

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**CORRUPTION AND ECONOMIC CRIMES DIVISION**

**AT MOSHI SUB-REGISTRY**

**ECONOMIC CASE NO. 6 OF 2021**

**THE REPUBLIC**

**VERSUS**

**1. ABUSHI TWAHA ABUDALLAH**

**2. SIMON ANDREW BOAA**

**JUDGMENT**

13<sup>th</sup> and 18<sup>th</sup> May, 2022

**BANZI, J.:**

Initially, this case involved two persons, Abushi Twaha Abudallah and Simon Andrew Boaa who stand charged with the offence of trafficking in narcotic drugs contrary to Section 15 (1) (a) and (3) (iii) of the Drug Control and Enforcement Act, No. 5 of 2015 ("the Drugs Act), as amended by Act No. 15 of 2017, read together with Paragraph 23 of the First Schedule to, and section 57 (1) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002], as amended ("the EOCCA").

It is alleged in the information that, on 2<sup>nd</sup> February, 2019, at Kwa Msomali Bomang'ombe area, within Hai District in Kilimanjaro Region, the

accused persons trafficked in narcotic drugs namely, Catha edulis (Khat) commonly known as Mirungi weighing 116.16 kilograms. However, it is on record that, the first accused person escaped from lawful custody on 15<sup>th</sup> April, 2021. Following his escape, on 21<sup>st</sup> October, 2021 when the case was called for plea taking and preliminary hearing before this Court, the prosecution side prayed to withdraw the information against the first accused person, Abushi Twaha Abudallah under section 91 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] ("the CPA"). Consequently, the information against the first accused was marked withdrawn and he was accordingly discharged. Thus, the case continued with the second accused person, Simon Andrew Boaa ("hereinafter to be referred as the accused person") who proclaimed his innocence throughout the trial.

In a bid to establish the case against the accused person, the prosecution side through Ms. Cecilia Shelly, learned Principal State Attorney and Mr. Edward Mokiwa, learned Senior State Attorney called in nine (9) witnesses and tendered fifteen (15) exhibits. On the other hand, the accused person under the services of Ms. Rachelly Mboya, learned Advocate testified under oath as the sole witness for defence and did not tender any exhibit.

Basically, the evidence by the Prosecution reveals that, on 2<sup>nd</sup> February, 2019 around 00:50 am, a police officer namely, F.3795 D/SGT Yusuph (PW3) with his colleagues, PC Andrew and PC Joshua were on duty at police barrier of Kwa Msomali, Bomang'ombe area. While they were still there, a motor vehicle with registration number T443 DET make Toyota Noah (Exhibit P5) arrived and they stopped it for a routine inspection. It had two persons; the driver Abushi Twaha Abudallah ("the escapee") and the accused person. After stopping, they raised suspicion and asked them what they were carrying. The duo replied that, they had nothing. PW3 did not satisfy, whereby, he called and informed the Inspector on duty at the station, Inspector Godfrey Gideon Malimba (PW2) about his suspicion who instructed him to take the motor vehicle in question and the suspects to the station. Thereafter, PW3, PC Joshua and PC Andrew boarded in the motor vehicle in question whereby PC Andrew drove it up to the station.

On arrival at the station, PW2 began to inspect the said motor vehicle. In the course of inspection, he discovered chambers which were skilfully made at the inner part of the bumper on the front tyres, in the boot and at the entrance of the middle door. All chambers were covered by a piece of tin and tied up with nuts. Also, the ones in the boot and middle door were concealed by carpet. After seeing that, PW2 opened the chambers and after

opening, he found bundles of fresh leaves suspected to be narcotic drugs, *Catha edulis*. The bundles were packed in newspapers package. After retrieving, they counted and got a total of 530 bundles. PW2 seized them together with the motor vehicle in question through certificate of seizure (Exhibit P2) which was signed by him, PW3, the escapee and the accused person. Upon signing the certificate of seizure, PW2 packed the bundles in two sulphate bags. The sulphate bags were white in colour with light green stripes on both sides. On the same date around 7:30 am, PW2 handed over seized exhibits to D.9903 SSGT James (PW6), the custodian of exhibits of Bomang'ombe police station via handing over certificate (Exhibit P3). Upon receiving, PW6 stored the sulphate bags with bundles in the exhibits room and parked the vehicle outside the station.

