

IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT MOSHI SUB-REGISTRY
ECONOMIC CASE NO. 8 OF 2021
THE REPUBLIC
VERSUS
1. ABDU ISSA FUSSY
2. HAMAD RAMADHANI @ MWANGA

JUDGMENT

20/10/2022 & 26/10/2022

E.B. LUVANDA, J.

The accused persons above mentioned are accused for trafficking in narcotic drugs to wit heroine hydrochloride weighing 1.59 kilograms, which is contrary to section 15(1)(a) and (3)(iii) of the Drugs Control and Enforcement Act, Cap 95 R.E. 2019 read together with paragraph 23 of the First Schedule to and section 57(1) of the Economic and Organised Crimes Control Act, Cap 200 R.E. 2019. Both accused persons pleaded not guilty to the offence.

In this case, the journey of the first accused travelling to New Delhi India via Addis Ababa Ethiopia (as per his itinerary, exhibit P10), was terminated with unhappy ending at Kilimanjaro International Airport (KIA), after the first accused

was removed by D/Sgt Janeth (PW6) at point where the first accused was queueing at the verge of checking in on the desk of Ms Ethiopia Airlines. PW6 with her vast experience of over twenty years at KIA on surveillance, spotted and suspected the first accused who was looking fatigue suggesting having illness, but upon enquiries, the first accused vowed being a business traveler. However search revealed he had a peanut amount of money UDS 1,000 (exhibit P11), which according to PW6, that sum amount could not afford even for the first accused's up keep in the foreign land or even purchase air ticket. The explanation by the first accused paradoxically ring out more suspicious on him, as per the explanation by PW6, who stated that a route of journey preferred by the first accused, to her (PW6) experience is not for traders, rather she normally encounter patient who are travelling to New Delhi. Essentially, the situation was escalating, and after the first accused was threatened for his journey to be postponed, it is when he declared to have swallowed 103 pellets suspected to be narcotic drugs. It is when the first accused find his journey abroad was diverted, enrooted to the Police Station KIA on the way to Mawenzi Hospital for expert management (radiologist), under police escort of A/Insp. Melike Joshua Malulu (PW10). At the medical facilities, it was established by the medical practitioner Victor Jeremia Adolph (PW9) that the X-ray reveal abnormal bowel loops contour in a small and large intestines, suggesting presence of a foreign

body, as per X-ray film exhibit P5, laboratory request form exhibit P29 and medical examination report exhibit P31. The plan by PW9 was for the first accused to be administered with lactose to aid in defecation, then advised after five days the first accused ought to be taken back for follow up and review.

Following the findings by PW9 which was closely in tandem with initial doubt by PW6 vis-à-vis oral confession by the first accused, the later was obliged to be put under observation of police officer pending or awaiting excrement from the bowel as follows;

On 05/12/2019 at 00.50 hours the first accused defecated twenty one (21) pellets while under observation of D/Sgt Amin (PW13) and Exaud John Kawishe (PW14), the later was an independent witness; on 05/12/2019 at 03.45 hours the first accused defecated seventeen (17) pellets while under observation of PW13 and Kennedy Joseph Sangalai (PW8), the later was an independent witness; on 05/12/2019 at 05.03 hours the first accused defecated twelve (12) pellets while under observation of PW13 and PW8; on 05/12/2019 at 07.30 hours the first accused defecated three (3) pellets while under observation of PW13 and PW8; on 05/12/2019 at 13.00 hours the first accused defecated fourteen (14) pellets while under observation of PW13 and Lupi Antony Kapenyu (PW7), the later was an independent witness; on 05/12/2019 at 15.30 hours the

first accused defecated nine (9) pellets while under observation of DC Lucas (PW5) and PW7; on 05/12/2019 at 19.00 hours the first defecated six (6) pellets while under observation of PW5 and PW7; on 06/12/2019 at 01.18 hours the first accused defecated three (3) pellets while under observation of D/Sgt Yohana (PW12) and Humprey Timonty Mshabara (PW15) an independent witness; on 06/12/2019 at 07.30 hours the first accused defected twelve (12) pellets while under observation of PW12 and PW15; on 06/12/2019 at 13.15 hours the first accused defecated six (6) pellets while under the observation of PW13 and Anold Kifunda (PW17) who was an independent witness, making a total of 103 pellets as per the testimony of PW13, PW14, PW5, PW7, PW8, PW12, PW15 and PW17, and the observation form DCEA 004 exhibit P28. In total, the first accused defecated one hundred and three (103) pellets, exhibit P4. Insp. Venance Gilbert Mdewa (PW3) submitted those 103 pellets (exhibit P4) to the analyst Emanuel Naftal Gwae (PW1), who is the Principal Chemist, via a sample submission form DCEA 001 (exhibit P1) and sample receipt notification form GCLA 001 (exhibit P2), where PW1 conducted analysis and confirmed all 103 pellets to be heroin, as per a report of analysis form DCEA 009 exhibit P3.

