

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

**CORRUPTION AND ECONOMIC CRIMES DIVISION**

**AT MOSHI SUB-REGISTRY**

**ECONOMIC CASE NO. 5 OF 2022**

**THE REPUBLIC**

VERSUS

**BERNAD DAMAS SILAYO @ BEN MBUZI**

**JUDGMENT**

**ISAYA, J.**

The accused person Bernad Damas Silayo @ Ben Mbuzi stands charged with offence of trafficking in narcotic drugs contrary to section 15(1) (a) and (3) (iii) of Act the Drugs 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] "the EOCCA".

It is alleged in the Information that on 1<sup>st</sup> January, 2022 at Njia Panda ya Himo area within Moshi District, in Kilimanjaro Region, the accused person trafficked in narcotic drugs, namely Catha edulis (Khat) weighing 130.15 Kilograms. The accused person pleaded not guilty to the Information.



At the trial, Ms. Tully Helela and Mr. Mabuba Malima, learned State Attorneys represented the Republic, while Mr. Willence Shayo, learned Advocate, represented the accused person.

In a bid to prove the case against the accused person beyond reasonable doubt, the prosecution side called in five (5) witnesses to testify, namely, Michael Sairorie Bernard (PW1), E248 CPL Mokiwa (PW2), Shabani Said Chalamila (PW3), D7035 SGT (PW4), and G 342 CPL Benson (PW5). They also tendered a total of eight (8) exhibits, which were admitted, thus: Exhibit P1, Sample Submission Form DCEA 001; Exhibit P2, Sample Receipt Notification GCLA 01; Exhibit P3, Government Laboratory Analyst Report; Exhibit P4, Catha edulis (Khat) contained in six sulphate bags; Exhibit P5, Certificate of Seizure; Exhibit P6, handing over certificate dated 01/01/2022; Exhibit P7, Motor vehicle with Reg. No. T 585 BSU and Exhibit P8, Entry No 1 of 2022 of Exhibit Register PF16. On the other hand, the accused person testified under oath as DW1 and called in two other witnesses, John Kalakala and Barthazar Francis Moshi who testified as DW2 and DW3 respectively. Besides, they tendered two exhibits; motor Vehicle Registration card (Exhibit D1) and 'mkataba wa makabidhiano ya gari' (Exhibit D2).

The summary of evidence of the prosecution's case presents that, on the 1<sup>st</sup> January, 2022 at 17.00hours PW2, a police officer was at Himo

area with other police officers such as Sgt Bernard and S/Sgt Mgeni inspecting vehicles for various offences. While at the place they stopped the vehicle with Reg. No. T585 BUS, make Noah (Exhibit P7), it did not stop. By using police vehicle, they decided to follow up the said Motor vehicle. PW2 signalled the driver (accused person) who was alone to stop but he did not obey. PW2's driver tried to drive on his side as he drove beside his vehicle. He was forced to drive on the extreme left side of the road and ultimately the accused succumbed. He stopped, hit down and ran away. His vehicle collided with police vehicle on the side and slightly got damaged.

PW2 took the exhibit P7 up to Central Police Station and managed to conduct search with the presence of PW3 whereby 6 sacks (sulphate bags) containing leaves suspected to be narcotic drugs (Exhibit P4) were retrieved and seized. The Certificate of seizure (Exhibit P5), was filled and signed by PW2 and PW3. Thereafter, PW2 handed over exhibits P4 and P7 to PW4 by both of them signing on the handing over certificate (Exhibit P6), PW4 having received Exhibits P4 and P7 registered in Exhibit P8 and put the two exhibits in safe custody.

On 03/01/2022 PW4 handed over exhibit P4 to PW5 an investigator of the case for the purpose of taking it to the Government Chemist Laboratory Authority (GCLA) Arusha zone for analysis. PW4 took exhibit



P4 to the GCLA where PW1 received exhibit P4 through Exhibit P1 and acknowledged to receive by issuing Exhibit P2. He went on weighing and conducted analysis on exhibit P4. The result revealed that the leaves contained in 6 sucks are narcotic drugs known as khat weighing 130.15. Thereafter PW1 prepared the Government Laboratory analysis Report (Exhibit P3). According to the prosecution case on 10/1/2022 the accused surrendered himself to police station where PW2 detained him at the police lock up after identifying him to be the same person who ran away from the scene of crime.

