

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT MOSHI SUB-REGISTRY

ECONOMIC CASE NO. 7 OF 2021

THE REPUBLIC

VERSUS

KAGANA RAHIMU JUMA

JUDGMENT

25th February and 1st March, 2022

BANZI, J.:

In this case, the accused person, Kagana Rahimu Juma 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 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 particulars of offence that, on 17th July, 2020 at Mnoa Village within Mwanga District in Kilimanjaro Region, the accused person trafficked in narcotic drugs namely, Catha edulis khat commonly known as *mirungi* weighing 76.5 kilograms. The accused person pleaded not guilty to the information.

In a bid to prove the case against the accused person, the prosecution side through Messrs. Philbert Mashurano and Isack Mangunu, learned State Attorneys brought seven (7) witnesses and produced thirteen (13) Exhibits. On the other hand, the accused person under the services of Mr. Emanuel Anthony, learned Advocate testified under oath as sole witness for the defence and tendered one Exhibit, previous statement of PW1 G.6772 D/CPL Grasiano.

Basically, the evidence by the prosecution side is to the effect that, on 17th July, 2020 around 8:00 am, six investigation officers of Mwanga Police Station including, E.7934 D/CPL Issaya (PW2) and H.1281 D/C Zephania (PW4) were conducting a routine patrol within Mnoa Village near Kenya and Tanzania border. In the course of patrol, they saw a person in a motorcycle carrying sulphate bags. After raising suspicion, they managed to stop him. Upon being asked, he introduced himself by the name of Kagana Rahimu Juma (the accused person). Also, PW2 with his colleagues introduced themselves. Thereafter, PW4 under the supervision of PW2 conducted search in three sulphate bags, one in green colour and the remaining two in white colour. The sulphate bags were on accused person's motorcycle with registration number MC848 CBE make Sinoray black in colour. In the green sulphate bag, they found 25 parcels of different colours; in the first white

sulphate bag, they found 20 parcels of different colours and in the last white sulphate bag, they found 21 parcels of different colours. All parcels in three sulphate bags contained fresh leaves suspected to be narcotic drugs namely *Catha edulis*. Three sulphate bags with parcels containing leaves (Exhibit P1) and the motorcycle with registration number MC848 CBE make Sinoray black in colour (Exhibit P8) were seized via certificate of seizure (Exhibit P9) which was signed by PW2, PW4 and the accused person who endorsed his handwritten signature and thumb print.

Thereafter, they took the accused person together with the seized exhibits to up to the area where they parked the motor vehicle. After getting in the vehicle together with accused person and exhibits, they began a journey back to Mwanga police station. On the way, they received a call from OC CID with instructions to pass at Kambi ya Simba village to attend another incident of a child who was drowned. After they went there and attended the incident, they went straight to Mwanga police station where they arrived around afternoon. According to PW2, throughout the journey the exhibits were under his custody and control. On arrival at the station, PW2 handed over all seized exhibits to G.6772 D/CPL Grasio (PW1), the custodian of exhibits via handing over certificate (Exhibit P3). After receiving, PW1 recorded in Exhibits Register at Entry No. 3/2020 (Exhibit P2), attached

exhibit label on each bag and labelled the bags A, B2 and C3 and with case file number MWG/IR/868/2020. He also labelled the motorcycle with case reference number. After that, he stored the bags in exhibits room.

On 20th July, 2020, PW1 handed over Exhibit P1 to investigator of the case, H.1713 D/C David (PW5) via handing over certificate (Exhibit P4) who went to Weights and Measures Agency in Moshi together with the accused person for purpose of weighing the exhibit in question. Weighing exercise was conducted by Meshack Peter Edward (PW6) who got a total weight of 76.5 kilograms for leaves in all three sulphate bags. After completion, he prepared a report (Exhibit P11) and handed over the sulphate bags to PW5 who upon returning to the office, he handed over to PW1 via handing over certificate (Exhibit P5). PW1 stored them until 22nd July, 2020 when he handed over to PW5 via handing over certificate (Exhibit P6) so that they could be sent to the Chief Government Chemist (CGC) Northern Zone, Arusha. Before going to Arusha, PW5 went to the District Court of Mwanga where he drew samples in duplicate from each parcel within three sulphate bags, put in three envelopes and marked 'A', 'A1' and 'A2' in the presence of PW2 and the Magistrate, Mariam Bakari Lusewa (PW3). Duplicate samples were also put in three separate envelopes. Samples were drawn via sampling inventory form (Exhibit P10).

