

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

**CORRUPTION AND ECONOMIC CRIMES DIVISION**

**AT MOSHI SUB-REGISTRY**

**ECONOMIC CASE NO. 4 OF 2021**

**THE REPUBLIC**

**VERSUS**

**HUSSEIN ALFAN MAKAMBA @ BOSII**

**JUDGMENT**

17<sup>th</sup> and 28<sup>th</sup> February, 2022

**BANZI, J.:**

Hussein Alfani Makamba @ Bosii (the accused person) is indicted for trafficking in narcotic drugs contrary to section 15 (1) (a) and (3) (iii) of the Drug Control and Enforcement Act, No. 5 of 2015 as amended ("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. 2002] as amended ("the EOCCA"). It is alleged in the particulars of offence that, on 5<sup>th</sup> June, 2018 at Deu Darajani Kahe area within Moshi District in Kilimanjaro Region, the accused person trafficked in narcotic drugs namely *Catha edulis* commonly known as *Mirungi* weighing 109.45 kilograms. The accused person pleaded not guilty to the information.

At the trial, Ms. Grace Kabu and Ms. Nitike Emmanuel, learned State Attorneys represented the Republic whereas, the accused person had the services of Ms. Diana Solomon, learned Advocate. In order to prove the case against the accused person, the prosecution side called in eight (8) witnesses and produced eight (8) exhibits. On the other hand, the accused person was a sole witness for the defence and he did not produce any exhibit.

In the main, the body of evidence by the prosecution presented a case that, on 5<sup>th</sup> June, 2018, around 9:00 am, four police officers from Anti-Drugs Unit (ADU) at the Regional Crimes Officer, Kilimanjaro (RCO) namely, E.7853 SGT Evodius (PW3), G.8672 SGT Habibu (PW7), D/C Zakaria and D/C Abdallah went to conduct patrol around Kahe and Chekereni areas. They were using two motorcycles owned by PW3 and PW7. Upon reaching at Deu bridge, they decided to hide in the bush and while they were still in hideout, they heard approximately ten motorcycles passing on the road. Around 2:45 pm, they heard another motorcycle passing on the road and all over a sudden it was switched off. After that, PW3 heard someone saying '*cheni imekatika tuko Deu*' while PW7 heard '*mnyororo umekatika naombeni msaada*'. Upon hearing that, PW3 with his colleagues ran towards that area where they saw two persons standing beside two motorcycles while another

one was sitting on a motorcycle. According to them, all three motorcycles were tied with parcels on the back seat. D/C Abdallah managed to arrest the one who was sitting on the motorcycle but the other two managed to escape while raising an alarm.

After being arrested, he was returned to his motorcycle with registration number MC941 BPJ which had two sulphate bags tied on the back seat. PW3 pierced the bags and managed to see leaves suspected to be Catha edulis. Upon inquiry, he introduced himself by the name of Hussein Makamba @ Bosii (the accused person). Then PW3 requested assistance back in the office. While they were waiting for assistance, they heard the alarm from group of people coming towards them. It was at that juncture when they smell danger and decided to leave. They left with their two motorcycles while PW3 took accused's motorcycle (Exhibit P2) and leaving behind two motorcycles of the escapees. According to PW3, the accused's motorcycle had no key but he managed to switch it on by just one kick. On the way near new weighing bridge, Njia Panda ya Himo, they met with their colleagues in a motor vehicle whereby PW3, D/C Abdallah and accused person got in the vehicle together with accused's motorcycle with parcels.

After reaching at RCO's office, PW3 conducted a search in the sulphate bags; white and green in the presence of independent witness one Prisini

Sebastian Tairo (PW5). In the green sulphate bag, he found six blue parcels and one red parcel, all containing fresh leaves suspected to be *Catha edulis*. He weighed the parcels and got 18.66 kg. Inside white sulphate bag, he found four blue medium sulphate bags, one green sulphate bag, four blue parcels, six blue parcels tied in three pairs and one blue parcel. All parcels contained fresh leaves suspected to be *Catha edulis*. He weighed the parcels and got 90.79 kg. The sulphate bags with parcels of leaves and motorcycle were seized via certificates of seizure (Exhibit P6) which was signed by PW3, PW5, PW7 and accused person.