PW5 is the investigator of this case. In his testimony he revealed that the actual registration number of Exhibit P7 is T 585 BSU and not T 585 BUS as written in Exhibits P5 and P6. He went on stated that he failed to make rectification since all records showed the registration to be T 585 BUS.

Nevertheless, since the accused person was found with a case to answer in respect of the offence charged with, he defended himself under oath and called two witnesses, John Kalakala (DW2) and Barthazar Francis Moshi (DW3).

Basically, the defence evidence is to the extent that, on the fateful day from 08:00 Am to 23:00 pm, the accused person was with DW3 at

Marangu area selling soup. It is the evidence of DW1 and DW2 that on the 27<sup>th</sup> December 2021 the accused person handed over Exhibit P7 to the driver Gabriel Kiuri Mchame for commercial purpose of the church end year blessing ceremonies. They agreed for the consideration of payment of Tshs. 40,000/= daily from the day he handed over the same up to the 5<sup>th</sup> January 2022. That the handing over was done by signing Exhibit D1 which allegedly was witnessed by DW2 at Himo. DW1 went on stating that on 05/01/2022 Gabriel did not bring back Exhibit P7. He tried to phone him but in vain. He went on to testify that on 07/01/2022 his brother Selestine Peter Silayo informed him that the vehicle was apprehended by the police and was being held at the police station. According to him, on 10/01/2022 he decided to make a follow-up of his vehicle at the police station. He was arrested upon asking about the vehicle. He claimed to know nothing about the six bags of Khat. In his defence the accused person tendered Exhibit D1 showing that Exhibit P7 belonged to him and Exhibit D2 exhibited that he handed over Exhibit P7 to one Gabriel Kiuri

Having carefully considered the evidence on record, it is now a common ground in this case that the Vehicle with registration number T 585 BSU, make Toyota Noah (Exhibit P7) was apprehended at Njia Panda ya Himo in a breath-taking event after a driver of the said motor vehicle



ran away to escape arrest by the police. He deserted the vehicle! The accused person on 10/01/2022 visited at Moshi district police station in a bid to make a follow-up his vehicle. He was arrested on spot soon after introducing himself at the police station that he was the owner of the vehicle.

Before I dwell to consider the issues in this case, it is important to note that throughout the proceedings of this case including committal proceedings Exhibit P7 was refereed as a motor vehicle with registration No. T 585 BUS, Toyota Noah but after being tendered and admitted as exhibit before the court, I found that the proper registration Number is T 585 BSU. This error is not a big deal here because it is curable under section 388 of the Criminal Procedure Act [Cap 20 RE. 2022] 'the CPA' since it has not occasioned any failure of justice. Even the accused person himself admitted that the said Exhibit P7 belongs to him. I therefore hold that the motor vehicle which was referred to as T585 BUS, Toyota Noah is the same T 585 BSU, Toyota Noah in this context referred to as Exhibit P7.

As a matter of law and principle, it is the prosecution's duty to prove their case beyond reasonable doubt that the accused person trafficked 130.15 kilograms of Catha edulis (khat). Issues for determination are; ***One, whether Exhibit P4 is narcotic drugs namely Catha edulis (Khat).***

***Two**, whether search of exhibits P7 was legally conducted. **Three**, whether the chain of custody of Exhibits was maintained and **four** whether the defence raised reasonable doubt against the prosecution case.*

In determination of the first issue, I will consider the evidence of PW1 a Chemist at GCLA Northern Zone Arusha. In his testimony stated that on 03/01/2022 while in his office he received six sulphate bags (Exhibit P4) which were sealed with a tape, labelled Reg. No. MOS/IR/38/2022 and also labelled letters D, D1, D2, D3, D4 and D5. That he received the exhibit P4 through signing on Exhibit P1. He thereafter verified and registered the said Exhibit with Laboratory No. NZL 004/2022. He went on opening and weighing the leaves which were in each sulphate bag without packages and got a total weight of 130.15 kilograms. After that he collected some samples from every package of sulphate bag and put in six envelopes. He labelled the same in relation to the sulphate bag from which it was collected and stored the same in sample room. That On 17<sup>th</sup> January 2022 he conducted Preliminary test by using Chen-Kao test, whereby he took a small amount of the sample from each envelope mixed with acetic acid, copper II sulphate and sodium hydroxide. A sample changed to violatate colour, to indicate that the leaves contained cathinone



cathine. According to him this chemical is found in khat (*Catha edulis*) plant.

