

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

(MOSHI DISTRICT REGISTRY)

AT MOSHI

ECONOMIC SESSION CASE NO. 04 OF 2023

REPUBLIC

VERSUS

1. MLAY RAMADHANI MSANGI

2. HAMIS RAMADHANI MAGOGO

J U D G M E N T

Date of last Order: 27/06/2023

Date of Judgment: 12/07/2023

K. D. MHINA, J.

The first accused person, Mlay Ramadhani Msangi, and the second accused person Hamis Ramadhani Magogo stand together and are jointly charged with the offence of Trafficking in narcotic drugs contrary to section 15 (1) (a) (2) and (3) (iii) of the **Drugs Control and Enforcement Act**, [Cap 95 R: E 2019], as amended by the Written laws [Misc. Amendment] Act No. 5 of 2021 read together with paragraph 23 of the 1st Schedule to and sections 57 (1) and 60 (2) of the **Economic and Organized Crime Control Act**, Cap. 200 R.E. 2022.

It was alleged that, on 30 January 2022, at Mamsera Village within Rombo District in Kilimanjaro Region, the accused persons were found in unlawful trafficking of 427.75 Kilograms of Catha edulis (khat), commonly known as Mirungi. The accused persons pleaded not guilty to the information.

During the Preliminary Hearing duly conducted under Section 35 of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2022, the accused persons admitted their names and were both arrested. They vehemently disputed all other facts read over to them.

The Republic thus brought **eight witnesses** in a bid to prove their case. The witnesses were Innocent Nyela (PW1); Baraka Kabululu (PW2); ASP Mohamed Kihara (PW3); E. 6980 D/ Sergeant Alfred (PW4); Maneno Jampani Mwankwasya(PW5); G. 3229 D/ Corporal Abtwalib (PW6); Angelina Batholome Shirima (PW7); and Michael Sailorie Baenardard (PW8).

They also tendered **twelve (12)** exhibits which were admitted as follows: Exhibit P1, Inventory Form (DCEA 006); Exhibit P2, Certificate of destruction (Form 1); Exhibit P3, Inventory Form (DCEA 003); Exhibit P4, Handing over certificate dated 30/01/2022; Exhibit P5, Toyota Land cruiser

with Registration No. STK 5211; Exhibit P6, plate numbers with Reg No. T 404 CFM; Exhibit P7, Handing over certificate dated 31/01/2022 at 10:53 hours; Exhibit P8, Handing over certificate dated 31/01/2022 at 20:30 hours; Exhibit P9, Motor Vehicle Registration Card for Number T. 404 CFM; Exhibit 10, sample submission form (DCEA 001), Exhibit P11, Sample receipt notification form (GCLA 01) and Exhibit P12, Government Laboratory Analysis report (DCEA 009).

The Republic was represented by Ms. Sabrina Joshi, learned Senior State Attorney, and Ms. Monica Maswe and Ms. Wanda Msafiri, learned State Attorneys, Learned State Attorneys. On the other hand, Mr. Wilhard Kitali, learned counsel, represented the 1st accused person, while Mr. Philemon Shio represented the 2nd accused person.

The prosecution witnesses testified as hereunder;

On 30 January 2022, morning, **PW3**, ASP Mohamed Kihara (the arresting officer), was patrolling at Mamsera area within Rombo District with other police officers, including PW6, G. 3229 D/ Corporal Abtwalib. While at the patrol vehicle with Reg. No. STK 5211 make Toyota Land Cruiser white in colour, and they signalled to stop. When the vehicle stopped, they found

that there were two individuals in the vehicle. Because the car windows were not closed, they saw the sacks loaded in the back seat. They arrested the two individuals and informed the OC-CID, who directed him to find independent witnesses and search the vehicle.

Before the search, they introduced themselves to the suspects and informed them of the purpose of the arrest. The arrested suspects also introduced themselves as Mlay Ramadhan Msangi and Hamis Ramadhani Magogo. After that, he succeeded in getting Angela Batholome and Kazen Gadi as independent witnesses.

During the search, he found six sacks (sulfate bags) in the back seat. He also found the photocopy of the vehicle registration card with the name Maneno, Plate number, with Registration No. T 404 CFM and a Salary Slip with the name Maneno.