Thereafter, PW3 handed over the two sulphate bags and the motorcycle with registration number MC941 BPJ (Exhibit P2) to custodian of exhibits, H.9323 D/C Michael (PW1) via handing over certificate (Exhibit P3). Nonetheless, I must hasten to state rightly that, the evidence of PW3 is materially different with the evidence PW1 on what was contained in the sulphate bags he received from PW3. According to PW1, he received two sulphate bags; white and green with parcels containing leaves suspected to be narcotic drugs (Exhibit P1). It was the testimony of PW1 that, the white sulphate bag contained sixteen parcels; four parcels were in blue sulphate bags, whereby two were wrapped with yellow tape and two with white tape; three parcels of sulphate bags whereby one was white and two were green;

four parcels of blue colour whereby three were in pair wrapped with yellow tape and one was separate wrapped with white tape; one parcel of green colour and one parcel in khaki package tied with yellow tape. The green sulphate bag contained seven parcels; one was red in colour and six were in blue colour whereby, five out of six were wrapped with yellow tape.

After receiving, PW1 registered Exhibits P1 and P2 in Exhibits Register at entry number 177 of 2018 (Exhibit P4). Then he, labelled white sulphate bag 'A' and green 'B'. He attached exhibit label with details of case reference number MOS/IR/4297/2018, entry number and name of the accused person. After that, he stored Exhibits P1 and P2 in a strong room. On 13<sup>th</sup> August, 2018, PW1 handed over Exhibit P1 to F.9950 D/C Isaack (PW8), the investigator of this case who submitted to the Chief Government Chemist (CGC) Northern Zone, Arusha where it was received by Michael Sairorie Benarnard (PW6) via sample submission form (Exhibit P7). PW6 registered Exhibit P1 by giving it laboratory number NZL 324/2018 and weighed leaves in sulphates 'A' and 'B' whereby, he got 90.79 kg and 18.66 kg respectively. After that, he drew samples from each parcel in sulphate 'A', put in khaki envelope and labelled it 'A' and with Lab number. Likewise, he drew samples from each parcel in sulphate 'B', put in khaki envelope and labelled it 'B' and with Lab number. Thereafter, he repacked Exhibit P1, sealed, signed on each

bag and handed over back to PW8 who upon returning to the office he handed over to PW1. PW1 stored them in strong room until they were brought and tendered in Court.

PW6 stored the samples in the fridge within the sample room until 16<sup>th</sup> October, 2018 when he handed over to Amina Shabani Benta (PW4) who on the same day boarded a flight to Mwanza and handed over to Bonaventura Njoka Masambu (PW2), a chemist at CGC Lake Zone, Mwanza. After receiving, PW2 registered the samples and gave them Lab number MLab 1263/2018 and stored the same in the fridge until 17<sup>th</sup> October, 2018 when he conducted analysis which confirmed that, the leaves were narcotic drugs namely *Catha edulis*. After getting the results, he prepared a report which was approved by Zonal Manager. On 25<sup>th</sup> October, 2019, PW8 forwarded a letter to Tanzania Revenue Authority (TRA) with a request to know the owner of the motorcycle, Exhibit P2. The report from TRA (Exhibit P8) reveals that, it is owned by WUZHOU Investment Company Limited. PW8 followed up at the said company only to be informed that it was sold to a certain citizen but they didn't have any record.