On defence, the first accused (DW1) said nothing regarding accusation that he defecated 103 pellets. Presumably he found prudent not to defend on such obvious fact, and unshakably testimony of PW13, PW14, PW5, PW7, PW8, PW12, PW15 and PW17, who testified seeing the first accused defecating those pellets; plus an observation form exhibit P28 where the first accused appended a thumbprint and signature.

A plea by DW1 that he signed dozen of papers out of threat and torture, is unrealistic. Because that fact was not cross examined to any prosecution witnesses including arresting officers (DC Lucas PW5 and PW6); police escort (PW10); observation officers (PW13, PW5, PW12) or independent witnesses (PW14, PW8, PW7, PW15, PW17) and Suzana Paul Turuya (PW16), the later witnessed the exercise of packing those 103 pellets.

The argument by DW1 that he was arrested for smuggling minerals, is a concoct. Because that fact was not cross examined to PW6 who stated that during a preliminary oral interview the accused said he was a trader, but PW6 made no mention of word minerals.

The allegation by DW1 that police officers solicited for a bribe, is suspect, as he did not mention even a single name of a police who solicited bribe. Meaning it was a false statement. Equally an argument that the police officers declared

and tendered in court a less sum of USD 1,000 instead of USD 2,500 are unbelievable, because when PW6 and PW5 were adducing evidence regarding seized a sum of USD 1000 exhibit P11 from the accused as reflected in a certificate of seizure exhibit P27, such argument and query as to the arrears of USD 1500 did not crop up in cross examination. As such a defence by the first accused (DW1) cannot be said that it managed to distance him from the accusation.

There is an evidence of Haruni Lupiana Kihombo (PW11), who explained to had picked and ferried the first accused along with the second accused from Serengeti Lodge located at Arusha Njiro to KIA on 04/12/2019 in the afternoon, via a car of PW11 registration number T672 DRB, Toyota Alphard, where the first accused disembarked at KIA and was seen by PW11 heading to departure. Thereafter PW11 and the second accused resumed back to Arusha and parted. It was the evidence of PW11 that on 03/12/2019 he was dialed phone call by the second accused where they convened at Megan Resort Arusha, located at Njiro Arusha, including the first accused who was introduced as the second accused's friend, where the second accused requested PW11 to ferry them to KIA the following day. It was the testimony of PW11, that the second accused fueled PW11's car a sum of TShs. 60,000/= for a trip to ferry them to KIA. It

was the evidence by PW11 that, on a certain occasion, he communicated with the second accused, where the later asked the former to relocate because the second accused suspected that police officers are looking for him.

A fact that PW11 picked the duo accused persons at Sengereti Lodge Njiro and ferried them to KIA, was not cross examined. Likewise a fact that the second accused hired PW11's motor vehicle, or that PW11 had conversation with the second accused and first accused at Megan Resort Njiro, Arusha on 03/12/2019, was also not cross examined. It is the rule that facts not cross examined, are deemed to be on concession.

In **Issa Hassan Uki vs The Republic**, Criminal Appeal No. 129 of 2017, Court of Appeal of Tanzania at Mtwara (unreported), cited by the learned State Attorney, at page 16 the apex Court had this to say,

'It is settled in this jurisdiction that failure to cross-examine a witness on a relevant matter ordinarily connotes acceptance of the veracity of the testimony'

The apex Court referred to the case of **Paul Yusuf Nchia vs National Executive Secretary, Chama cha Mapinduzi & Another**, Civil Appeal No. 85 of 2005 Court of Appeal of Tanzania (unreported), that,

'As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said'

It is true that PW11 did not see the first and second accused in possession of heroin. However, the circumstantial facts and connection of dots between a fact that the second accused had conversation with PW11 regarding arrangements to pick and ferry the first accused to KIA, the second accused fueled PW11's car, the second accused escorted the first accused to KIA and ensured that the first accused land at a departure area. Thereafter an enticement by the second accused to persuade PW11 to relocate, on account that police officers are looking for him (second accused). All these bring the second accused to a fact that he was an accomplice to the acts committed by the first accused for trafficking 103 pellets of heroin to New Delhi India by way of ingesting in bowels.

In **Jimmy Runangaza Vs Republic**, Criminal Appeal No. 159 'B' of 2017, Court of Appeal of Tanzania at Bukoba (unreported), at pages 9-10 the apex Court stated that;

*'In order for the circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt. (See **Simon Musoke Vs Republic**, (1958) EA 715). **Sarkar on Evidence** 15th Ed 2003 Report Vol. 1 page 63 also emphasized that on*

cases which rely on circumstantial evidence, such evidence must satisfy the following three tests which are:

(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

(2) Those circumstances should be of definite tendency unerringly pointing towards the guilt of the accused; and

(3) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else'

A plea by the second accused that PW11 was given promise that if the later testifies on false evidence he (PW11) will be discharged and his (PW11) properties will be released, is untenable. To my view PW11 was testifying on truthful facts on account of what transpired as narrated above, and therefore he deserves credence. A mere fact that he was arrested, then subsequently discharged after staying behind the bar for over one year and seven months or else that his car was retained at police even after he was set free, are matters which cannot be said to have the effect of diluting his testimony or compromising the truth. In fact, there is no compelling reasons for misbelieving PW11. Above all, PW11 refuted a claim for a promise to be handed over back a car. A defence by Hamad Ramadhani Mwanga (DW2) that he never visited to Arusha, is

suspect. This is because when PW11 testified to have convened and met with the second accused at Arusha on 03/12/2019 and 04/12/2019, those facts were not cross examined. A defence by the second accused that he visited at Kilimanjaro for the first time on 24/04/2021, after he was arrested, are equally suspect. Because a fact by PW11 that the second accused escorted the first accused to KIA on 04/12/2019, was not cross examined. Essentially, a defence by DW2 did not managed to bail him out and or exonerated him from accusations.