On the same day, 22nd July, 2020, PW5 went to CGC Northern Zone, Arusha where he handed over the samples to Erasto Laurence (PW7) via sample submission form (Exhibit P12). According to him, he received three envelopes marked 'A', 'A1' and 'A2' with their duplicate. After receiving, he opened the envelopes and found fresh leaves suspected to be *Catha edulis*. Then he registered the samples by giving them laboratory number NZL 536/2020. After that, he filled in sample receipt notification form (Exhibit P12) and gave a duplicate copy to PW5. PW5 returned to the station where he handed over Exhibit P1 to PW1 via handing over certificate (Exhibit P7). He recorded them in Exhibit P2 and stored them until they were brought and tendered before this Court. During the cross-examination of PW1, the defence side tendered his previously recorded statement, Exhibit D1 in a bid to impeach his credibility.

PW7 proceeded to conduct analysis on the samples he received from PW5. He conducted two tests; Chen-Kao test and Thin Layer Chromatography whereby both tests confirmed that the leaves were narcotic drugs namely *Catha edulis*. After getting the results, he prepared a report (Exhibit P13) which was submitted to the officer in-charge of investigation at Mwanga police station.

In his defence, the accused person (DW1) denied the allegation against him. Also, he denied to be arrested at the crime scene and claimed to be arrested at Kitobo village while he was cutting grasses for selling to cattle keepers. According to his testimony, on 17th July, 2020, while he was at Kitobo village near the border of Tanzania and Kenya cutting grasses for sale, he was arrested by police officers. After the arrest, he was taken to their motor vehicle and boarded in together with his sulphate bag which had grasses and working tools; sickle and bicycle. In the vehicle, he found a motorcycle (Exhibit P8). After that, they left and headed to Mwanga police station. On the way, one officer requested for bribe so that he can be released. He told him that, he has Tshs.2,000/=. After being told that it was not enough, he begged to be released so that, he can sell the grasses and bring them enough money. They laughed at him and another officer said that, he will fit them for their operation.

On arrival at Mwanga police station, he was put in lock up. On 18th July, 2020, the said police officer who told him that he was fit for their operation went to lock up with a plain paper and asked him if he knows how to read and write. After being told by DW1 that he doesn't know how to read and write, the said officer left. Sometimes later, the same officer returned with a written document whereby, DW1 endorsed his thumb print after been

told that he will be released so that he can bring them seventy thousand shillings. At the time of signing, he did not know its contents but later he came to realise that, it was the certificate of seizure, Exhibit P9. He stayed in lock up until 21st July, 2020 when he was taken to Mwanga District Court and charged with the offence of trafficking in narcotic drugs. He denied to have any connection with Exhibit P8. He. He prayed to be acquitted as he was not involved in the alleged offence.

In briefly, that was the evidence of the Prosecution and Defence. Counsel of both sides opted not to make the final submissions. Having carefully considered the evidence of both sides, the issues before the Court for determination are, **one**, *whether Exhibit P1 was seized from the accused person*; **two**, *whether the leaves in Exhibit P1 are narcotic drugs* and **three**; *whether chain of custody was maintained*.

Starting with the first issue, it is the testimony of PW2 that, on the fateful day around morning hours, while they were in the routine patrol around Mnoa village, they managed to arrest the accused person after they saw him with the motorcycle (Exhibit P8) carrying three sulphate bags. In the course of search, they found 25 parcels of different colours in green sulphate bag; in the first white sulphate bag, they found 20 parcels of different colours and in the last white sulphate bag, they found 21 parcels

of different colours. All parcels in three sulphate bags contained fresh leaves suspected to be narcotic drugs namely, *Catha edulis*. PW2 seized three sulphate bags with parcels and the motorcycle via Exhibit P9 which was signed by the accused person and PW4. PW2's evidence is supported by PW4 and Exhibit P9.

