Cap 20 R.E. 2019; **Janta Joseph Komba and another vs Republic**, Criminal Appeal No. 95 of 2006 CAT at Dar es Salaam (unreported) at page 14. With respect to the learned Counsel, the

law cited is inapplicable to the offence falling under the Drugs Control and Enforcement Act No 5 of 2015 as amended. The proper provision is section 48(2)(a)(v) of Act No. 5 of 2015 as amended which provide, I quote,

> *"cause or require a person arrested to admit or deny the offence in writing within **twenty four hours** or such other reasonable time and as it may be extended"* bold added

As such the time available for interrogating the suspect under restraint for offences of this nature is twenty four hours subject to extension. In the premises, a caution statement of the accused (exhibit P7) which was recorded on the same date on 22/7/2018 at 07.00 hours being four hours counting from when the accused was arrested at 03.30 hours, was made and recorded within the period stipulated in the law above.

The learned defence Counsel also raised an argument that a seizure certificate (exhibit P4) was obtained illegally for want of search warrant as it was not an emergence search. He cited **Shaban Said Kindamba vs Republic**, Criminal Appeal No. 390 of 2019 CAT at Mtwara (unreported), pages 15 and 16. It is to be noted that PW2 had stated that the incident occurred at 03.30 hours while on his business as inspector on duty, where Said Magohe (PW4) summoned him to proceed to the screen machine or x-

ray. In the circumstances, I go along with the argument of the learned State Attorney that search of the accused was under emergency situation after PW3 and PW4 had suspected the accused's bag images showing suspicious substances on the edge of corner for both sides. In the case of **Livinus Uzo Ajan** (supra), the Court of Appeal held at pages 28 and 29, I quote,

> *'After considering the submission from both side, we are inclined to side with Ms. Matikila that the need for a search order or seizure certificate in the instant matter did not arise due to its urgency. There was ample evidence which was tendered to establish that the need to search the appellant, arose as an emergency incident after the appellant had been suspected, while people were in their ordinary course of business. Under the situation, there was no time for the police officer to seek for a search order from the relevant authorities. The situation in the appeal at hand was similar to the one we encountered in* ***Marceline Koivogui's*** *case (supra) where also an emergence search had to be done. We stated that such situation did not call the procedure under section 38 of* ***the CPA****, but befits section 42 of the same Act'*

The learned defence Counsel also imported a question of knowledge making reference to the caution statement of the accused (exhibit P7).

In exhibit P7, the accused was recorded to had stated, I quote in verbatim,

> *'...hivyo nilibeba begi langu la nguo nikasafiri hadi NJIA PANDA YA SEGEREA MAJUMBASITA ambako nilimpigia simu akadai nitamwona ALEGANT HOTEL hivyo nilikodi Bodaboda hadi ALEGANT HOTEL nikakutana na ALEX akanikaribisha kwenye chumba No. 213 nikiwa na begi langu nikaingia. Kisha ALEX s/o? aliniaga kuwa anatoka atarudi baadaye. Baada ya dakika 20 hivi ALEX aliingia kwenye chumba alichoniacha no. 213 ALEGANT HOTEL akiwa na begi jeusi. Kisha akaniamuru nitoe nguo zangu zote kwenye begi langu niweke ndani ya begi alilokuja nalo. Baada ya hapo akanipa tiketi ya ndege ya shirika la Ethiopia ya kwenda MADAGASCA mji wa ANTANALIVO (sic, Antananarivo)'*

To my view a question of knowledge is not available in the circumstances where the accused had repudiated exhibit P7. Even a line of his defence was not aligned to averment depicted in exhibit P7, to portray a question of lack of knowledge, as the accused disowned the alleged black bag where exhibit P1 was found. Indeed, on defence the accused said he was travelling to Madagasca of his own accord and personal arrangements for

issues of model. The accused alleged to have made reservation on his own for hotel there including ground transport, although DW1 was unable even to mention or provide email or website or uniform resource locator (URL) link of a hotel where he purported to have made reservation. Neither mentioned the name of a hotel. More important, for the offences of this nature, the law does not set expressly knowledge as among the elements or ingredients of the offence. As such it remains to be a judicial invention depending on the circumstances of each particular case. But for the accused herein that window is totally closed for reasons adumbrated above.

The learned defence Counsel submitted that PW3, PW4 and PW5 were not supposed to be independent witness, because have interest concerning the arrest, search and seizure of an exhibit of two packets of powder of narcotic drugs. With respect, nowhere PW3 and PW4 stated that they were independent witness to a search, seizure or packing/sealing. PW3 and PW4 were responsible for screening and inspecting cargo at the x-ray machine for departure passengers. Principally PW3 and PW4 can be said were the complainant who lodged a complaint to PW2 who afterwards conducted a search and thereafter effected seizure and arrest. PW5 who is a customs

officer of Tanzania Revenue Authority stationed at JNIA, was summoned and attended as an independent witness to the search. The learned defence Counsel did not expound as to how PW5 is affiliated or interested in the outcome of a case or how will profit from it. Above all, a question of independent witness did not feature anywhere among the questions put to PW5 on cross examination. More important, PW5 stated that he was summoned via his office. In **Livinus Uzo** (supra) at page 29, the Court of Appeal of Tanzania established, I quote,

> *'We noted that among these witnesses, there were some who were police officers, while others were not and therefore the question that there was collusion did not arise'*

The apex Court did not rule that public servant or officers are barred or precluded to appear as independent witness. As much PW5 is not a police officer or security officer, he cannot be disqualified to be an independent witness. In view of a fact that the law does not define as to who is eligible to be called as an independent witness, I rule that PW5 was an independent witness for all purpose and intend.

The learned defence Counsel also pinpointed some discrepancies that PW3 said it is PW4 who opened a bag during physical search, while PW4 said it

is the accused who opened a bag. This discrepancy even if is there, is a minor, as does not change anything regarding a fact that a bag was physically inspected by PW4. Also the defence Counsel submitted that PW3 and PW4 did not say about a small bag which was found inside the bag during search at police. It is to be noted that, PW3 and PW4 did not conduct search, after screening and physical inspection, they reported to PW2 who conducted a formal search in the bag of the accused person. Therefore, whether they saw or not a small bag, or else whether they saw the accused holding a backpack on his back, is irrelevant to the main story that the accused's bag was found with two packets of powdery substance being narcotic drugs. All these discrepancies including those depicted by the learned prosecuting officer that there was a discrepancy regarding the object used by PW2 to pierce or bore hole the two packets, where PW2 said he used a pin, PW3 said a knife (sic, pin), PW4 said a pin (sic, knife), PW5 said an instrument or sharp object, all fall under category of minor discrepancies. As submitted by the learned prosecuting officer these discrepancies do not go to the root to dent prosecution case. In a case of **Maramo Slaa Hofu and three others vs Republic**, Criminal Appeal No.

246 of 2011, CAT (unreported) cited by the learned prosecuting officer, at pages 12 and 13 the Court of Appeal of Tanzania had this to say, I quote

> *'...in all trials, normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradictions or inconsistencies, embellishments or improvements on trivial matters which do not affect the case for the prosecution should not be made a ground on which the evidence can be rejected in its entirety'*

Therefore, the accused is found guilty and is convicted for the offence of trafficking in narcotic drugs contrary to section 15(1)(a) of the Drugs Control and Enforcement Act No. 5 of 2015 as amended, and paragraph 23 of the First Schedule to, and sections 57(1) and 60(2) both of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002.

HIGH COURT OF TANZANIA ... AND ECONOMIC CRIMES DIVISION

E.B. Luvanda
Judge
19.05.2022