When the sacks opened, they found bundles of fresh leaves of suspected khat. After counting bundles from each sack, they found 1153 bundles. He prepared the certificate of seizure, which he signed. He stated that the police officer who were together, the independent witnesses, and the suspects signed the certificate of seizure. To this effect, PW3 tendered

- i. Certificate of Seizure (form No. DCEA 003) dated 30/01/2022) as Exhibit P3.*
- ii. Motor vehicle make Toyota Land Cruiser white in colour with Reg. No. STK 5211 as Exhibit P5.*
- iii. Two white plate numbers with Reg. No. T 404 CFM as Exhibit P6.*

When shown Exhibit P3 and cross-examined, PW3 stated that the independent witnesses (PW7) and Kazeni Gadi did not sign the certificate of seizure (Exhibit P3). Also, when asked about the colour of the six sacks, he did not remember, but he remembered that the two sacks had the same colour and the four sacks had the same colour.

On his part, **PW6**, G. 3229 D/ Corporal Abtwalib, who participated in arrest, search and seizure, when cross-examined, stated that the independent witness did not sign the certificate of seizure (Exhibit P3), and he did not know why. Further, he stated that the vehicle windows were closed during the arrest.

When **PW7**, Angelina Batholome Shirima (independent witness) testified that she witnessed the search and seizure, but when cross-examined, she stated that she did not sign the certificate of seizure (Exhibit P3) because she was not told to sign the same.

In his testimony, **PW3** stated that after the seizure, he took the seized exhibit and the two accused persons to Mkuu Rombo Police Station, where he handed the accused persons to CRO in-charge, Sergeant Humphrey and the exhibits to **PW4**, E. 6980 D/ Sergeant Alfred (the exhibit keeper). He handed PW4 six sacks containing 1153 bundles of fresh leaves suspected to be khat weighing 438.6 kilograms, and the vehicle with Reg. No STK 5211 in the presence of the accused persons, whereby **PW4** labelled the six sacks as M, M1, M2, M3, M4 and M5, respectively.

To this effect, he tendered

- i. Handing over certificate dated 30 January 2022 as Exhibit P2 (collectively).*

According to **PW4**, after receipt of the seized exhibits from PW3, he labelled the sacks with A, A1, A2, A3, A4 and A5, respectively and registered the exhibits in the Exhibit Register (PF No. 16) by entry number 41 of 2022. The sacks were yellow and white in colour.

On 31 January 2022, PW4 handed the exhibits to **PW6**, G. 3229 D/ Corporal Abtwalib, to submit the same to the Government Chemist Laboratory Agency at Arusha for analysis. To this effect, PW4 tendered:

i. Handing over certificate dated 31 January 2022 as Exhibit P7.

Exhibit P7 indicated that the exhibit which **PW4** handed over to **PW6** were; one, six sacks (two with green colour and four with white) containing a total of 1153 bundles of fresh leaves of suspected khat with 438.6 Kilograms; two, a vehicle make Toyota Land Cruiser white in colour with Reg. No. STK 5211; three, a copy of the vehicle's registration card; four, two plate numbers with Reg. No. T404 CFM, and five, a salary slip.

PW6 testified that on 31 January 2022, he was handed by **PW4** six sacks containing 1153 bundles of suspected khat. The sacks were labelled M, M1, M2, M3, M4 and M5. At the GLCA, he handed the exhibit to the Chemist, Michael Sailorie Baenardard (**PW8**), for analysis. To this effect, **PW6** tendered:

i. Laboratory submission form (Form DCEA 001) dated 6 May 2022 as Exhibit P10.

Exhibit P10 indicates that the exhibit submitted to GLCA contained six sacks containing 1153 bundles of fresh leaves of suspected khat.

After receiving the sacks labelled M, M1, M2, M3, M4 and M5, **PW8** measured the weight and found it to be 427.75 kilograms. After that, he registered the exhibit in the Laboratory by registration number NZL

119/2022. Thereafter, he took the samples from each bundle. When that exercise was completed, he labelled the sacks with the laboratory registration number NZL 119/2022 and handed back **PW6**.

In his testimony, **PW6** stated that he was handed back the exhibit, the handing over by signing a form.

To that effect, PW6 tendered;

- i. Sample Receipt Notification (GCLA 01) dated 31 January 2022 as Exhibit P11.*

Exhibit P10 indicates that the exhibit was the six sacks labelled M, M1, M2, M3, M4 and M5 containing fresh leaves of suspected khat with a total weight of 427.75 kilograms.

On the same day, PW6 returned the exhibit to PW4, who admitted to receiving the same. To that effect, PW4 tendered;

- i. Handing over certificate dated 31 January 2022 at about 20:30 hours as Exhibit P8.*

Exhibit P8 indicates that the exhibit was the six sacks containing 1153 bundles of fresh leaves of khat with a total weight of 483.6 kilograms.

