

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM REGISTRY

ECONOMIC CASE NO. 23 OF 2021

THE REPUBLIC

VERSUS

ALLY HASHIM @ ATHUMAN

JUDGMENT

21st October and 11th November, 2022

BANZI, J.:

In this case, the accused person Ally Hashim @ Athuman stands charged 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] ("the Drugs Act), 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. 2019] ("the EOCCA").

The particulars of offence indicate that, on 20th March, 2020 at Mailimoja area, within Kibaha District in Coast Region, the accused person was found trafficking 82.16 kilograms of narcotic drugs namely, Cannabis Sativa commonly known as Bhangi with a motor vehicle with registration

number T688 CKZ make Toyota Carina. The accused person pleaded not guilty to the information.

In a bid to prove the case against the accused person, the prosecution side through Ms. Gladness Mchami and Ms. Elizabeth Olomi, learned State Attorneys paraded eleven (11) witnesses and tendered nine (9) Exhibits. On the other hand, the accused person under the services of Mr. Ole Mkulago Yangalai, learned Advocate testified under oath as the sole witness for defence and did not tender any exhibit.

In the main, the evidence by the Prosecution reveals that, on 20th March 2020, a traffic officer namely, G.7473 CPL George Emanuel (PW3), while he was at his duty point at Mailimoja old bus stand area received a call from his superior, the OC CID who instructed him to stop a motor vehicle with registration number T688 CKZ make Carina Ti white in colour which was coming from Morogoro heading to Dar es Salaam and give him feedback so that he can send a patrol team. About 11:00 am to 12:00 noon, PW3 saw the motor vehicle in question, stopped it and asked the driver to park aside. After that, PW3 followed the driver and after introduction, he informed him that, he stopped him for purpose of being searched following the instructions from his superior. Then he asked him to park properly and after being asked, the driver introduced himself by the name of Ally Hashim Athuman (the

accused person). Thereafter, PW3 informed his superior and after ten to fifteen minutes, the patrol team arrived headed by A/INSP Michael Ambrose Milinga (PW1). After arriving, PW3 handed over to PW1 and returned to his point.

After taking over, PW1 called the local leaders including Ward Councillor namely Ramadhan Abdallah Lutambi (PW6). At that time, the accused person who was alone in the car was still on the driver seat. After PW6 arrived, the introduction was made. Thereafter, PW1 informed the accused person his allegation and asked him what he was carrying. According to PW1, the accused person revealed that, he was carrying cannabis sativa from Melela Morogoro and he was communicating with a person namely Abuu who is in Dar es Salaam. Then after being instructed, the accused person opened the doors and boot whereby a total of five sulphate bags containing leaves suspected to be cannabis sativa were retrieved from the said car. After retrieving, PW1 seized five sulphate bags containing leaves suspected to be cannabis sativa (Exhibit P3) together with the motor vehicle with registration number T688 CKZ make Toyota Carina (Exhibit P7) through a certificate of seizure (Exhibit P1) which was signed by relevant persons including PW1, PW6 and the accused person. Upon signing the certificate of seizure, the accused person was ordered to board in his car and PW1 instructed CPL Elisante to drive it up to Kibaha police station.

On arrival at the station, PW1 found F.4035 SGT Mohamed (PW7) who was the in-charge of the Charge Room (CRO) and WP.12802 PC Tatu (PW9). PW7 instructed PW9 to receive exhibits from PW1. After receiving and opening the case, PW9 handed over the exhibits to PW7 who handed over to custodian of exhibits namely, WP.3665 SGT Mwamvita (PW5). After receiving, PW5 registered Exhibit P3 and P7 in Exhibits Register at entry number 59/2020 and 60/2020 respectively. After that, she labelled all exhibits and stored Exhibit P3 in exhibits room and parked Exhibit P7 outside the station. On 24th March, 2020, PW5 handed over Exhibit P3 to A/INSP Omary (PW4) so that he could submit the same to the Chief Government Chemist (CGC) in Dar es Salaam. After that, Exhibit P3 was sealed by the investigator, WP.5707 D/CPL Manathe (PW10) and then PW4 submitted it to CGC where it was received by a government analyst one, Gabriel Jacob Gabriel (PW2) who conducted analysis which revealed that the said leaves are narcotic drugs namely cannabis sativa with total weight of 82.16 kilograms. Then PW2 sealed Exhibit P3 and handed over to PW4 who upon returning to the station, he handed over to PW5 who stored the same until she brought it before this Court. After his analysis, PW2 prepared and issued a report (Exhibit P2). It was further revealed that, the motor vehicle in question, Exhibit P7 was handed over to the accused person by Faraji Ally Mwinyimkuu, the taxi driver of Shafiq Diamond Somji (PW8) who is the

owner. The statement of Faraji Ally Mwinyimkuu was tendered under section 34B of the Evidence Act [Cap.6 R.E. 2022] ("the Evidence Act") and admitted as Exhibit P9 after the efforts to procure his attendance proved futile.

