

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT MOSHI SUB-REGISTRY

ECONOMIC CASE NO. 03 OF 2021

THE REPUBLIC

VERSUS

1. CHARLES THOBIUS JAPHET KIMAMBO

2. SANGIWA SAIDI THABITI

JUDGMENT

11th and 28th February, 2022

BANZI, J.:

This case involves two persons, Charles Thobius Japhet Kimambo and Sangiwa Saidi Thabiti ("the first and second accused person, respectively") who are alleged to commit the offence of trafficking in narcotic drugs contrary to Section 15 (1) (b) of the Drug Control and Enforcement Act, No. 5 of 2015 ("the Drugs Act), read together with paragraph 23 of the First Schedule to, and sections 57 (1) and 60 (2) the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002] ("the EOCCA"), as amended.

It is alleged in the particulars of offence that, on 31st October, 2016 at Uhuru Hostel Shanty Town area, within the Municipality of Moshi, in Kilimanjaro Region, the first and second accused person trafficked 398.38

kilograms of narcotic drugs namely, *Catha edulis* (Khat) commonly known as Mirungi. The accused persons proclaimed their innocence from the beginning to the end of the trial.

In a bid to prove the case against the accused persons, the prosecution side through Ms. Lucy Kyusa and Ms. Sabitina Mcharo, learned State Attorneys brought nine (9) witnesses namely, Kaijunga Triphon Brassy (PW1), E.8544 SSGT Michael (PW2), H.2310 D/SGT Damas (PW3), Kagera Zakaria Ng'weshemi (PW4), F.1157 D/SSGT Hashim (PW5), G.790 D/CPL Emmanuel (PW6), F.9950 D/CPL Isack (PW7), Swalehe Abdallah Said (PW8) and H.3923 D/C Michael (PW9). In addition, they tendered eleven (11) exhibits, which were admitted, thus: Exhibit P1, 59 parcels of leaves with its packages; Exhibit P2, Handing over certificate dated 24/11/2016; Exhibit P3, Motor vehicle make Toyota Cresta with plate number T324 CAQ; Exhibit P4, Certificate of seizure; Exhibit P5, two pairs of plate numbers with Reg. No. T459 AYP and T239 DAZ; Exhibit P6, three mobile phones; one Nokia and two Tecno; Exhibit P7, two driving licenses with number 4000150123 and 4002021441; Exhibit P8, Government Chemist Analysis Report; Exhibit P9, Entry No.71/2016 in Exhibits Register; Exhibit P10, Submission form and Exhibit P11, Report from Tanzania Revenue Authority.

On the other hand, the first accused person enjoyed the services of Ms. Fay Sadallah, learned Advocate, whereas Mr. Innocent Nsyenge, learned Advocate appeared for the second accused persons. The first and second accused person as testified under oath as DW1 and DW2, respectively and did not tender any exhibit. I must sincerely thank the Counsel of both sides and everyone who took part in the proceedings of this case for their tireless efforts towards determination of this matter.

In the main, the evidence by the Prosecution presents a case that, on the fateful day, 31st October, 2016, PW3 with his colleagues including PW6 were conducting normal patrol around Moshi town areas. Around 3:45 pm, while they were parking at KDC area, they saw a car Cresta GX100 passing there and PW3 raised suspicion as it resembled with a car which escaped them in the past days. They decided to pursue it and upon seeing that, the said car over speeded while overtaking without precautions. They kept on pursuing it and on arriving at YMCA area, they didn't see it. PW3 with his colleagues took Moshi Arusha road and upon reaching at Changbay area, PW3 got off from their vehicle and walked back up to the road heading to Sauti ya Injili. While he was there, he saw the said car turning to the road heading to Mawenzi Secondary School. After seeing that, he headed to Shanty town area while instructing his colleagues to return back.

