

IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT DAR ES SALAAM
ECONOMIC CASE NO. 1 OF 2020
REPUBLIC
VERSUS

- 1. ABUBAKARI IBRAHIM HUSSEIN KILONGO**
- 2. ALEX ALLEN MEMBA**

JUDGMENT

26th January, 2023 and 27th January 2022

E.B. LUVANDA, J.

The accused persons Abubakari Ibrahim Hussein Kilongo (first accused) and Alex Alen Memba (second accused) are jointly indicted for trafficking in narcotic drugs contrary to section 15(1)(a) of the Drugs Control and Enforcement Act, No. 5 of 2015 as amended and paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act (Cap. 200 R.E. 2002) as amended.

In the particulars of offence, Abubakari Ibrahim Hussein Kilongo and Alex Alen Memba are accused that on 15/11/2018 at Mapinga area within Bagamoyo District in Coast Region, jointly and together trafficked in narcotic drugs of cannabis sativa commonly known as bhang weighing 327.56 kilograms in a motor vehicle with registration number T819 CYQ make Prado. The accused persons denied the information.

Ms. Mwahija Ahmed learned Senior State Attorney and Ms. Clara Chawe learned State Attorney was acting for republic, Mr. Majura Magafu learned Advocate and Mr. Nehemiah Nkoko learned Counsel were defending the accused persons. Only the prosecution filed closing submission which shall be referred to in the course of deliberation in the due course as the need will arise.

Principally, the evidence by the Prosecution side reveal that, on 15th day of November, 2018 at Mapinga area within Bagamoyo District, a police officer namely ASP Joseph Hilinti Jingu (PW5) who was an OCS of Mapinga Police Station while at his office received a call from a stranger person informing him that there were two cars at Kiharaka Road chasing each other in a way it may result into causing accident. After receiving such information, ASP Joseph Hilinti Jingu (PW5) phoned call one CPL Mramba a police officer who he instructed to make follow-up as he was at a near point towards those motor vehicles.

After a while CPL Mramba phoned call PW5 informing him that those cars were being chased by so many motorcycle riders commonly *bodaboda* and that he needed assistant of man power. That is when PW5 took a police car with a driver and five police men and headed to Kiharaka road where the incident was taking place and started chasing those two cars,

one was Land Cruiser Prado with registration No T819 CYQ blue in colour and the other car was Toyota WISH. After a while they succeeded to stop both motor vehicles upon inquire the driver of the WISH informed them that the motor vehicle with registration number T819 CYQ make Toyota Prado (exhibit P5) knocked his car at Kibaha Kwa Mathias and run away. PW5 ordered those who were inside the Toyota Prado to disembark, the driver opened the door and alighted, the one who was on a passenger seat attempted to run away but was apprehended by the motorcyclist (*bodaboda*).

After the doors were opened emitted strong smell of cannabis sativa inside the car. Upon inquiring the driver admitted that it was cannabis sativa which they took from Morogoro heading to Kimara Suka. Thereafter they were arrested and taken to Mapinga Police Station where search was conducted and a total of 17 sulphate bags containing leaves suspected to be cannabis sativa (exhibit P2) were retrieved from the said car (exhibit P5). After retrieving, PW5 seized 17 sulphate bags containing leaves suspected to be cannabis sativa (exhibit P2) together with the motor vehicle with registration number T819 CYQ make Toyota Prado (exhibit P5) through a certificate of seizure (exhibit P7) which was signed by PW5, accused persons and independent witnesses one Bilal Mohamed and John Paul, as per his statement exhibit P9.

After recording the certificate of seizure PW5 returned exhibit P2 inside the car and handed over to DC Yohana (PW3) who was the exhibit keeper. On 28/11/2018 PW3 handed over exhibit P2 to D.SGT James (PW4) so that he could submit the same to the Chief Government Chemist (CGC) in Dar es salaam where it was received by the Government analyst Gabriel J, Gabriel (PW1) who conducted analysis which reveal that the said leaves are narcotic drugs namely cannabis sativa with the total weight of 327.56 kilograms, as per a report (exhibit P1). Then PW1 sealed exhibit P2 and handed over to PW4 who upon return to the station he handed over to PW3 who stored the same until it was brought before the court.

In their defence, the accused persons (DW1) and (DW2) denied the allegation against them. According to DW1's testimony on a fateful day he had an appointment with second accused person (DW2) of going to Mapinga Pwani Region Bagamoyo for purpose of purchasing land. He further stated that he used his father's motor vehicle with registration number T819 CYQ make Toyota Prado (exhibit P5) which was driven by second accused person (DW2). On their way to Mapinga they were knocked by a car make Toyota WISH which caused their car to lose direction and knocked a culvert, they alighted to see what was going on, it is when they saw a soldier alighted from a car make WISH with a pistol in his hand and shoot on the windscreen of their car (exhibit P5) they

hurriedly boarded into their car and started chasing each other. Upon reaching an unknown destination their car got a defect and it could not move or start. After a short while many motorcycles surrounded them forcing them to alight from the car, it is when a police car arrived and they were arrested and taken to Mapinga Police Station, put in lockup and they were told that they were playing with powerful people (*watu wakubwa*) and they shall face consequences. They denied being arrested in possession of bang, and that they came to know about exhibit P2 after they were taken to Bagamoyo Court.