In his defence, the accused person (DW1) denied the allegation against him. According to his testimony, on the fateful day, he was around Kibaha old weighing bridge waiting for Daladala to Dar es Salaam. Soon thereafter, a car arrived and parked near the area where he was standing. After a short time, another car makes Noah arrived and parked in front of that car whose driver got off and crossed the road. After that, two traffic officers disembarked from Noah and went to the parked car. After getting there, they opened the doors and closed. After that, they went to DW1 and asked him about the person involves with that car. DW1 replied that, he saw him going across the road. After hearing that, one of officers told his colleague that, DW1 will assist them in getting the owners of that car. After that, accused person was arrested and taken to Kibaha Police Station where he was locked up for ten days until 30th March, 2020 when he was arraigned to the court and charged with offence of trafficking cannabis sativa.

DW1 further stated that, on 20th April, 2020 when he was inside Mkuza prison, he was called at admission office. After going there, he found police officer i.e., PW1 who showed him documents to sign which he did not

recognise. After signing, DW1 returned to the cell where he informed his inmates on what had transpired and they advised him to inform the magistrate when he goes to court. On 22nd April, 2020, DW1 was taken to court where he informed the presiding Magistrate about how he was caused to sign some documents on 20th April 2020 while he was at prison. After he was committed, it was when he realised that, the documents he signed was the certificate of seizure. He further claimed that, this is a framed-up case.

In a nutshell, that was the evidence of the Prosecution and Defence. I thank both sides for their final submissions 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 five sulphate bags containing cannabis sativa were seized from the motor vehicle in question*; **two**, *whether on the material date, the accused person was driving the motor vehicle in question* and **three**, *whether chain of custody was maintained*.

The prosecution evidence shows that, on the date of the incident, PW3 stopped the motor vehicle in question which was driven by the accused person and he was alone. According to his testimony, he apprehended it at old bus stand. After directing it to park aside, he followed the driver who upon being asked, he introduced himself by the name of Ally Hashim

Athuman. When the patrol team arrived, he handed over to PW1 to proceed. According to the testimony of PW1 and PW6, they found the accused person on the driver's seat. In the course of search, they retrieved five sulphate bags on the rear seats and in the boot containing leaves suspected to be cannabis sativa. PW1 seized them together with the motor vehicle (Exhibit P7) through certificate of seizure, Exhibit P1. As per testimony of PW1 and PW6 the certificate of seizure was executed at the crime scene and signed by them together with the accused person. Their testimony is supported by Exhibit P1 which shows that it was executed on 20th March, 2020 at Mailimoja stand. Apart from that, PW1, PW3 and PW6 successfully identified the accused person as the one who was found in the motor vehicle in question.

As stated herein above the accused person claimed to be arrested by two traffic officers while he was waiting for Daladala to Dar es Salaam. The duo arrested him so that he can assist them to know the owner of the car which was abandoned near to the place where he was standing. If those officers were looking for the owner of the motor vehicle in question, they could have apprehended him after arriving there because according to the testimony of the accused person, the driver of the said motor vehicle got off after the traffic's car arrived. If at all there was such driver and the officer were chasing him, they could not have allowed him to get off the car and disappeared towards the other side of the road while they were just

watching. Apart from that, if he got off when they were right there, it is very unlikely for them to go to arrest a mere passenger who was waiting for Daladala so that he can assist them to find the said owner. Besides, during their testimony, PW1, PW3 and PW6 were not cross-examined by the defence about this aspect that, the accused person was arrested by two traffic officers while he was waiting for Daladala. Failure to cross-examine them implies that, the defence accepted the truth of witnesses' testimony that, the accused person was arrested while he was within the motor vehicle in question. In that regard, it is the considered view of this Court that, the defence evidence fell short of controverting the prosecution evidence on where and how the accused person was arrested at the crime scene.

Apart from that, the accused person also claimed to sign some unknown documents on 20th April, 2020 while he was in Mkuza prison which he later became to realise that, it was the certificate of seizure. He claimed to inform the committal court two times. It is undisputed that, the committal record shows that on 22nd April, 2020, the accused person informed the court that, on 20th April, 2020, the investigator went to the prison and caused him to sign some documents. Also, on 29th November, 2021, the accused person informed the court that, on 22nd May, 2021, A/INSP Millinga went to Mkuza prison and forced him to sign some forms. What I gathered from the testimony of accused person is that, he was caused to sign Exhibit P1 by

PW1 on 20th April, 2020. However, at first, he told the committal court that, he was caused to sign by investigator on 20th April, 2020. But one year later, he informed the court that PW1 caused him to sign on 22nd May, 2021. Although PW1 in his testimony admitted to be at Mkuza prison on 22nd May, 2021, but he claims to be there with other stakeholders of criminal justice forum for inmate visit and denied to make the accused person to sign any document. Can it be said that, the accused person signed the same document twice i.e., on 20th April, 2020 through the investigator (PW10) and on 22nd May, 2021 through PW1? From his testimony and what he told the committal court, it is clear that the accused person himself is not certain when he was caused to sign and by who. This uncertainty leaves a lot to be desired on defence evidence if at all, he was forced to sign any document leave alone the certificate of seizure. Thus, once again, the defence evidence fell short of controverting the prosecution evidence on where the certificate of seizure was filled and signed.