PW1 proceeded with the confirmatory test. In conducting this test, he took two chemicals Dichloromethane (DCM) and water. He made extraction of the sample and proceeded to subject it to vortex (mix by using machine) and took samples to the machine called FTIR (Fourier Transform Infrared Spectroscopy). That the machine is connected to the library (memory) which after injecting it drew a spectrum which translated the result that the compound had cathinone and cathine. This gave a right confirmation that the leaves from all six samples are khat (*catha edulis*). After confirmatory test he prepared a report Exhibit P3 in support of his testimony, that Exhibit P4 is Khat (*catha edulis*). Now, is *Exhibit P4 narcotic drugs namely Catha edulis (Khat)?* I have carefully studied the evidence of PW1. In deliberating on this issue, I have it in my mind that the accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence. See the case of **Mohamed Haruna @ Mtupeni v. Republic**, Criminal Appeal No. 25 of 2007 Court of Appeal (unreported).

During PW1's testimony there was a contradiction of date in Exhibit P3 which show exhibit P4 was received by PW1 and later handed back by PW1 to PW5 on 03/01/2021. However, the said Exhibit P3 was dated 17<sup>th</sup>

January 2022 and in the said report there is Investigation Register Number (IR) MOS/IR/38/2022. It is however, a settled principle that, it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled. See the case of **Said Ally Ismail vs. Republic**, Criminal Appeal No. 249 of 2008, Court of Appeal at Mtwara (unreported). Since the said report bears a reference number (IR) of the year 2022 and the same shows that it was dated 17<sup>th</sup> January 2022, In my opinion a date 03<sup>rd</sup>, January 2021 as appeared in Exhibit P3 bear an error in typing a year and that is because it was prepared in a very preliminary days of the new year of 2022. It is my considered opinion that the contradiction of year 2021 instead of 2022 is minor error which does not go to the root of the case.

Basing on the evidence of PW1 and Section 48A (2) of the Drugs Control and Enforcement Act, Cap 95, this court is of considered opinion that, Exhibit P3 is a conclusive proof that Exhibit P4 is narcotic drug namely Catha edulis (khat), weighing 130.15 Kilograms.

Coming to the second issue which examines as to whether search of exhibits P7 was legally conducted, the answer can be found through studying the testimonies of PW2 and PW3, as well exhibit P5 and P6. I



hasten to state rightly that the evidence of PW2 and PW3 contradicted with exhibit P5 on the place where seizure was executed. The evidence of PW2 and PW3 were to the effect that the seizure of Exhibit P4 and P7 was executed at Moshi Central Police on the 1<sup>st</sup> January 2022. It very unfortunate that the certificate of seizure (Exhibit P5) shows that the search was conducted at Njia panda ya Himo. For easy of reference, I reproduce what was written in Exhibit P5 pertaining to search of Exhibit P7 and seizure of Exhibit P4 as hereunder

*'Mimi E248 Sgt MOKIWA.....nathibitisha kuwa nimefanya upekuzi siku ya 1-01-2022 eneo la NJIA PANDA YA HIMO'*

This kind of contradictory evidence leaves behind unanswered questions, firstly, if the search and seizure of Exhibit P7 and P4 respectively was conducted at Njia Panda ya Himo area as evidenced by Exhibit P5 why PW2 and PW3 allege to sign Exhibit P5 at Central Police Station Moshi? secondly, if search and seizure of Exhibit P7 and P4 respectively was conducted at Central Police Station Moshi, why Exhibit P5 recorded the same to have been conducted at Njia Panda ya Himo?

It is the settled principle laid in the case **David Athanas@ Makasi** and **Another vs the Republic**, Criminal Appeal No. 168 of 2017, CAT at Dodoma (unreported), where the Court of Appeal held that,

*'...the certificate of seizure ought to have been signed at the place where the search was conducted and in the presence of an independent witness...'*

In the instant case, the evidence of PW2 and PW3 show that the search and seizure of Exhibit P7 and P4 respectively was conducted at central Police Moshi where Exhibit P5 was executed. As stated earlier, Exhibit P5 itself shows that it was executed at Njia Panda ya Himo. This contradiction cannot leave the prosecution case unshaken. On the other hand, there is no any justification or any exceptional circumstance given by PW2 as to why he conducted search and seizure at the place other than the scene of crime.