Although the accused person in his defence admitted to have signed Exhibit P9, but he claimed to sign the same at the lock up of Mwanga police station and not at the crime scene. However, in the course of testimony of PW2, who is the author of Exhibit P9, the accused person through his Advocate did not cross-examine him on this aspect about the accused person signing the certificate of seizure while he was at the lock up and not at the crime scene. It is a settled principle that, failure to cross-examine a witness on a relevant matter ordinarily connotes acceptance of veracity of the testimony. See the cases of **Issa Hassan Uki v. Republic** (Criminal Appeal No. 129 of 2017) [2018] TZCA 361 at www.tanzlii.org and **Niyonzima Augustine v. Republic**, Criminal Appeal No. 483 of 2015 CAT (unreported). Apart from that, if the accused person truly signed in Exhibit P9 by endorsing his thumb print at lock up of Mwanga police station, that must be another document other than Exhibit P9, because Exhibit P9

contains two signatures of the accused person, that is; handwritten and thumb print.

Besides, looking closely at his defence, the accused person relied on the defence of alibi. Nonetheless, his *alibi* flawed the procedure stipulated under section 42 (1) (2) of the EOCCA which reads as follows;

"(1) Where a **person charged** with an economic offence intends to rely upon an alibi in his defence, he shall first indicate to the Court the particulars of the alibi at the preliminary hearing.

(2) Where an accused person does not raise the defence of alibi at the preliminary hearing, he shall furnish the prosecution with the particulars of the alibi he intends to rely upon as a defence at any time before the case for the prosecution is closed." (Emphasis supplied).

It is apparent from the extract above that, the accused person ought to have notified the Court his intention to rely on *alibi* as his defence during the preliminary hearing. But he did not do so. If his *alibi* was genuine, it was expected to be revealed from the beginning at the preliminary hearing considering the fact that, at that stage he was duly represented by learned Advocate. If he knew from the beginning that he was not at the crime scene, he could have told his counsel who is conversant with the procedure of

notifying the Court to that effect. Apart from that, according to the extract above, the accused person also failed to furnish the prosecution with the particulars of his *alibi* before the closure of prosecution case as required by subsection (2) above. If his *alibi* was genuine, he could at least reveal his particulars to the prosecution before the closure of prosecution case. Furthermore, if his *alibi* was genuine, it was expected to be revealed in the course of testimony of PW2 and PW4. But the questions pertaining his *alibi* were not asked by his counsel when the seizing officer and arresting officer, PW2 and PW4 were testifying. In other words, the accused person through his counsel did not cross-examine PW2 and PW4 on this aspect which ordinarily connotes acceptance of the truth of the witness' evidence. This alone is a clear indication that, his so-called *alibi* is nothing but an afterthought. Thus, I reject it completely.

Since the evidence of PW2 shows that, the accused person signed in Exhibit P9 at the crime scene and since he was not cross-examined on that aspect, it is the finding of this Court that, the accused person signed Exhibit P9 to acknowledge the seizure of Exhibit P1. Equally, he signed Exhibit P9 at the crime scene and not at the lock of Mwanga police station as alleged by him. See the case of **Song Lei v. The Director of Public Prosecutions and Others** (Consolidated Criminal Appeals No. 16 A of 2016 & 16 of 2017)

[2019] TZCA 265 at www.tanzlii.org which stated that, upon signing the certificate of seizure, the accused person acknowledges to be found with the exhibit in question. Besides, PW2 and PW4 successfully identified Exhibit P1 before this Court as the same one they seized from the accused person. In that view, the prosecution side has managed to prove that, Exhibit P1 was seized from the accused person. This concludes the first issue which is affirmatively answered.

Returning to the second issue whether the leaves in Exhibit P1 are narcotic drugs. It is on the evidence of PW7 that, after receiving samples on 22nd July, 2020, he conducted two tests namely, Chen Kao and Thin Layer Chromatography on each sample. In Chen Kao test, he began by grinding the leaves, then he mixed with three reagents; Acetic Acid, Copper II Sulphate and Sodium Hydroxide whereby the colour changed from colourless, to blue precipitate to brownish orange which is an indication that the leaves contain Cathinone and Cathine chemicals. According to him, these chemicals are only found in Catha edulis plant. After that, he proceeded with Thin Layer Chromatography test whereby, he grinded the leaves and mixed with Methanol reagent. Then he filtered the same in order to get filtrate. After that, he put the filtrate in a plate which is coated with chemical. After the reaction, the colour changed into brown which is a confirmation that the

leaves are narcotic drugs, namely Catha edulis as they contained Cathinone and Cathine chemicals which are only found on Catha edulis plant. PW7 concluded his analysis by preparing the report, Exhibit P13 which supports his testimony.

