

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

AT DAR ES SALAAM

ECONOMIC CASE NO. 05 OF 2021

REPUBLIC

VERSUS

1. HAMISI SELEMANI

2. MSAILO MSAILO @ TWANGILO

JUDGMENT

6th and 20th January, 2022

BANZI, J.:

Hamisi Selemani and Msailo Msailo @ Twangilo, the first and second accused person, respectively stand charged with the offence of trafficking in narcotic drugs contrary to Section 15 (1) (b) of the Drug Control and Enforcement Act, No. 5 of 2015 ("the Drug Act), read together with paragraph 23 of the First Schedule to, and sections 57 (1) and 60 (2) the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002], as amended. It is alleged that, on 13th November, 2016 at Kwala Village, within Kibaha District in Coast Region, the first and second accused person trafficked narcotic drugs namely, *cannabis sativa* weighing 4492.43 kilograms.

Both accused persons pleaded not guilty to the information and in order to establish the case against them, the prosecution side under representation of Ms. Kasana Maziku, learned Senior State Attorney assisted by Ms. Elizabeth Mkunde and Edith Mauya, learned State Attorneys called in five (5) witnesses to testify, namely, Inspector Fanuel Christopher Millinga, (PW1), Elias Mulima (PW2), E.8966 CPL Mokili (PW3), Kavumo Masewa Mndeme (PW4) and Said Ally Dikulu (PW5). Besides, they tendered seven (7) exhibits, which were admitted, thus: Exhibit P1, Certificate of Seizure; Exhibit P2, Forensic Laboratory Submission Form; Exhibit P3, Inventory Form; Exhibit P4, Certificate of Destruction; Exhibit P5, six motorcycles; Exhibit P6, six water pumps and Exhibit P7, Laboratory Analysis Report.

On the other hand, Ms. Mwanahamisi Kilongo and Mr. Victor Kweka, learned counsel represented the first and second accused person, respectively. The two accused persons were the sole witnesses for defence who testified as DW1 and DW2 and tendered two exhibits, *viz.*, previous statement of PW3 and previous statement of PW5 which were both admitted as Exhibits D1 and D2 respectively.

In the main, the body of evidence by the prosecution presents a case that, on 13th November, 2016, PW1 received a tip from an informant that, there are some people at Kipera area, Kwala ward in Mlandizi rural who are

involving themselves in cultivating narcotic drugs namely cannabis sativa and transporting the same in urban areas by using motorcycles. Following such information, he informed his superior who instructed him to go to the said area together with other police officers. After given working tools, he went to Kipera area with an informant and other police officers including D/CPL Silvery and D/C Killian.

On arrival, they found a forest and in the middle of the forest, they found more than fifteen houses and farms of cannabis sativa. After seeing the motor vehicles with police officers, the residents dispersed by running towards the forest and river and two amongst them who happened to be the first and second accused person entered in a certain house. Upon seeing that, PW1 with his colleagues decided to focus on the two who entered in that house. They surrounded the house while looking for independent witness and according to PW1, they managed to get two persons, PW5 and Salum Fundi who were in a motorcycle coming from a witch doctor. They searched them in order to confirm if they were not among the suspects. After being asked, they agreed to be witnesses of the intended search. Thereafter, the police officers knocked the door which was opened by the two suspects. After opening, PW1 made introduction and informed them about the intended search. According to PW1, upon enquiry, the second accused person admitted to be the owner of that house. In the course of

search inside the house, they retrieved 203 sacks of dry leaves suspected to be cannabis sativa and 28 sacks of seeds suspected to be cannabis seeds. According to the testimony of PW1, the sacks were at the sitting room, bedrooms and on the ceiling. Outside the house, there was another room where they also found six motorcycles and six water pumps. After retrieving them, PW1 filled in certificate of seizure which he signed together with PW5, Salum Fundi and both accused persons.