Regarding an argument that in a court exhibit register PF16 (exhibit D1), tendered by PC Alphonse (PW4) during cross examination), reveal PW4 received a total 95 pellets while in his (PW4) testimony he said he received 103 pellets.

This was clarified by PW4 during cross examination and re-examination that, it was an error, because on 05/12/2019 at 1:10 hours (PW4) received 21 pellets from PW13, but he erroneously recorded 13 pellets which made an entry of pellets in PF16 (exhibit D1) to be less. Above all, in a handing over certificates exhibit P17, P18, P19, P20, P21, P22, P23, P24, P25 and P26 depict PW4 received a total of 103 pellets. More importantly, handing over officers to wit PW13, PW5 and PW12 all testified in totality that they handed over 103 pellets to PW4. As such to my view, the omission in exhibit D1, did not prejudice anyone.

There was a concern that in exhibit P17, P18, P19, P20, P21, P24, P25 and P26 witnesses' signatures are missing. But all witnesses to the handing over proceedings in exhibit P17, P18, P19, P20, P21, P24, P25 and P26, inclusive, all appeared and testified as prosecution witnesses number (PW) 14, 8, 7, 15 and 17. On similar vein, it is true that in exhibit P22 and P23 names and signature of independent witnesses are missing. However, the independent witness who witnesses those defecations, appeared and testified as PW7. As such his oral narration that he witnessed handing over in respect of a nine and six pellets between PW5 and PW4, suffices. Also an argument that the name of receiving officer is missing in exhibit P21, is not fatal. Because PW4 explained on his oral testimony under oath.

Regarding an argument that there was a variation of time in exhibit P17, P19, P20, P21, P22, P23, P24 or that in exhibit P2 time was corrected. To my view even if the omission is there, cannot be taken as a serious concerns to say had the effects of denting prosecution case. To crown out all, the oral testimony of witnesses to the proceedings of handing over pellets to PW4 from PW13, PW5, and PW12 take into board all issues of chain of custody. In other words there was no nay element suggesting that at any time there was a breakage of a chain of custody, from the initial stage of defecation, recording in observation form;

handing over to the exhibit keeper, packaging and sealing, transmission to and from the chemist, all were taken into board by oral testimony supported by paper trail, as demonstrated above.

Appreciation to the prosecution team, Mr. Timothy Mmari learned State Attorney and Ms. Grace Kabu learned State Attorney and defence Counsels Mr. Leonard Mashabala learned Advocated for the first accused person and Mr. Innocent Msack learned Counsel for the second accused person, for their valuable representation and labored final submissions.

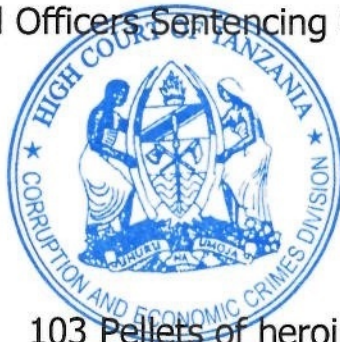
I therefore pen down by nodding or inclining to a proposal by the learned prosecuting officer, inviting the court to hold that both accused persons are liable for trafficking, on account that the information was proved beyond shadow of doubt.

The first and second accused are guilty for trafficking narcotic drugs contrary to section to section 15(1)(a) and (3)(iii) of Cap 95 R.E. 2019 (supra) read together with paragraph 23 of the First Schedule to and section 57(1) Cap 200 R.E. 2019 (supra) and the duo are convicted forthwith.

E.B. Luvanda
Judge
27/10/2022

SENTENCE

I have heard the mitigation submitted by the learned defence Counsel for first and second accused, however the offence committed by the duo accused persons of trafficking 103 pellets of heroine via KIA to New Delhi India is a serious one and is detrimental to the national economic and image and the society at large. I therefore sentence the first and second accused persons to a term of thirty (30) years in prison, which is ceiling period under the Tanzania Judicial Officers Sentencing Guidelines.



Order

E.B. Luvanda
Judge
27/10/2022

- I. 103 Pellets of heroine exhibit P4, to be disposed, set on fire.
- II. A sum of 1,000 USD exhibit P11 seized from the first accused is confiscated to the government, as was an instrumentality to facilitate the commission of an offence.



E.B. Luvanda
Judge
27/10/2022

Court: Right of appeal against conviction and sentence is there.

E.B. Luvanda
Judge
27/10/2022