From the evidence of PW7 there is no doubt that Exhibit P1 is narcotic drug namely Catha edulis. In the light of Section 48A (2) of the Drugs Act, and since there is no any evidence to the contrary, Exhibits P13 is conclusive proof that Exhibit P1 is narcotic drug in the ambit of section 2 and the First Schedule to the Drugs Act. According to Exhibit P13, Catha edulis has effects on human being as it causes drug dependence and mental disability. Thus, the second issue is also answered positively.

Reverting to the third issue regarding the chain of custody, it is settled law that, in cases involving movement of exhibits from one point to another, the evidence concerning chain of custody is of utmost importance. As a matter of principle, it is well settled that as far as the issue of chain of custody is concerned, it is crucial to follow carefully the handling of what was seized from the accused person, is the same which was analysed and finally tendered in Court. Chain of custody can be established by documentary evidence as it was insisted in the case of **Paulo Maduka and Four Others v. Republic**, Criminal Appeal No.110 of 2007 CAT (unreported) or by oral

testimony as it was stated in the cases of **Charo Said Kimilu and Another v. Republic**, Criminal Appeal No. 111 of 2015 CAT (unreported) and **Abas Kondo Gede v. Republic** (Criminal Appeal No. 472 of 2017) [2020] TZCA 391 at www.tanzlii.org just to mention a few.

In the matter at hand, in establishing the chain of custody, the prosecution side relied on oral testimony of PW1, PW2, PW5, PW6 and PW7. Besides, they tendered Exhibits P2, P3, P4, P5, P6, P7, P9, P10 and P12 to supplement oral testimony. The evidence on record shows that, the arrest of the accused person and the seizure of the drugs in question was made on 17th July, 2020 by PW2 in the presence of PW4. The exhibits were seized through the certificate of seizure, Exhibit P9. Upon seizure, the exhibits in question remained in the custody and control of PW2 throughout the journey from Mnoa Village until they arrived at Mwanga Police station where he handed them over to exhibits keeper, PW1 on same day via Exhibit P3. Upon receiving, PW1 recorded in Exhibit P2, attached exhibit label on each bag and labelled the bags A, B2 and C3 and with case file number MWG/IR/868/2020. Then he stored them in exhibits room.

On 20th July, 2020, PW1 handed over to PW5 through Exhibit P4 who travelled to Moshi at Weights and Measures Agency for weighing. On arrival, he handed over to PW6 who after weighing handed back the exhibit to PW5.

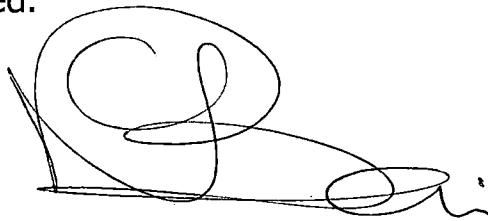
On the same day, PW5 returned to the station where he handed over to PW1 via Exhibit P5. PW1 once again recorded in Exhibit P2 and stored them until 22nd July, 2020 when he handed over to PW5 via Exhibit P6. Upon receiving, PW5 went to Mwanga District Court where he drew samples in duplicate from each parcel within three sulphate bags, put in three envelopes and marked 'A', 'A1' and 'A2' in the presence of PW2 and PW3. Samples were drawn through Exhibit P10. On the same day, PW5 handed over the samples in three envelopes in duplicate to PW7 via Exhibit P12 who on the same day analysed the samples. Likewise, it was on the same day when PW5 handed back Exhibit P1 to PW1 via Exhibit P7. After receiving, PW1 recorded in Exhibit P2 and stored it until it was brought and tendered before this Court.