After signing the certificate of seizure, PW1 informed his superior who sent him a police lorry. On arrival of the lorry, they loaded seized exhibits and went to Kibaha police station. After arriving, PW1 opened a case and the accused persons were put in lock up. He then labelled the seized exhibits with case reference number which was KBA/IR/4051/2016 and handed over to custodian of exhibits, PW3. Upon receiving, PW3 recorded them in exhibits register and stored them. On 25th November, 2016, around morning hours, PW3 handed over 203 sacks of dry leaves suspected to be cannabis sativa and 28 sacks of seeds suspected to be cannabis seed to PW1. After receiving, he sealed the area with exhibits and then handed over to PW2 who was instructed to go there by the Chief Government Chemist to draw samples. Before drawing sample, he labelled the sacks with leaves 1 to 203 and those with seeds 1 to 28. Then he weighed the seeds and leaves separately from their packages whereby, he got total weight of 847.84 kilograms for seeds

and 3644.59 kilograms for leaves. After that, he drew samples from each sack and put in envelopes whereby he labelled each envelope according to the number he marked on each sack. Then he registered the exhibits by giving them laboratory number (Lab. Number) 2066/2016. After that, sealed the sacks with tape and labelled all sacks and envelopes with lab number 2066/2016. Thereafter, he handed over the sacks to PW1 and left with samples. On arrival in the office, he stored the samples in special cabinet.

After receiving the exhibits from PW2, PW1 handed over to PW3 who stored them until 15th October, 2018 when he handed over to PW1 for destruction exercise. PW1 filled in inventory form (Exhibit P3) and showed the exhibits subject to destruction to the Magistrate (PW4). After confirming the state of exhibits, PW4 signed Exhibit P3 together with both accused persons. Then, PW4 issued a disposal order. After that, the sacks containing leaves and seed were destroyed by burning the same on the same day at the dump located at Pangani area, Kibaha District. The destruction was conducted in the presence of PW4, PW1, both accused persons and other relevant persons. After completing, they filled in destruction certificate form (Exhibit P4).

It is also the prosecution's evidence that, three weeks after he drew samples, PW2 conducted his analysis. He began his analysis by conducting

microscopic test on seeds. Through the microscope, he saw tortoise shell shape in all 28 samples which is a confirmation that, the seeds were cannabis seeds because it is only cannabis seed which has a shape of tortoise shell when examined by microscope. After that, he proceeded with leaves by conducting preliminary test whereby, after mixing with chemical the leaves changed colour into purple indicating presence of cannabis sativa. After such result, he proceeded with confirmatory test by using a machine called High Performance Liquid Chromatography. Through the machine, it was confirmed that all 203 samples were cannabis sativa because they contained the chemical called *tetrahydrocannabinol* which is only found in cannabis plant. After completion, he prepared his report which was admitted as Exhibit P7.

In their defence, the first and second accused person testified under oath as DW1 and DW2, respectively. They categorically denied to have committed the offence of trafficking in narcotic drugs. They also denied to be cultivators of cannabis sativa. Each one denied to be the owner of the house where the alleged sacks together with motorcycles and water pumps were retrieved. DW1 told the Court that, on the fateful day, while he was passing at Usungura Village on his way to Mzungu hamlet, he saw many people running towards his direction and he met with police officers who stopped him. After enquiry about where he was going, they ordered him to

board in their motor vehicle and they drove off up to the houses where he found many police officers with the second accused person and PW5. He was told to sit with them under the tree. After eating, the team leader (PW1) led them and began to search one house after another. Whatever is retrieved therein, they were ordered to carry the same to the motor vehicle. They completed the exercise around 3:00 pm and they were taken to police station.

On his side, DW2 told the Court that, while he was returning home, he found police officers at the house of Saidi Ulata together with PW5. He was put under restraint and after meal, the search began in houses. It began with the house of Saidi Ulata where they found a lot of sacks. According to him, the police were breaking into those houses as everyone escaped. During the search, they were ordered to carry sacks from the houses to the motor vehicle. After completion, they were taken to police station. He claimed to be beaten at the station by one police officer namely Masimike. He attempted to run away to avoid the beating. He was then taken to court and sentenced to three months imprisonment for trying to escape. While he was in prison, he received summons and after being taken to Court, he was joined with first accused person and charged with trafficking narcotic drugs. Both accused persons denied to have signed the certificate of seizure at the crime

scene and claimed to sign it at the police station. They maintained their innocence and urged the Court to acquit them.

In a nutshell, that was the evidence by the prosecution and defence side. The counsel of both sides filed their final submissions timely. I will consider their submissions in the course of this Judgment. Having considered the evidence on record and the submissions by counsel for both sides, the main issue before the Court for determination is whether *the prosecution has proved the case against the accused persons beyond reasonable doubt*.