It was the evidence of PW2 that on the material day he was at Njia panda ya Himo carrying on his daily routine on road safety while there he stopped an Exhibit P7 but it did not stop, therefore he decided to chase the same and apprehend it while its driver ran away, he took the said motor vehicle to Moshi police Station and conducted search.

The provision of section 38 of the Criminal Procedure Act, [Cap 200 RE 2022] requires presence of search warrant for the search which is conducted by police officer other than police officer in charge of a police station (OCS). In this case PW2 was not OCS and he did not have search warrant which authorise him to conduct search of Exhibit P4. However, from the said evidence it suggests that the search of Exhibit P7 was an



emergence one. The same ought to be according to section 42 (1), (2) and (3) of the CPA.

The said section 42 (1), (2) and (3) of the CPA require that search to be conducted at the scene of crime immediate after the motor vehicle being stopped. In this case according to PW2 he apprehended Exhibit P7 at Njia panda ya Himo while Search and Seizure were conducted at Moshi Central Police Station. This contravenes the provision of section 42 of the CPA.

From the contradictions, irregularities and unreliable evidence of PW2 and PW3, I am afraid to hold that the search and seizure of Exhibit P7 and P4 respectively were legally executed. Thus, the second issue is answered negatively.

Reverting to the third issue, search and seizure are the first step in the process of establishing the chain of custody in narcotic drug cases. In that regard, whenever there is contradiction or irregularities at the stage of search and seizure as in the second issue above, the same shall go to the root of the case and the whole prosecution case be rip to pieces. For sure, the court may decide not to determine the remaining issues, however for best interest of justice I will proceed to determine the remaining issues as raised in the case at hand

Basing on testimony of PW2, PW3, PW4 and PW5 as well as Exhibit P5 and P6, the chain of custody integrity and accuracy remain the question under scrutiny. PW3 an officer executing search of Exhibit P7 and seizure of Exhibit P4, stated that he does not know the number of small bags in the six sulphate bags which were contained Exhibit P4 since he never counted them. However, in the exhibit P5 each sulphate bag listed was identified by its colour, type of items and their colour inside the said bags. But again, it shown in Exhibit P6 that the six sulphate bags and items inside them were listed in when PW2 handed over Exhibit P4 to PW4. It is astonishing for PW2 to state that he did not count the items inside the sulphate bags (Exhibit P4). It is again in the record that in both Exhibits P4 and P5 which purported to be filled by him exhibited number and colours of items inside sulphate bags. This imply that bundles and parcels used as packages of Exhibit P4 were counted and identified by colours during seizure of Exhibit P4 and the ultimate handing over to PW4.

It is trite law 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 as held by the Court of Appeal in the case of **Goodluck Kyando v. Republic**, Criminal Appeal No. 118 of 2003, CAT at Mbeya (unreported). In the present case the piece of

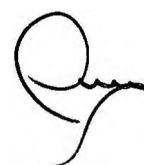


evidence of PW2 in this aspect pose a convincing reason for the court to fail to believe him.

According to the testimony of PW4, it is PW2 who listed down the items in handing over Exhibit P4 and P7. In exhibit P6 six sulphate bags were listed with their items inside, this imply that the items inside sulphate bags were counted during handing over. It is the testimonies of PW2 and PW3 that PW2 was the one who filled Exhibit P5. I had opportunity to go through the two Exhibits, P5 and P6 which purported to be filled by PW2, with naked eyes the hand writing within the said documents showing that the two documents written by two different persons, that is the one who filled in items in exhibit P5 is not the same who filled in Exhibit P6.

Again, it is in the testimonies of PW4 and PW5 that, each of them claimed to have labelled Exhibit P4 with investigation number MOS/IR/38/2022. PW4 stated that he labelled the same on the day he received from PW2 while PW4 stated that he labelled the same on the 2<sup>nd</sup> January 2022 after being assigned to investigate the case at hand. The evidence above cast doubt on the credibility of PW2, PW3, PW4 and PW5. What then can be said in this issue? Indeed, there are very serious contradictions in the evidence of the prosecution witnesses as far as the chain of custody is concerned. See the case of **Said Ally Ismail** (Supra). The issue at hand is answered in the negative.