I am very much aware of the principle that, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. Moreover, good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See the case of **Goodluck**

Kyando v. Republic [2006] TLR 363. In the matter at hand, I find no reason to doubt the evidence of PW3 who stopped the accused person and restrained him until the patrol team arrived. Equally, I find no reason for not believing PW1 and PW6 who clearly explained how they conducted search and retrieved Exhibit P3 as well as how Exhibit P1 was prepared and signed at the crime scene. Besides, the accused person in his testimony admitted to have no grudges with PW1 or PW6. Thus, his claim that this is a framed-up case is baseless.

Moreover, I find no reason to draw adverse inference on the prosecution for failure to call Faraji Ally Mwinyimkuu as suggested by the defence Counsel because such adverse inference is drawn when the witness is within reach but is not called without sufficient reason being shown which was not the case in the instant case. In the matter at hand, there is proof of service that, the witness in question is nowhere to be found within the area he was living. This fact was also emerged in the course of testimony of PW8, his former employer who confirmed that, the said witness disappeared after he successfully sued him for civil action before Primary court. Apart from that, his statement was tendered and admitted as Exhibit P9. Furthermore, it is undoubted that, on the material day, Exhibit P7 was in the hands on the accused person after being handed over by Faraji Ally Mwinyimkuu. Although the accused person denied to have known Faraji Ally Mwinyimkuu, but the

latter's statement contains a detailed information about how the two knows each other. Apart from that, PW1, PW3 and PW6 successfully identified the accused person in the dock as the one who was in the said motor vehicle on the material day and he was alone. In that regard, there is no doubt that Exhibit P3 was retrieved from the motor vehicle which on the material day was driven by the accused person. According to the analysis conducted by PW2, Exhibit P3 was confirmed to be narcotic drugs namely cannabis sativa. His testimony is supported by Exhibit P2 which according to section 48A (2) of the Drugs Act is conclusive evidence unless rebutted. With such findings, the first and second issues are affirmatively answered.

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. In the case at hand, the prosecution side relied both on oral and documentary evidence. Besides, all witnesses who handled Exhibit P3 were called to testify. The evidence on record shows that, on 20th March, 2020, PW1 seized Exhibit P3 through Exhibit P1. After seizure, the same was transferred to the station under his control until he handed over to PW9 who then handed over to PW7. On the same day, PW7 handed over to PW5 who after receiving, she registered it in Exhibits Register at entry number

59/2020. After that, she labelled the same and stored in exhibits room until 24th March, 2020, when she handed over PW4 who submitted the PW2 at CGC in Dar es Salaam through Forensic Laboratory Submission Form (Exhibit P4). On the same day, after preliminary test, PW2 sealed it and handed over to PW4 via Sample Receipt Notification Form (Exhibit P5) who upon returning to the station, he handed over to PW5 who stored the same until she brought it before this Court. From these chronological events, it is clear that the chain of custody was not broken as all witnesses who handled Exhibit P3 were summoned. Therefore, basing on oral testimony of PW1, PW2, PW4, PW5, PW7 and PW9 as well as Exhibits P1, P2, P4, P5 and P6, 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. Therefore, third issue is also affirmatively answered.

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, Ally Hashim Athuman 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.



I. K. BANZI
JUDGE
11/11/2022

Delivered via video link in the presence of Ms. Gladness Mchami, learned State Attorney for the Republic and Mr. Ole Mkulago Yangalal, learned Counsel together with accused person. Right of appeal is duly explained.



I. K. BANZI
JUDGE
11/11/2022

SENTENCE

The accused person is convicted with the offence of trafficking in narcotic drugs which according to section 15 (1) (a) of the Drug Control and Enforcement Act [Cap. 95 R.E. 2019], the maximum penalty is life imprisonment. However, being an economic offence, the sentence ranges between 20 years as minimum and 30 years as maximum.

I am very much aware that, trafficking of drugs is a serious offence. Also, according to Exhibit P2 and testimony of PW2, cannabis sativa causes drug dependence and mental disorder. However, according to Sentencing Manual for Judicial Officers, the first offender deserves lenient sentence. Having considered that, the accused person had already spent more than two years in custody and since he is the first offender with a family depending on him, I hereby sentence Ally Hashim Athuman to 20 years imprisonment.



I. K. BANZI
JUDGE
11/11/2022

ORDER

Exhibit P3 is hereby confiscated to the government and the same be destroyed under the Drug Control and Enforcement Act [Cap. 95 R.E. 2019]

together with its Regulations. As far as the motor vehicle with Registration No. T688 CKZ make Toyota Carina (Exhibit P7) is concerned, I have considered the evidence of its owner Shafiq Diamond Somji (PW8). Basically, he had no knowledge or clue that his car was with the accused person and the same was used as instrumentality of crime. What he knew was that, he handed it over to his driver Faraji Ally Mwinyimkuu for usage as taxi. In that regard and since he had no knowledge, I hereby order that the same be restored to its lawful owner PW8, Shafiq Diamond Somji together with its registration card Exhibit P8.

It is so ordered.



I. K. BANZI
JUDGE
11/11/2022