In a nutshell that is the evidence of prosecution and defence side. The issue before the court for determination is: whether the prosecution side has managed to prove their case on the required standard.

Essentially the evidence presented by prosecution was direct evidence. To start with expert evidence, the chemist Gabriel J. Gabriel (PW1) stated that he conducted analysis in respect of samples he collected from 327.56 kilograms of leaves contained in seventeen sacks of sulphate bags (exhibit P2) and confirmed that it was cannabis sativa (commonly bhang) as per the report form DCEA 009 exhibit P1. Basically there was no question which was raised by the defence side to discredit this scientific finding and conclusion (expert opinion) by the chemist (PW1). A mere fact that those sacks (seventeen bags, exhibit P2 collectively) where PW1 took sample

for analysis, had some dry leaves like elongated grasses, (which PW1 said were used as packing materials), on itself cannot be taken as a serious concern, as no scientific proof that it affected the analysis by PW1. I say so because PW1 was keen that what he analyzed were leaves which were confirmed to be cannabis sativa. PW1 denied to had conducted analysis in respect of other grasses which were used as packing materials to cover bhang. Equally an argument that some sacks are holed (pierced), or else that some leaves poured and scattered in a car (exhibit P5), are all immaterial, as did not affect the analysis and conclusion by PW1.

Number two, chain of custody. According to PW1, he received from Sgt James (PW4) the seventeen sacks of cannabis sativa (exhibit P2) via a submission form DCEA 001 exhibit P6, where after a preliminary test, PW1 sealed them and handed over back to PW4. PW4 explained to have received exhibit P2 from D.Cpl Yohana Amos Mashamba (PW3) and after PW1 had handed over to him (PW4), the later handed over back to PW3 on the same date, to wit on 28/11/2018. The handing over between PW3 and PW4 were done through exhibit register exhibit P3. PW3 who is the exhibit keeper, stated to have received exhibit P2 including a motor vehicle T819 CYQ and its switch collectively exhibit P5 on 15/11/2018 from ASP Joseph Hilinti Jingu (PW5 an arresting and seizing officer). It suffices

to say the chain of custody was properly established by the prosecution. There is no clue suggesting that at any time chain of custody in respect of exhibit P2 collectively was broken.

Number three, arrest and seizer. The evidence of PW5 was to the effect that he seized the seventeen sacks of cannabis sativa exhibit P2 in a motor vehicle exhibit P5, where Alex Allen (second accused) was a driver and Abubakari Ibrahim Hussein Kilongo (first accused) was a passenger, at the scene of incident at Mingoi road Mapinga Bagamoyo. The seizure was done via certificate of seizure exhibit P7. It was the evidence of PW5 that, they nabbed the two accused persons after were blocked and surrounded by motorcycle riders.

Therefore, a defence by the accused persons that they went to Mapinga to look for plots, is unfounded. This is because there was ample evidence implicating them to have been caught red-handed in control of a car exhibit P5 which had loaded those seventeen sacks of cannabis sativa exhibit P2. The evasive denial by the accused persons that they were not arrested in possession of exhibit P2, cannot assist them to distance from the liability. As I have said above, the evidence presented by the prosecution is direct and water tight. My finding is cemented by the evidence of Thadeo Matogolo Julius PW6, a soldier who unwearied pursued and chased the accused's car exhibit P5 from Picha ya Ndege

Kibaha, where PW6's Toyota Wish was knocked by accused's car, up to the final destination at the scene where the accused's car was ultimately intercepted, blocked and enclosed by a crowd of motorcycle riders. Equally, Hamad Abdallah Ally PW2 motorcycle rider at Mapinga and Cpl Mramba PW7 explained on how the duo accused were apprehended and found in possession of seventeen sacks of cannabis sativa exhibit P2.

In view of that, the accused's defence that they were on the way to Mapinga to look for plot, as I have said above, is unrealistic and unbelievable, as they did not mention a specific destination or location. Neither stated as to who was their host there. As reflected in the testimony of PW2, PW5 and PW7 mentioned various destinations at Mapinga, including Tungutuhgu, Kiharaka, Mingoi and Kwa Kipingu. But the duo accused were unable to depict even a single specific destination or spot. This suggest that, the accused persons lost their way, after knocking PW6's car and while trying to escape PW6, only to be entrapped and snared on a throng of motorcyclist and thereby formerly apprehended by police officers as aforesaid.