In his defence, the accused person properly raised the defence of *alibi* according to section 42 (1) (2) of the EOCCA. It is the evidence of DW1 and DW3 that on the material date the accused person was not at the scene crime. In support of that DW2 and exhibit D2 exhibited that the said motor vehicle was handed over to one Gabriel Kiuri Mchami who was supposed to hand back exhibit P7 to DW1 on 5<sup>th</sup> of January 2022. According to the defence side, on the 1<sup>st</sup> January 2022 exhibit P7 was at in the possession and control of Gabriel Mchami. However, PW2 in his evidence stated that he identified the accused person as the one who at the scene of crime on the fateful day. He further stated that he identified him by his face and that he knew him by his name even before. If the accused person was known to PW2 even before the arrest, why PW2 failed to write the name of the accused person in Exhibit P5? It is again in the record that the accused person was arrested by PW2 at the police station when he had introduced himself to him in relation to the vehicle in question. If the accused person was known and familiar to PW2, we could expect the arrest of him even before he introduced himself. This casts doubt if really PW2 identified him at the scene of crime.



In the case of **Oden Msongela and 5 Others Vs The DPP**, Consolidated Criminal Appeals No. 417 of 2005 and 223 of 2018, CAT at Mbeya (unreported), the Court of Appeal held that;

*'the appellants having properly raised the defence and having established their whereabouts, had no further duty to prove the truthfulness of their alibi the burden was on prosecution to disapprove it.'*

In the case at hand, since PW2 did not write the name of accused person in Exhibit P5 while he alleged to know him by his name at the scene of crime, but also the fact that he did not state exactly features found on the said face which makes identify the accused person, the identification made by PW2 cannot be enough and suffice to rebut the defence of alibi as raised by the accused person. Therefore, this issue is determined in the affirmative

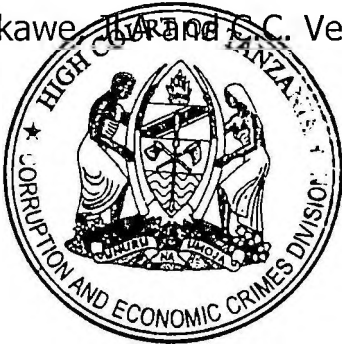
Having addressed all issues raised in this case, the court finds the prosecution evidence has failed to prove the case to the hilt against the accused person for an offence of trafficking in narcotic drugs contrary to section 15(1)(a) and (3)(iii) of Act the Drugs Control and Enforcement Act, [Cap 95 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] "the EOCCA".

Consequently, I find the accused person not guilty and I hereby acquit him of the offence he is charged. He is hereby set free.



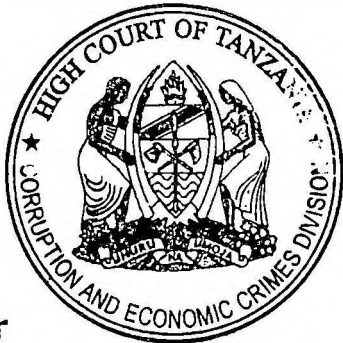
  
**G.N. ISAYA**  
**JUDGE**  
**30.11.2022**

The judgement delivered in open Court this 30<sup>th</sup> day of November, 2022 in the presence of Ms. Tully Helela, State Attorney, the Accused person, Advocate Willence Shayo for the accused person, Hon. Chilemba Chikawe, and S.C. Venance Kimaro.



  
**G. N. Isaya**  
**Judge**  
**30/11/2022**

Right of Appeal full explained



  
**G. N. Isaya**  
**Judge**  
**30/11/2022**

**Order**

Exhibit P7 the motor vehicle with Reg. No. T585 BSU make Noah which is the instrumentality of crime shall remain in the custody of police as per the order dated 23/11/2022. The prosecution is hereby advised to deal with it as per section 49A of the DCEA.

Exhibit P4 to be destroyed in accordance with Drugs Control and Enforcement Act, Cap. 95 R.E. 2022 together with its regulations.

Order accordingly.



  
**G. N. Isaya**  
**Judge**  
**30/11/2022**