PW3 went up to Uhuru Hostel and on arrival, he saw the said car which had plate number with registration number T324 CAQ and managed to apprehend the first accused person who was getting off through driver's door. His colleagues managed to arrest the second accused person who was getting off through passenger's door. After apprehension and introduction, they opened the car and on the rear seats and in the boot, they saw parcels. PW3 inserted a stick in the parcels and found fresh leaves. PW3 and PW6 entered in that car with accused persons and went up to the office of the Regional Crimes Officer (RCO) at Anti- Drugs Unit. On arrival, PW3 looked for independent witnesses and managed to get PW8 and another person namely Juma Ally Kaseke. After that, PW3 began to conduct search. In the course of search, on the back seats and in the boot, he found a total of 59 parcels. Out of 59 parcels, 27 were in sulphate bags packages; 12 in sack packages; 19 in khaki paper packages wrapped with yellow Sellotape and 1 in newspaper package with yellow Sellotape (Exhibit P1). All parcels contained fresh leaves suspected to be narcotic drugs. In the same car, he found two pairs of plate number, T459 AYP and T239 DAZ (Exhibit P5). He also searched on accused persons' bodies and managed to retrieved, three mobile phones; one Nokia and two Tecno (Exhibit P6) and two driving licenses with number 4000150123 and 4002021441 (Exhibit P7).

Thereafter, PW3 seized all exhibits together with the car in question through certificate of seizure (Exhibit P7) which was signed by him, PW8, the first accused person and the second accused person. After that, PW3 handed over seized exhibits to PW5, the custodian of exhibits at RCO's office. After he received, PW5 recorded them in Exhibits Register at Entry 71 of 2016 (Exhibit P9) and labelled the sulphate parcels with mark 'V', sack parcels with 'G' and khaki and newspaper parcels with 'Y'. Also, he labelled them with case reference number MOS/IR/8806/2016. Then he stored them in the exhibits' room.

On 11th November, 2016 around 11:00 am, PW5 handed over all parcels containing fresh leaves to PW1, a Chemist from the office of Chief Government Chemist (CGC) Northern Zone, Arusha so that he can weigh and draw samples. PW5 handed them over via Exhibit P10. According to PW1, he received 27 parcels with label 'V', 12 parcels with label 'G' and 20 parcels with label 'Y'. After receiving, he weighed the leaves separately from the packages whereby he got the total weight of 398.38 kilograms. He registered them by laboratory number NZ 218/2016. Thereafter, he drew samples from each parcel with label 'V' and put in 27 envelopes; parcels with label 'G' in 12 envelopes and those with label 'Y' in 20 envelopes. He labelled envelopes 'V', 'G' and 'Y' and with laboratory number. Thereafter, PW1 repacked the

exhibits and put 27 parcels with label 'V' in white sulphate bag, 8 parcels with label 'G' in white sulphate bag, 4 parcels with label 'G' in green sulphate bag and 20 parcels marked 'Y' in white sulphate bag. After that, he sealed all four bags with manila rope, marked the same with Lab. No. NZ 218/2016, signed, attached a tag and handed them over to PW5, who upon receiving, he recorded in Exhibit P9 and stored them in the strong room until 1/1/2018 when he handed over to PW9 following his transfer to Mwanza. PW9 stored them until they were brought and tendered before this Court. So far as the motor vehicle is concerned, on 24th November, 2016, PW5 handed over to PW7 via Exhibit P9 who on receiving, he handed over to PW2 who stored it until he brought it before this Court.

PW1 left with samples and on arrival in Arusha, he stored the them until 6th December, 2016 when he travelled up to CGC Lake Zone, Mwanza where he handed over to PW4. After receiving, PW4 registered them with laboratory number MLab 556/2016. After weighing the samples, he conducted analysis by mixing three chemicals Acetic Acid, Copper Sulphate and Sodium Hydroxide with each sample and it changed colour to violet which indicates that, each sample contained chemicals namely Cathine and Cathinone. Presence of Cathine and Cathinone is a confirmation that the samples were narcotic drugs, namely Catha edulis as the two chemicals are

only found on Catha edulis plant. After getting the results, he prepared a report, signed it and sent to CGC Northern Zone, Arusha ready for collection.