More important, DW1 conceded to have been chasing each other with a car make Toyota Wish. He also admitted to have got a breakdown, including seeing many motorcycle riders, which by and large support and

carry forward prosecution case. Similarly, a narration by DW2 that their car got breakdown and switched off where motorcycle riders followed them and a fact that they alighted after police had arrived, it brings him closer to the scene and destination where they were apprehended after being blocked by motorcycle riders. A defence by the first accused that he signed a seizure certificate (exhibit P7) by force, is an afterthought. An explanation by the second accused that he did not sign exhibit P7, is a mere defence. This is because a question of torture (beating) or use of force during signing exhibit P7, as alleged by DW1 and none signing of exhibit P7 as contemplated by DW2, these facts were not tested to PW5 who tendered exhibit P7. Admittedly, the argument of torture and none signing was raised by the defence Counsel, when objecting a certificate of seizure to be admitted. It is elementary knowledge that, torture and none signing are matters of facts, it was therefore expected for them to be tested to PW5 during cross-examination. In the circumstances, that sort of defence cannot be entertained.

Regarding an argument that a seizure certificate exhibit P7 was not recorded at the scene of incident rather at Mapinga Police Post. It is true that after the accused persons were arrested at the scene of incident at Mingo road Mapinga Bagamoyo, search and seizure was not done there,

rather it was done at Mapinga Police Station. However, PW5 explained that they failed to conduct search and record a seizure certificate at the scene of incident because of crowd of motorcycle riders (*bodaboda*). To me that constitute sufficient reason, as according to PW2 explained that there were over a hundred motorcycle riders who assembled at the scene of incident. Meaning that the place was unsecured. Therefore, PW5 was justified to move from the scene and conduct search at Mapinga Police Station.

Regarding leftover on admission of a statement of John Paulo exhibit P9, as per my ruling it was open for any part who wish to pursue it further, to furnish more materials or precedent form the apex Court. But neither the defence Counsel (who raised the argument during trial) nor the prosecuting officer availed me with the said materials. In fact, the defence Counsel did not file submission at all as aforesaid. The prosecuting officer filed final submission was not of her interest to argue further on the subject. More importantly the statement exhibit P9 was made under section 10(3) of the Criminal Procedure Act, Cap 20 R.E. 2019 as reflected on the certification part. Under the said provision of law, there is no requirement for a police officer who record the statement under that proviso dictating him to append his signature on a certification. For

avoidance of doubt, I reproduce the provision of section 10(3), (3B) and (3C) Cap 20 R.E. 2019,

(3) Any police officer making an investigation may, subject to other provisions of this Part, examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(3B) The person examined shall then sign that statement immediately below the last line of the record of that statement and may call upon any person in attendance to sign as a witness to his signature.

(3C) The police officer recording the statement shall append below each statement recorded by him the following certificate:

"I..., hereby declare that I have faithfully and accurately recorded the statement of the above named..."

Therefore, exhibit P9 is not only admissible but also reliable.

There were some discrepancies on the prosecution evidence, for stance PW2 contradicted himself, at first stated that after a motor vehicle make Prado was arrested, they proceeded to Mapinga Police Station where counting of seventeen sulphate bags was done. But during re-examination, PW2 stated that after a car make Prado was arrested, he

left and proceeded to the village at Mapinga. On cross-examination, PW2 stated that he cannot recall if he went to Mapinga. Nevertheless, the same were miniature and tiny, in a way that could not affect the above central story that the two accused were arrested red-handed in possession of seventeen sacks of cannabis sativa (exhibit P2) loaded in a car exhibit P5. That said, I find that the prosecution has managed to prove an information levelled to the first and second accused.

Therefore, the first and second accused are found guilty and are convicted for the offence of trafficking in narcotic drugs contrary to section 15(l)(a) of the Drugs Control and Enforcement Act, No. 5 of 2015 as amended and paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act (Cap. 200 R.E. 2002) as amended.



E. B Luvanda

JUDGE

27/01/2023

SENTENCE

In view of the mitigation by the learned defence Counsel, I sentence each accused person to serve a term of 30 years imprisonment.



E.B. Luvanda
Judge
27/01/2023

Orders:

- i. The 17 sacks of cannabis sativa exhibit P2 to be set on fire.
- ii. Motor vehicle T819 CYQ (exhibit P5) to be dealt with under the relevant rules, because exhibit P4 reveal the owner is Ibrahim Gumpi Kilongo who was not heard in this matter.

E.B. Luvanda
Judge
27/01/2023

Court: Right of appeal against conviction, sentence and orders in there.



E.B. Luvanda
Judge
27/01/2023