On 4<sup>th</sup> February, 2019 around 2:40 pm, PW6 handed over the exhibit to E.3111 D/SGT Emanuel (PW7), the investigator of the case through handing over certificate (Exhibit P8) for purpose of taking to Weights and Measures Agency (WMA) at Moshi for weighing exercise. PW7 went to WMA together with accused person and the escapee and upon arrival, they were received by Brenda John Mbuya (PW5). According to PW5, she received two sulphate bags containing 530 bundles of fresh leaves packed in newspapers package whereby, she weighed the bundles in the presence of accused and

the escapee and got a total weight of 116.16 kilograms. After that, she prepared a report (Exhibit P7) signed it and handed over to PW7 together with and the exhibit. PW7 returned to the station where he handed over the exhibit to PW6 via handing over certificate (Exhibit P9). PW6 stored it until 5<sup>th</sup> February, 2019 at 11:30 am when he handed over to PW7 via handing over certificate (Exhibit P10), so that he could submit to the Government Chemist Laboratory Authority (GCLA) Northern Zone, Arusha. PW7 travelled to Arusha by using police vehicle, and on arrival, he handed over to Amina Shabani Benta (PW1) via Submission Form DCEA 001 (Exhibit P14). According to PW1, she received two sulphate bags containing 530 bundles of fresh leaves packed in newspapers suspected to be *Catha edulis*. After receiving, she weighed the bundles and got total weight of 116.16 kilograms. Thereafter, she drew samples, packed in two separate envelopes, labelled them with Lab No. NZL105/2019 and stored the same in sample storage room. Then, she filled in Sample Receipt Notification Form GCLA 01 (Exhibit P1) and handed it over to PW7 the exhibit with the exhibit in question.

On the same day around 5:20 pm, PW7 returned to the station and handed over the exhibit to PW6 via handing over certificate (Exhibit P11). PW6 stored the exhibit in exhibits room until 11<sup>th</sup> July, 2019 when he handed over to PW7 via handing over certificate (Exhibit P12) for purpose of taking

to court for disposal. Upon receiving, PW7 prepared Inventory Form DCEA 006 (Exhibit P13) and went to Hai District Court before Hon. Devota January Msofe (PW8). After seeing the state of exhibit, PW8 issued a disposal order in the presence of the accused person and the escapee. According to PW7 and PW8, all 530 bundles of leaves were destroyed by fire in a damp outside of court premises in the presence of the accused and the escapee.

On 26<sup>th</sup> February, 2019, on the instructions of Zonal Manager, PW1 handed over samples in two envelopes to a Chemist, Onesphat Donat Stephano (PW4) so that he could transmit them to GCLA, Dar es Salaam for analysis. On the same day, a Chemist at GCLA Dar es Salaam, one Gabriel Jacob Gabriel (PW9) received two samples from PW4 via a letter with Ref No. NZA/L.20/02/310 (Exhibit P6) dated 25<sup>th</sup> February, 2019. After receiving, PW9 registered by giving them Lab No. 730/2019. Thereafter, he went to laboratory with PW4 where he verified by comparing the exhibit with submitted documents. After confirming, he caused PW4 to sign in their register and released him. According to PW9, he received two envelopes labelled with Lab No. NZL 105/2019 containing samples which were fresh leaves suspected to be narcotic drugs, Catha edulis. Thereafter, he conducted his analysis on those samples by using a machine called Liquid Chromatography Mass Spectrometry. After analysis, the leaves from two

samples were confirmed as narcotic drugs, namely *Catha edulis* after being found with Cathinone chemical which is only found in *Catha edulis* plant. After getting the results, he prepared a report which was approved by Acting Chief Government Chemist. The report was admitted as Exhibit P15.