On 9th November, 2016, PW7, the investigator of this case forwarded a letter to Tanzania Revenue Authority (TRA) with a request to know the owner of the car in question which had plate number T324 CAQ and registration number T459 AYP printed on windscreen and other mirrors. The report from TRA (Exhibit P11) reveals that, registration number T324 CAQ belongs to a car make Suzuki Carry while the real registration number of the car seized with narcotic drugs was T459 AYP make Toyota Cresta GX100 owned by Julius Shija.

In their defence, the accused persons refuted to have committed the alleged offence or to have ever been involved in the business of Catha edulis. They denied to know each other and claimed to meet for the first time before the Magistrate when they were arraigned in Court. Although each one claimed to be arrested on 31st October, 2016, but they denied to be arrested at Uhuru Hostel in the car in question. It was the defence of the first accused person (DW1) that, on 30th October, 2016 he left home, Holili area to Moshi town for a disco at Pub Alberto. On arrival, he drunk until 00:00 am when he got out for purpose of going home. Outside the club, he found bodaboda riders squabbled for customers and it was at that point when he was arrested

by police officers. Thereafter, he was taken to Majengo police station where he was put in lockup after handed over his properties including mobile phones and driving licence. He stayed in lock up until 2nd November, 2016 when he was taken to Central police station where he stayed until 3rd November, 2016 when he was taken out for purpose of taking finger prints and photograph. Thereafter, he was returned to the lock up and stayed until 10th November, 2016 when he was taken to Court and charged with the offence of trafficking in narcotic drugs together with the second accused person. He also denied to know or ever been at Uhuru Hostel. Likewise, he denied to have ever seen or driven the car in question. Furthermore, he denied to have ever signed any document at police.

On the other hand, it was the evidence of the second accused person (DW2) that, on 31st October, 2016, he left home, Njia Panda ya Himo and went to Moshi town at Mbuyuni market to buy clothes. On his way back to the bus stand, he passed at East Africa bar for eating. After eating, he ordered a bottle of Konyagi and upon finishing, he left and headed to bus stand. On the way, he quarrelled with one pedestrian after they knocked each other. It was at that point when the police arrived whereby, he was arrested and taken to Central police station. On arrival, he was put in lock up after handed over his properties including his mobile phone and driving

licence. Since he was drunk, he fell asleep after having bath until mid-night when he was surprised after being told by other inmates that, he was at police station. He stayed in lock up until 3rd November, 2016 when he was taken out to another room at the back of the station where he recorded his statement, photographed and taken his finger print. After that, he returned to lock up and stayed until 10th November, 2016 when he was arraigned to Court and charged with the offence of trafficking in narcotic drugs together with the first accused person. He denied to know any exhibits tendered by the prosecution save for his mobile phone and driving licence. He prayed to be set free as he was not involved in the alleged offence.

In the main, 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 main issue before this Court for determination is whether the prosecution has proved the case against both accused persons beyond reasonable doubt. However, determination of this issue

depends on another issue featured from the final submissions that, whether the search and seizure were illegally.

It is worthwhile to underscore that, in criminal matters, a fact is said to be proved when the court is satisfied by the prosecution beyond reasonable doubt that such fact exists. Refer to section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2019]. That is to say, the guilt of the accused person must be established beyond reasonable doubt. It is well known that, generally, and always, such duty lies with the prosecution except where any statute or other law provides otherwise.