Apart from that, PW3 and PW4 identified Exhibit P1 before this Court as the same one they saw and seized from accused person at the crime scene. Likewise, PW5 and PW6 identified Exhibit P1 as the one which passed in their hands at some point. Also, PW1 identified Exhibit P1 before this Court as the one he received from PW2, handed over to PW5 on different dates and stored the same until he brought to Court. As stated herein above, during the cross-examination of PW1, the defence side tendered his previously recorded statement, Exhibit D1 in a bid to impeach his credibility. Nevertheless, was claimed by the defence as contradiction, is not a

contradiction at all because, PW1 was just responding to the question when he was led to mention some features that will assist him to identify the three sulphate bags. The fact that he mentioned the bags to be tied by sisal fibre as among the features something which is not in his statement does not necessarily mean that he gave contradictory testimony considering that, the sulphate bags in question (Exhibit P1) which were tendered before this Court are tied with sisal fibre. Thus, I find nothing to question the credibility of PW1. In that regard, from the above evidence, there is no shadow of doubt that, the substance that were seized by PW2, are the very one which were examined by PW7 and tendered in evidence in this Court by PW1. Therefore, the third issue is also affirmatively answered.

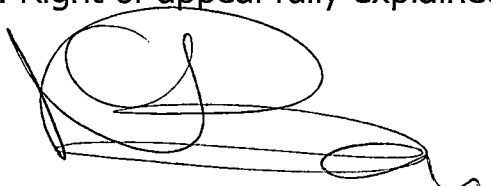
For the reasons stated above, and since all issues were affirmatively answered, it is the finding of this Court that, the prosecution side has managed to prove the case against the accused beyond reasonable doubt. Since accused person was found in possession of the drugs in question in the course of 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, Kagana Rahimu Juma 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
01/03/2022

Delivery in open court in the presence of accused person, Mr. Kassim Nassir, learned Senior State Attorney for Republic and Mr. Emanuel Anthony, learned Advocate for accused. Right of appeal fully explained.



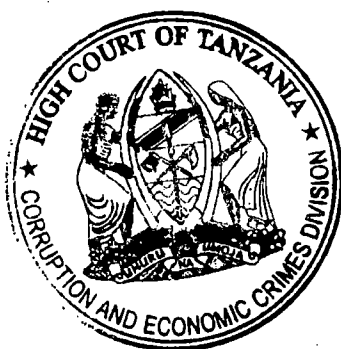
I. K. BANZI
JUDGE
01/03/2022

SENTENCE

The accused person is convicted with trafficking in narcotic drugs whereby section 15 (1) (a) of the Drug Control and Enforcement Act [Cap.

95 R.E. 2019] attracts a life sentence. But this being an economic offence, section 60(2) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2019] provides for minimum sentence of 20 years and maximum of 30 years imprisonment.

However, trafficking of narcotic drugs is a serious offence whereby according to analysis report (Exhibit P13), *Catha edulis* causes drug dependence and mental disability. But I have taken into consideration the mitigation factors including that he is the first offender; still young and his parents depend on him. Also, since his arrest, he has been in custody for more than one year and a half. Considering all these facts especially being the first offender, in my view, he does not deserve a maximum penalty which is usually reserved for the worst offenders. In that regard, I hereby sentence the accused person, Kagana Rahimu Juma to 23 years imprisonment.

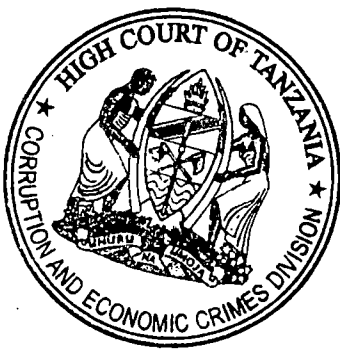


I. K. BANZI
JUDGE
01/03/2022

ORDER

Exhibit P1 to be destroyed in accordance with the Drug Control and Enforcement Act [Cap. 95 R.E 2019] ("the Drugs Act") together with its

Regulations. So far as exhibit P8, the motorcycle is concerned, apart from being the instrumentality of crime, there is no proof that it is owned by the accused person considering the fact that he disowned it. In that regard, the same shall be dealt with according to section 49A (2) (3) of the Drugs Act and Proceeds of Crime Act [Cap 256 R.E. 2019] in order to accord a right to be heard to the owner before issuing confiscation order.



A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a series of loops and a horizontal line extending to the right.

I. K. BANZI
JUDGE
01/03/2022