In his defence, the accused person came up with a general denial. First and foremost, he denied to be arrested at the crime claiming that, during the material night, he was sleeping at his home located at Kwa Sadala area. Apart from denying to commit the alleged offence, he also denied to know the escapee Abushi Twaha Abudallah. He further claimed to involve himself in selling cattle grass along the road at Kwa Sadala area. According to his testimony, on 2<sup>nd</sup> February, 2019, at 1:00 pm, while he was cutting grass near his sale point, he was called by someone whom he came to know later as police officer namely Andrew. After being called, the accused person began to insult him. The said Andrew went closer to him and the two started to fight. The accused person was arrested by Andrew after being overpowered by him. After being arrested, he was put in a motor vehicle where he found other persons. After that he was beaten and taken to Bomang'ombe police station where he was put in lock up. He tried to apologise but his efforts proved failure. He claimed to sign by force various documents brought to him by PW7 while he was in lock up. He stayed in

custody until 7<sup>th</sup> February, 2019 when he was taken to Hai District Court and charged with the offence of trafficking in narcotic drugs jointly with Abushi Twaha Abudallah whom he didn't know. He prayed to be acquitted as he was not involved in the alleged offence.

In a nutshell, that was the evidence of the Prosecution and Defence. I thank both sides for filing their final submission timely which will be considered 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 530 bundles of leaves were seized from the motor vehicle with registration number T443 DET make Toyota Noah*; **two**, *whether on the material night, the accused person was arrested in the motor vehicle in question* and **three**, *whether chain of custody was maintained*.

I will determine the first and second issue jointly. The prosecution evidence shows that, on the night of incident, the motor vehicle with registration number T443 DET make Toyota Noah silver in colour was stopped at police barrier located Kwa Msomali Bomang'ombe area by PW3 with his colleagues for routine inspection. The vehicle had two persons; the driver Abushi Twaha Abudallah (the escapee) and the Simon Andrew Boaa



(accused person). After informing PW2 following their suspicion, they took the motor vehicle and accused persons up to the station. The motor vehicle was thoroughly inspected and found with secret chambers skilfully made. After opening the chambers, 530 bundles of fresh leaves suspected to be narcotic drugs, *Catha edulis* were found therein. The bundles were packed in newspapers packages. PW2 seized them together with the motor vehicle (Exhibit P5) through certificate of seizure, Exhibit P2. Exhibit P2 which supports the evidence of PW2 was signed by PW2 himself, PW3, PC Joshua, the escapee and the accused person. The evidence of PW2 is also supported by the evidence of PW3. Apart from that, PW2 successfully showed this Court those secret chambers in the motor vehicle in question where he retrieved 530 bundles of leaves.

As stated herein above the accused person in his defence came up with a general denial. He claimed that, on the night of incident, he was sleeping at his house located at Kwa Sadala area. It is well known that; general denial is fundamentally a weak defence; negative and self-serving which cannot impress the Court. See the case of **Leonard Joseph @ Nyanda v. Republic** (Criminal Appeal No. 186 of 2017) [2020] TZCA at [www.tanzlii.org](http://www.tanzlii.org). Apart from denying everything, looking closely at his evidence, the accused person relied on the defence of *alibi*. Nonetheless, his

*alibi* was raised in contravention of the law because according to section 42 (1) (2) of the EOCCA, the accused person ought to have notified the Court his intention to rely on *alibi* as his defence during the preliminary hearing. But he did not do so. Likewise, he failed to furnish the prosecution with the particulars of his *alibi* before the closure of prosecution case as required by law but he did not do so. If his *alibi* was genuine, and he knew he was not at the crime scene, it was expected to be revealed from the beginning at the preliminary hearing considering the fact that, at that stage he was duly represented by learned Advocate who is conversant with the procedure of notifying the Court to that effect. Moreover, if he truly knew he was not at the scene of crime, he could at least furnish the particulars of his *alibi* to the prosecution before the closure of prosecution case.

Furthermore, if his *alibi* was genuine, it was expected to be revealed in the course of testimony of PW2 and PW3. But the questions concerning where he was arrested were not asked by his counsel when arresting officer and seizing officer, PW3 and PW2 respectively, were testifying. PW2 and PW3 were not asked question about the accused person to be arrested in the afternoon of 2<sup>nd</sup> February, 2019 at Kwa Sadala area after a fight with the so-called Andrew. In other words, the accused person through his counsel failed to cross-examine PW2 and PW3 on this vital point, which ordinarily

implies the acceptance of the truth of the witness evidence; and any alarm to the contrary is taken as an afterthought if raised thereafter. See also the case of **Martin Misara v. Republic** (Criminal Appeal No. 428 of 2016) [2018] TZCA 318 at [www.tanzlii.org](http://www.tanzlii.org). Therefore, this alone is a clear indication that, his so-called *alibi* is nothing but an afterthought.