In his defence, the accused person (DW1) denied allegation against him. He claimed to be casual labourer in different farms around Kahe area. According to his testimony, on 5<sup>th</sup> June, 2018 while he was returning home

from his work, he saw about ten people standing along the road with motorcycles laying down. In the course of greeting them, they were invaded by police officers who arrested him while other people managed to escape. After the arrest, one officer took one motorcycle amongst those which were down whereby DW1 and another officer boarded. They went up to weighing bridge where they met with a motor vehicle. He was put in the vehicle and before they left, they brought some parcels and loaded therein. Thereafter, he was taken to Moshi central police station and on arrival, he was put in a certain office where he found some other officers. Then, they brought those bags, cut them, took parcels out and began to weigh the same. After that, he was asked to sign on documents but he refused that is when he was severely beaten and caused to endorse his thumb print on those documents. Thereafter, he was taken to lock up where he stayed until he was arraigned to Court and charged accordingly.

In a nutshell, that was the evidence of the Prosecution and Defence sides. Final submissions were made in writing whereby both sides filed their written submissions timely. I appreciate for their laboured submissions and the same will be referred to in the course of this judgment when the need arises.

Having carefully considered the evidence on record and submissions by Counsel of both sides, the issues before the Court for determination are, **one**, *whether Exhibit P1 was seized from the accused person* and **two**; *whether chain of custody was maintained.*

Starting with the first issue, the accused person denied to be arrested with Exhibit P1 alleged to be found in his motorcycle. The evidence of PW3 and PW7 shows that, they arrested the accused person who was sitting on his motorcycle (Exhibit P2) which had two sulphate bags; white and green. It is further their testimonies that, the search in those bags was conducted at police station in the presence of PW5. According to PW3, after he opened green sulphate bag, he found seven parcels whereby, six were blue in colour and one was red in colour. All parcels contained fresh leaves suspected to be *Catha edulis*. However, concerning the white sulphate bag, although all witnesses claimed that it contained sixteen parcels, but there is contradiction on the evidence of arresting officers in respect of number of parcels in that bag. At first, PW3 said there were sixteen parcels but later before he was given Exhibit P1 to identify, he said there were nine parcels. On other hand, PW7 in his testimony stated that, the white sulphate bag had eight parcels. Apart from that, there is another contradiction concerning type of parcels found in white sulphate bag and seized by PW3. When PW3 was led to

explain type of parcels he found in white sulphate bag, he stated that and I quote:

*"After that, I opened the white sulphate bag. After opening, we found **four medium sulphate bags blue in colour** containing fresh leave. Also, we found **one green sulphate bag**. We also found **four blue parcels, six blue parcels tied in three pairs and one blue parcel**. All these contained fresh leaves."*(Emphasis supplied).

On the other hand, PW7 stated that;

*The second bag was white sulphate bag. Inside that bag, there were 8 parcels. **Four parcels were blue in colour, two were green, one was white. One was khaki. There was another blue parcel** hanged aside on that big bag. There were **6 bags tied in three pairs and 1 separately.**"*

It is apparent from the extract above that, what was found in white sulphate bag and seized by PW3 is different from what was seen by PW7 who were both present from the stage of arrest to search and seizure. While PW7 saw two green parcels, PW3 saw one green parcel. Also, while PW7 saw a total of eleven blue parcels, PW3 saw and seized a total of fifteen blue parcels. Moreover, while PW7 saw one white parcel and one khaki parcel,

PW3 in his testimony did not say anything about seizing white or khaki parcel within white sulphate bag.

Furthermore, what was stated by PW3 and PW7 before this Court is different from what he recorded in the certificate of seizure. According to the certificate of seizure, PW3 seized the following parcels from white sulphate bag; four blue sulphate bags, three sulphate bags, one khaki parcel, four blue parcels and one clothed green bag.

Looking closely at PW3's testimony, he did not mention about the parcels to be wrapped with yellow Sellotape. Moreover, despite being the one who listed seized parcels in the certificate of seizure but when he was given Exhibit P1 to identify, PW3 failed to identify green clothed parcel, khaki parcel and two green sulphate bag parcels as among the parcels which were in white sulphate bag. From the evidence of arresting and seizing officers, it is not clear what were found and seized from the white sulphate bag. This uncertainty could have been resolved by independent witness (PW5) but his evidence is not helpful because he didn't recall the colour of the parcels apart from blue parcels and khaki parcel. In that regard, this uncertainty and/or contradiction on what was seized by PW3 casts strong doubt on prosecution evidence which as a matter of law should be resolved in favour of the accused person. Thus, I cannot arrive into conclusion that, with the evidence

of PW3, PW5 and PW7 the prosecution side has managed to prove that Exhibit P1 was actually seized from the accused person. This concludes the first issue which is negatively answered.