As stated herein above, in determining the main issue, I will consider the complaints raised by defence Counsel in the light of evidence on record. Both accused persons have denied to be arrested at the crime scene, Uhuru Hostel in the car with registration number T324 CAQ Toyota Cresta (Exhibit P3). While the first accused person claimed to be arrested on the night of 31st October, 2016 at outside Pub Alberto club, the second accused person claimed to be arrested on 31st October, 2016 along double road while he was on his way to the bus stand. Looking closely at their defence, they tried to raise the defence of *alibi*. However, their *alibi* faulted the provisions of section 42 (1) and (2) of the EOCCA for want of notice and failure to disclose its particulars before closure of prosecution case. Although their *alibi* might

be implausible and an afterthought, but it is a settled law 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 CAT (unreported).

Reverting to evidence adduced by PW3 and PW6, it shows that the accused persons were arrested at Uhuru Hostel, Shanty town area. According to them, they saw Exhibit P3 when they were at KDC area in the course of conducting the patrol. They raised suspicion and decided to pursue it but they lost it on arrival at YMCA area. It is on record that, while PW3 was at Changbay area, he saw it headed to Shanty town area and pursued it until he found the same at Uhuru Hostel where the arrest was executed. After the arrest, they inspected Exhibit P3 and found parcels at the rear seats and in the boot. After that, PW3 inserted the stick in the parcels and found fresh leaves suspected to be *Catha edulis*. After realising that, they got into the car together with accused persons and drove up to police station where the search and seizure were executed. According to them, PW8 who was found at the said station participated in the search as independent witness. It is at that point where they seized Exhibit P1.

It is apparent from the evidence of PW3 and PW6 that, the accused persons were arrested at one point and searched at another point. Looking closely at Exhibit P4, the search in question was conducted under section 42 (1), (2), (3) of the Criminal Procedure Act [Cap. 20 R.E. 2002] ("the CPA"). The section provides as hereunder;

"(1) A police officer may–

(a) search a person suspected by him to be carrying anything concerned with an offence; or

*(b) **enter upon any** land, or into any premises, vessel or **vehicle**, on or in which he believes on reasonable grounds that anything connected with an offence is situated,*

***and may seize any such thing that he finds in the course of that search**, or upon the land or in the premises, vessel or vehicle as the case may be–*

(i) if the police officer believes on reasonable grounds that it is necessary to do so in order to prevent the loss or destruction of anything connected with an offence; and

*(ii) **the search or entry is made under circumstances of such seriousness and urgency as to require and justify immediate***

search or entry without the authority of an order of a court or of a warrant issued under this Part.

(2) A police officer who believes on reasonable grounds that that person is carrying an offensive weapon or anything connected with an offence may stop that person and seize any such weapon or thing that is found on the person.

(3) A police officer who believes on reasonable grounds that an offensive weapon, or anything connected with an offence is being carried in a vessel or vehicle, may stop and seize any such weapon or thing found in the vessel or vehicle.” (Emphasis supplied).

It is clear from the extract that, this section is about search under an emergency situation. It empowers a police officer under seriousness and urgency circumstances which justify the immediate search, to stop, enter into a vehicle, search and seize anything connected with an offence. In other words, the emergence search in motor vehicle must be conducted at the crime scene immediately after stopping the vehicle connected with the offence. The rationale behind this is to preserve the integrity of the whole exercise of search and collection of evidence. In that view, depending on particular circumstances of each case, except in exceptional and compelling situations such as imminent danger or commotion which is likely to interfere

with the search exercise or tampering with or destruction of exhibit, any emergence search in the vehicle must be conducted at the crime scene where the incident occurred and not at any other place.

In our instant matter, had the search been conducted at Uhuru Hostel where the accused persons were arrested, that could have amounted into an emergency search which section 42 of the CPA could have catered for the situation. However, from the evidence on record, the search was conducted at police station and not at the crime scene where the accused persons were alleged to be apprehended with the car in question. Besides, no exceptional or compelling reason was given by PW3 that made him to conduct search at the place other than the crime scene. According to his testimony, he did not conduct search at Uhuru Hostel because it was the business place and there were many people including foreigners who were carrying out their own activities. This reason is far-fetched to be considered as exceptional one which could compel them not to search at the crime scene. PW3 did not explain if there was imminent danger, commotion or likelihood of interference with or destruction of at the said place. In the absence of exceptional reason, PW3 was required to conduct search right there at Uhuru Hostel. Otherwise, the emergence situation ended up right there after they decided to leave the crime scene and go to conduct search at police station.