Apart from that, his defence on how he was arrested is implausible as it is very unlikely for a person to insult a mere stranger just because he was called by him. Besides, a suggestion by the accused person that he was forced by PW7 to sign various documents including certificate of seizure is wanting. PW2 and PW3 testified about the accused person to sign the certificate of seizure at the place where search and seizure were executed. These two were not cross-examined about the accused person being forced by PW7 to sign the same while he was in lock up. Also, PW7 was not cross-examined on that aspect. All these connote that, the defence accepted the truth of PW2 and PW3 evidence concerning the accused person signing the certificate of seizure at the place where the search was conducted. This is a clear proof that, he signed to acknowledge that, 530 bundles of fresh leaves were seized from him. See also the case **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](http://www.tanzlii.org) which emphasised

that, by signing the certificate of seizure, the accused person acknowledges to be found with the exhibit in question.

In her final submission, the defence counsel attacked the search and seizure in question for want of independent witness. She cited the decision of this Court in the case of **Republic v. Mussa Hatibu Sembe**, Economic Case No. 4 of 2019 HC Corruption and Economic Crimes Division at Tanga Sub Registry (unreported) to support her submission. It is undisputed that, in this case, the search and seizure in question were executed in the absence of independent witness. However, unlike in the cited case of **Mussa Hatibu Sembe** where the search was conducted at the bus stand, during the day time while the police had prior information, in the present case, the same was conducted in the middle of the night after the accused persons being stopped at police barrier for routine inspection while the police had no prior information about presence of narcotic drugs in the said motor vehicle. This situation fall under section 42 of the CPA concerning search under emergency situation which does not require presence of independent witness. Besides, according to Exhibit P3, the seizure in question was executed under section 48 (2) (c) (vii) of the Drugs Act which does not imperatively provide for the need of an independent witness to sign it. The same position was also held in the case of **Jibril Okash Mohamed v.**

**Republic** (Criminal Appeal No. 331 of 2019) [2021] TZCA 13 at [www.tanzlii.org](http://www.tanzlii.org). Hence, the argument by the defence that the seizure in question was illegal is misplaced.

In these premises, I find the whole defence by the accused person particularly his *alibi* as nothing but afterthought and it has failed to raise any doubt in prosecution evidence. Thus, it is the finding of this Court that, on the material night of incident, the accused person was found in the motor vehicle in question in actual possession of 530 bundles of leaves which were narcotic drugs as per testimony of PW9 and Exhibit P15. Apart from that, there is no doubt that the accused person was aware of the presence of narcotic drugs within the secret chambers as they were the only persons found in the vehicle in question. Unfortunately, the accused person did not give any reasonable explanation on how he ended up in the said vehicle in the middle of the night. Assuming those narcotic drugs were packed in the secret chamber by the escapee but this must have been done in the knowledge of the accused person who was arrested in the same vehicle. With this finding, the first and second issue are affirmatively answered.

Before determining the third issue, it is pertinent to determine whether the leaves in question are narcotic drugs namely, *Catha edulis*. The defence

counsel in her submission was of the view that, it is doubtful if the all 530 bundles were narcotic drugs since PW1 did not draw samples from each bundle. It is the cardinal principle that, the duty of an expert is to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the court to form its own independent judgment by application of these criteria to the facts proven in evidence. See the case of **Sylvester Stephano v. Republic**, Criminal Appeal No. 527 of 2016 CAT at Arusha (unreported).