It is vital to underscore that, according to section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2019], 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. Section 28 (1) of the Drug Act is among of such exceptions. 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 settled 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. In that regard, and according to the principles underscored above, it is the duty of the prosecution to prove beyond reasonable doubt that the accused persons trafficked the alleged drugs and, particularly by proving that, 203 sacks of cannabis and 28 sacks of cannabis seeds were seized from the accused persons. Likewise, it is the duty of the accused persons to prove on balance of probabilities that, the traffic was in accordance with the licence or permit granted under the Drug Act.

As highlighted above, there is one main issue to be determined by this Court, that is, whether the prosecution has proved the case beyond reasonable doubt. However, the determination of this issue rests on other two specific issues, namely, **one**, *whether the items recorded in the certificate of seizure were in fact retrieved from the accused persons particularly, in the house of the second accused person* and **two**, *whether the chain of custody was maintained.*

Starting with the first specific issue, throughout the trial, the prosecution side was optimistic that, 203 sacks of cannabis sativa, 28 sacks of cannabis seeds, six motorcycles and six water pumps were seized from the accused persons in the house of the owned by the second accused person. On the other hand, it was the contention of the defence that, the

sacks in question were not seized from the house of the second accused person and both accused persons did not sign in Exhibit P1 or own Exhibits P5 and P6.

In answering the first specific issue, I have carefully considered the evidence of PW1 and PW5 as well as Exhibits P1 and P5 in the light of evidence of DW1 and DW2. It is on record that, on the fateful day, PW1 with his colleagues were sent to the crime scene following the information about persons who are involving themselves in cultivating narcotic drugs namely cannabis sativa and transporting the same in urban areas by using motorcycles. According to PW1, on arrival at the crime scene, residents dispersed by running towards the forest and river but two of them ran towards a certain house, entered therein and locked themselves. According to PW1, before searching, he saw two persons, PW5 and Salum Fundi passing there with the motorcycle. After enquiry, they revealed that they were coming from the witch doctor. According to PW1, these two were the one who witnessed the search. He further testified that, in the course of search inside the house, they found sacks at the sitting room, bedrooms and on the ceiling. After counting, they got 203 sacks of dry leaves suspected to be cannabis sativa and 28 sacks of seeds suspected to be cannabis seeds. Apart from that, outside the house, there was another room where they found six motorcycles and six water pumps. After retrieving them, PW1 filled

in certificate of seizure which he signed together with PW5, Salum Fundi and both accused persons. It was further his testimony that, after the enquired, the second accused person admitted to be the owner of the house in question.

A close look of the evidence of PW1, one might conclude that, the house in question actually belongs to the second accused person because, normally, in a situation of danger or commotion, a person tends to seek refuge at his house or home. However, this is not the case in the matter at hand due to the reasons which I am going to demonstrate hereunder. First and foremost, apart from the evidence of PW1 who claimed to be told by the second accused person, there is no evidence which proves that the house in question belongs to the second accused person. Both accused persons disowned the house in question whereby according to DW2, that house belongs to a person by the name of Saidi Ulata. This piece of evidence from the defence is corroborated by the evidence of the prosecution because during cross-examination, PW5 revealed that, the house where the sacks in question were found belongs to Saidi Ulata. This witness insisted to know very well Said Ulata and both accused persons and their houses. According to him, the house of the first accused person is 30 minutes walking distance from the house in question. As for second accused person, he lives in a small hut and not in the house in question. This in itself casts strong doubt on the

evidence of PW1 if at all the second accused person admitted to be owner of the house in question. Moreover, the fact that the first and second accused person ran towards the house in question while others ran towards the forest and river is not a conclusive proof that, the house in question belongs to the second accused person. Inversely, it may suggest that, the accused persons were just seeking hideout just like those who sought the same at the forest.

Apart from that, there are contradictions between the evidence of PW1 and PW5 as well as Exhibit P1 which creates doubts on prosecution case. **First**, while PW1 said they found the sacks at the sitting rooms, bedroom and ceiling, PW5 insisted that, on the ceiling, they did not find any sack. **Second**, while PW1 said that he looked for independent witness and managed to find PW5 who was with Salum Fundi in the motorcycle coming from the witchdoctor, PW5 said, he was alone returning from forest to cut building materials. **Third**, while PW1 said search and seizure were witnessed by PW5 and Salum Fundi, Exhibit P1 shows that PW5, Salum Fundi and Mrisho Selemani were the ones who witnessed the seizure and signed in the certificate of seizure. Besides, PW5 claimed that, other two persons were present at first but left before the search begins. **Fourth**, while PW1 said the six motorcycles and six water pumps were found in the room which was outside the house, PW5 said they found the same at the backyard beside the wall of the house and there was no room outside the house. These

contradictions cast doubt on prosecution evidence if at all PW1 and PW5 were at the same place when the search in question was conducted. Since the contradictions are at the stage of search and seizure, it is my considered view that, they go to the root of the case because proving trafficking or possession begins at the stage of search and seizure. In addition, search and seizure are the first step in the process of establishing the chain of custody.