This in itself vitiates the entire search and seizure because the whole exercise was conducted contrary to the requirement of the law.

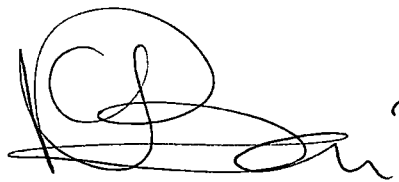
Apart from that, as correctly submitted by defence counsel, in order to preserve the integrity, truthfulness and fairness of the search conducted at police station, the independent witness could have been picked from Uhuru Hostel where the accused persons were alleged to be apprehended with the car in question. It is undisputed that, the independent witness (PW8) who participated in search was picked at the police station. During cross-examination, he admitted to find the car in question at police station. He further admitted not see it when it arrived at police station and he didn't know where it came from. This in itself suffices to hold that, his presence was fruitless because he knew nothing about what had transpired from the moment the accused persons were apprehended at the crime scene up to the stage when the car in question was arrived at the station. As submitted by defence counsel, a witness from the crime scene could have served the purpose by explaining what had really happened from the crime scene considering the fact that, both accused persons denied to have been arrested at the crime scene.

In these premises, since the search was conducted under emergence search pursuant to section 42 (1), (2) and (3) of the CPA as indicated in

Exhibit P4 while in real sense it was not an emergence search and since it was conducted at another place other than the crime scene without assigning exceptional and compelling reasons, it is the finding of this Court that, the search in question was illegal and thus, it vitiates the subsequent seizure including Exhibit P1 which is the subject matter of the case at hand.

With such finding and since the search and seizure are found to be illegal, I cannot arrive into conclusion that, Exhibit P1 was seized from the accused persons. Thus, the prosecution has failed to prove the case against the accused persons beyond reasonable doubt and the resultant, the main issue is negatively answered. That being said and from the foregoing reasons, I find the first and second accused person, Charles Thobius Japhet Kimambo and Sangiwa Saidi Thabiti not guilty and I hereby acquit them from the charged offence of trafficking in narcotic drugs. They hereby set free.

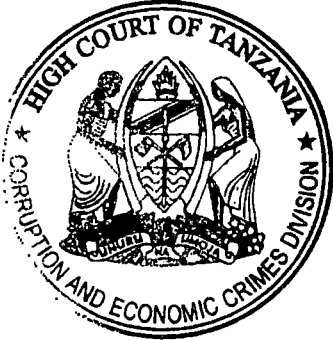
It is accordingly ordered.



I. K. BANZI
JUDGE
28/02/2022

Delivered in open Court in the presence of both accused persons, Ms. Lucy Kyusa learned State Attorney for Republic and Ms. Fay Sadallah,

learned counsel for 1st accused person who is also holding brief of Mr. Innocent Nsyenge for 2nd accused person. Rights of appeal is fully explained.



I. K. BANZI
JUDGE
28/02/2022

ORDER

Exhibit P1, 58 parcels of narcotic drugs to be destroyed in accordance with Drug Control and Enforcement Act [Cap. 95 R.E. 2019] with its Regulations. Exhibits P6 and P7 to be restored to accused persons. So far as Exhibit P3, a motor vehicle with plate number T324 CAQ is concerned, since the same is owned by another person other than the accused persons, the same shall be dealt with under the provisions of section 49A (2) (3) of the Drug Control and Enforcement Act [Cap.95 R.E. 2019] together with the provisions under the Proceeds of Crime Act [Cap. 256 R.E. 2019]. Exhibit P9 to be restored to the office of Regional Crimes Officer.



I. K. BANZI
JUDGE
28/02/2022