In this case PW1 and PW9 are experts who testified on their areas of expertise on how they dealt with the said 530 bundles of leaves. PW1 stated how she weighed 530 bundles of leaves with and without packages and how she calculated to find the actual weight of the 530 bundles of leaves. Before drawing samples, she put the leaves into two groups depending on their structure or morphology. After that, she did random sampling by drawing two samples and packed in two envelopes. PW9 the Government Chemist stated the whole process of analysis starting from extraction by mixing the samples with chemicals until injecting them into the machine called Liquid Chromatography Mass Spectrometry. The machine revealed that both samples contained Cathinone chemical which is a confirmation that, the leaves from 530 bundles were narcotic drugs namely *Catha edulis* because

Cathinone is only found in *Catha edulis* plant. The testimony of PW9 is supported by his report, Exhibit P15 which is a conclusive proof according to section 48A (2) of the Drugs Act. Thus, from the evidence of PW9 there is no doubt that leaves in 530 bundles are *Catha edulis* (Khat) and therefore, narcotic drugs in the ambit of section 2 and the First Schedule to the Drugs Act.

Returning to the third issue regarding the chain of custody, it is settled that, in the absence of paper trail documentation, credible oral testimony is sufficient to prove chain of custody. See the case of **Abas Kondo Gede v. Republic** (Criminal Appeal No. 472 of 2017) [2020] TZCA 391 at [www.tanzlii.org](http://www.tanzlii.org). In the case at hand, the prosecution side relied both on oral and documentary evidence. The evidence on record shows that, On 2<sup>nd</sup> February, 2019 around 1:00 am, PW2 seized 530 bundles of fresh leaves packed in newspapers from the motor vehicle in question in the presence of PW3 via the certificate of seizure, Exhibit P2. PW2 packed the bundles in two white sulphate bags with light green stripes on both side and on the same date at 7:30 am he handed over to PW6, the custodian of exhibits via Exhibit P3. After receiving, PW6 counted to confirm and stored the same in the exhibits' room until 4<sup>th</sup> February, 2019, at 2:40 pm when he handed to PW7, through Exhibit P8 who submitted to PW5 for weighing. After completing

weighing exercise, PW5 handed over to PW7 who returned to the station at 5:15 pm and handed over to PW6 via Exhibit P9. PW6 stored the same until 5<sup>th</sup> February, 2019 at 11:30 am when he handed over to PW7 via Exhibit P10 who submitted to PW1 via Exhibit P14. After weighing and drawing samples, PW1 handed over the exhibit to PW7 who returned to the station and handed over to PW6 through Exhibit P11. PW6 stored the same in exhibits room. On 26<sup>th</sup> February, 2019, PW1 handed over the samples to PW4 who transmitted the same to GCLA, Dar es Salaam via Exhibit P7 where he was received by PW9 who analysed the them and confirmed that the leaves were narcotic drugs namely *Catha edulis*.

On 11<sup>th</sup> July, 2019, PW6 handed over 530 bundles of leaves to PW7 via Exhibit P12 who took them to Hai District Court where PW8 issued disposal order after finding that the leaves are perished. The leaves were destroyed by fire in the presence of PW7, PW8, accused person and the escapee. The inventory was duly executed (Exhibit P13) and the same was tendered before this Court in lieu of seized 530 bundles of *Catha edulis*. From these chronological events, it is clear that the chain of custody was not broken as all witnesses who handled the exhibit were summoned. Besides, all documents concerning handling of exhibit were tendered before this Court. Therefore, basing on oral testimony of PW1, PW2, PW4, PW5, PW6,



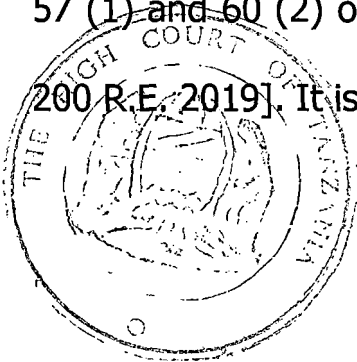
PW7, PW8 and PW9 as well as Exhibits P1, P2, P3, P6, P8, P9, P10, P11, P12 and P14, there is no shadow of doubt that, the substance that were seized, they are the very one which were examined by the Government Chemist and finally tendered in evidence in this Court through the Inventory, Exhibit P13.