Furthermore, the prosecution evidence shows that, the accused persons were found with six motorcycles (Exhibit P5). But the accused persons in their defence, disassociated themselves from owning the same. Worse enough, the prosecution side did not bring any evidence to verify who is the owner of the motorcycles in question, be it the accused persons or any other person. Such evidence could be useful to connect the accused persons with the incident since there is no proof if one of them is the owner of the house where the motorcycles in question were found. Apart from that, the authenticity of those motorcycles is also questionable because PW1 in his testimony failed to identify them by their description. He did not mention even their colours, registration number, chassis number or their type. PW1 just identified them by the label he claimed to mark which is KBA/IR/4051/2016. In her submission, Ms. Kilongo contended that, one among the motorcycles is labelled KBA/IR/3336 which suggest that, it is not among the motorcycles labelled by PW1. I have carefully examined Exhibit

P5. Surprisingly, one among the motorcycles is labelled with different investigation register number from the one mentioned by PW1. Although the label is faded but it is readable. That motorcycle is labelled KBA/IR/1335/2016 and not KBA/IR/4051/2016 as claimed by PW1. This in itself casts doubt on the evidence of PW1 if the motorcycles brought before this Court have any connection with the instant case. If were actually seized by him from the house in question how come he didn't remember even their type and colour? This in itself leaves a lot to be desired.

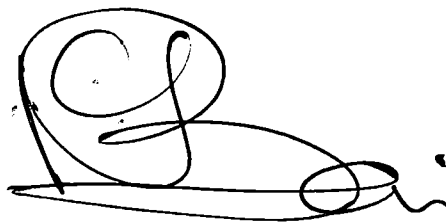
Moreover, both accused persons claimed that, the sacks and motorcycles in question were retrieved randomly from different houses of those persons who escaped. With the above-mentioned contradictions and gaps in the prosecution evidence, it is the considered view of this Court that, the defence side has managed to raise reasonable doubt on the prosecution's evidence if at all the items mentioned in the certificate of seizure including the sacks of cannabis sativa were actually retrieved from the accused persons particularly in the house of the second accused person. In view thereof, the first specific issue is answered negatively.

Therefore, since the first specific issue is answered negatively, the second one dies automatically because its determination depends on the outcome of the first issue. In that regard, I cannot arrive into conclusion

that, the case against the accused persons was proved to the required standard. It is a settled law that, the accused person cannot be convicted basing on weakness of his defence but he can only be convicted on the strength of prosecution case. The available evidence leaves a lot to be desired as there are many doubts which as a matter of law should be resolved in favour of the accused persons. Thus, the main issue is also negatively answered.

That being said, it is the finding of this Court that, the prosecution side has failed to prove the case against the accused persons beyond reasonable doubt. Consequently, Hamisi Selemani and Msailo Msailo @ Twangilo, the first and second accused person, respectively are accordingly acquitted of the charged offence of trafficking in narcotic drugs and are hereby set free.

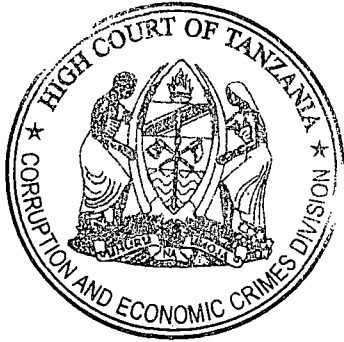
It is accordingly ordered.

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a horizontal line and a small flourish at the end.

I. K. BANZI
JUDGE
20/01/2022

Delivered in open Court in the presence of Ms. Estazia Wilson, learned State Attorney, Ms. Mwanahamisi Kilongo, learned counsel for first accused

person, Mr. Victor Kweka, learned counsel for second accused person and both accused persons. Right of appeal fully explained.



I. K. BANZI
JUDGE
20/01/2022

ORDER

Exhibits P5 and P6 (six motorcycles and six water pumps) are hereby forfeited to the government of the United Republic of Tanzania:



I. K. BANZI
JUDGE
20/01/2022