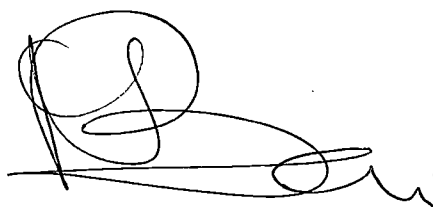
Apart from uncertainty of what was found in the white sulphate bag and seized by PW3, there is another contradiction between the testimony of PW3 and PW1 on what was handed over to PW1 and eventually tendered before this Court. For ease of reference, I hereby reproduce a portion of PW1's testimony in respect of parcels in white sulphate bag as hereunder:

*"The white sulphate bag had 16 parcels of different colours; **4 were in blue sulphate bags**, whereby two were wrapped with yellow tape and two with white tape; **3 parcels of sulphate bags whereby 1 white and 2 green; 4 parcels of blue colour whereby 3 were in pair wrapped with yellow tape and 1 was separate wrapped with white tape; 1 parcel of green colour and 1 parcel in khaki package with yellow tape.**"*

A close look at PW3's testimony hereinabove and this extract from PW1's testimony, reveals that, what was seized by PW3 is different from what was received by PW1 and tendered before this Court. While PW3 seized a total of fifteen parcels in blue colour and one parcel in green colour within white sulphate bag, PW1 received and tendered eleven blue parcels, three

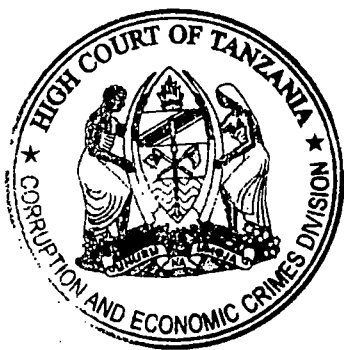
green parcels, one white parcel and one khaki parcel. With this contradiction it is clear that what was claimed to be seized by PW3 is different from what was brought received by PW1, analysed by PW2 and finally tendered before this Court. Therefore, it is the considered view of this Court that, this contradiction goes to the root of the case as it touches the whole issue of chain of custody which is the gist of the second issue. With this finding, the second issue is also answered in negative.

For the reasons stated above, and since all issues were negatively answered, it is the finding of this Court that, the prosecution side has failed to prove the case against the accused beyond reasonable doubt. Thus, I find the accused person Hussein Alfán Makamba @ Bosii not guilty and acquit him with the charged offence of trafficking in narcotic drugs. Consequently, he is hereby set free.

A handwritten signature in black ink, appearing to be 'I. K. Banzi', written over a horizontal line.

**I. K. BANZI**  
**JUDGE**  
**28/02/2022**

Delivered in open Court in the presence of accused person, Ms. Lucy Kyusa, learned State Attorney for Republic and Ms. Diana Solomon learned Advocate for accused. Right of appeal fully explained.



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

**I. K. BANZI**  
**JUDGE**  
**28/02/2022**

### **ORDER**

Exhibit P1 to be destroyed in accordance with the Drugs Control and Enforcement Act [Cap. 95 R.E. 2019] and its Regulations. Exhibit P4 to be restored to the Regional Crimes Officer, Kilimanjaro. So far as Exhibit P2, the motorcycle MC941 BPJ is concerned, since it is owned by another person other than the accused, the same shall be dealt in accordance with section 49A (2) (3) of Drug Control and Enforcement Act [Cap.95 R.E. 2019] read together with the Proceeds of Crime Act [Cap. 256 R.E. 2019].



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

**I. K. BANZI**  
**JUDGE**  
**28/02/2022**