Notably, section 36 of the Drugs Act permit disposal of narcotic drugs at any time depending on its hazardous nature. According to PW7, the leaves were perishing that is why he prepared Inventory Form pursuant to the law and took the same before the Magistrate for destruction. Likewise, PW8 in her testimony clearly stated that, she issued disposal order after seeing that the leaves were decomposed. In that view, the argument by the defence counsel that there was no justification for disposing the leaves in question is wanting. That being said, third issue is also affirmatively answered positively.

For the reasons stated above, and since all issues were affirmatively answered, it is the finding of this Court that, the prosecution side has managed to prove the case against the accused beyond reasonable doubt. Since the accused person was found in possession of the drugs in question in the course of conveying from one point to another, his act amounts to trafficking as per definition of the trafficking under section 2 of the Drugs

Act. Besides, there is no evidence from him to prove trafficking was lawful as he was required under Section 28 (1) of the Drugs Act.

Thus, I find the accused person, Simon Andrew Boaa 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 [Cap.95 R.E. 2019], 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. 2019]. It is so ordered.



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**I. K. BANZI**  
**JUDGE**  
**18/05/2022**

Delivered in open court the presence of Ms. Cecilia Shelly, learned Principal State Attorney and Mr. Edward Mokiwa, learned Senior State Attorney for the Republic and Ms. Rachelly Mboya, learned Counsel together with accused person. Right of appeal is duly explained.



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**I. K. BANZI**  
**JUDGE**  
**18/05/2022**

## **SENTENCE**

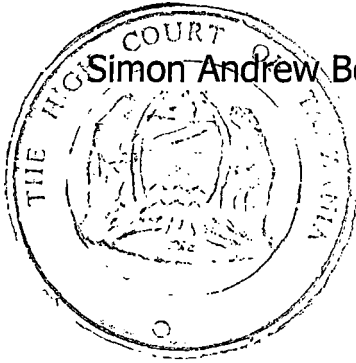
The accused person is convicted with economic offence which according to section 60(2) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2019], the punishment is 30 years maximum and 20 years minimum. Likewise, according to Tanzania Sentencing Manual for Judicial Officers, a convict of drug trafficking offence under section 15 (1) (a) of the Drug Control and Enforcement Act [Cap. 95 R. E. 2019] can be sentenced with a minimum sentence of 20 years towards 30 years which is maximum penalty.

I have considered the submission by learned Principal State Attorney including that they have no previous criminal record against the accused and the effect of narcotic drugs on human being. I have also considered the mitigation factors as submitted by learned defence Counsel including the accused being the first offender, the time he had already spent in custody and having old parents who depend on him for their livelihood.

I am aware that, trafficking of narcotic drugs is a serious offence. I am also aware on the effects of Catha edulis on human being because according to Analyst report (Exhibit P15), it causes drug dependence and mental disorder. But taking into consideration that the accused person has no

criminal records for being first offender and the time he had already spent in custody which is more than three years, it is my considered view that he deserves lenient sentence. Thus, I hereby sentence the accused person

Simon Andrew Boaa to 24 years imprisonment.

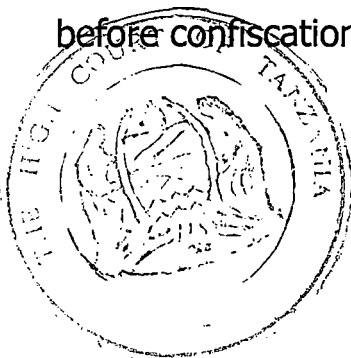


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**I. K. BANZI**  
**JUDGE**  
**18/05/2022**

### **ORDER**

Although Exhibit P5 the motor vehicle with Reg No. T443 DET make Noah with its key, Exhibit P4 is the instrumentality of crime, but there is no proof that it is owned by the accused person. In that regard, since on 13<sup>th</sup> May, 2022 I ordered it to be in the custody of RCO, Kilimanjaro, the same shall remain in his custody and the prosecution are advised to deal with it according to section 49A (2) (3) of the Drug Control and Enforcement Act [Cap. 95 R. E. 2019] in order to accord a right to be heard to its lawful owner before confiscation order is issued.



A handwritten signature in black ink, appearing to read "I. K. Banzi".

**I. K. BANZI**  
**JUDGE**  
**18/05/2022**