According to the testimony of **PW4**, on 3 February 2022, he handed **PW3** six sacks to submit to the court to request an inventory. On the same day, **PW3** returned the exhibit.

According to **PW3**, after he was handed the six sacks (labelled M, M1, M2, M3, M4 and M5) containing 1153 bundles, he filled the inventory and submitted the same to the Court where **PW1, Innocent Nyela**, attended him.

On his side, **PW1** testified that at the Court, the six sacks labelled M, M1, M2, M3, M4 and M5 were opened, and inside were bundles wrapped by newspapers. When they tore the newspapers, they found leaves which started to dry. The bundles were counted in the presence of the accused persons and found to be 1153. After that, he signed the inventory, which the accused persons also signed.

To that effect, PW1 tendered;

- i. Inventory (DCEA Form No. 006) dated 3 February 2022 as Exhibit P 1.*

Exhibit P1 indicates that the exhibit contained six sacks containing fresh khat leaves with a total weight of 427.75 kilograms.

According to **PW4** (the exhibit keeper), on 8 June 2022, he handed the exhibit to **PW3** to take the exhibit to Holili, a place prepared to destroy the exhibit.

In his testimony, PW3 stated that at Holili, he met with **(PW 2) Baraka Kabululu**, Resident Magistrate from Rombo, District Court. Also,

there were representatives from the offices of the Government Chemist Laboratory Agency, DSO, NEMC, Police Force, and NPS. The accused persons were also present. He handed PW2 the destruction form.

According to **PW2**, who supervised the destruction, the exhibit was in the six sacks labelled M, M1, M2, M3, M4 and M5. When opened, they found 1153 bundles of khat wrapped in newspapers. Then the khat and its packaging were put in the incinerator and burnt by fire to ashes. After that, he signed the destruction form, which the accused persons and the representatives from other offices also signed.

To that effect, he tendered;

- i. Certificate of Destruction (Form No. 1) dated 8 June 2022
Exhibit P2.*

Exhibit P2 indicates that the destroyed exhibits were narcotic drugs, namely khat, with a total weight of 438.6 kilograms.

At the Government Chemist Laboratory Agency, **PW8** conducted a laboratory analysis using **Liquid Chromatography- mass spectrometry** (LC-MS). He took the sample and mixed it with ethanol. Then the mixture was added with water and dichloromethane at a ratio of 50%-50%. The

mixture was put into the LM-MS machine, and as a result, PW8 stated that it contained Cathinone and Cathine, the chemicals found in khat only. To that effect, he tendered;

- i. Government Laboratory Analysis Report (Form No. DCEA 009) as Exhibit P12.*

Regarding the vehicle used to carry the khat, it was the evidence of **PW5, Maneno Jampani Mwankwasya**, that the vehicle (Exhibit P5) belonged to him. He bought that vehicle from the Government, and it had Registration No. STJ 1962. After buying the vehicle, in 2012, he registered it at TRA offices in Mbeya with Reg. No. T 404 CFN.

To that effect, he tendered;

- i. Motor Vehicle Registration Card for T 404 CFM as Exhibit P9.*

On 28 January 2022, Mlay Ramadhani (1st accused person) hired his vehicle orally at Dodoma for two days for TZS 200,000/=. He said the 1st accused told him they had an N.G.O. dealing with orphans. Therefore, the 1st accused told him that he wanted to travel to Dar es Salaam to show the vehicle to his boss so that they could hire for the N.G.O activities with a promise to return the vehicle on 30 January 2022.

Later, he was informed that his vehicle had been seized at Rombo. At first, he tried to call Mlay, but when he could not get him, he travelled to Rombo. At the Police Station, he identified his vehicle. He stated that STK 5211 was not the registration number of that vehicle.

In their defences, the 1st and 2nd accused persons testified as DW1 and DW2 flatly denied committing the offence of trafficking in narcotic drugs. They both stated that their arrest was because of a quarrel over the woman with police officers called Paulo and Twalib.

DW1 told the Court that on 29/2/2022 at 01:00 hours, he was arrested at Rombo Bar Garden when drinking with his friend Hamisi Ramadhan Magogo (DW2). They quarrelled with some individuals after inviting the barmaid who was serving them at their table to drink with them. One Paulo, among the persons they quarrelled with, alleged that he had a love relationship with that barmaid. When they were taken outside the Bar, they found the Police vehicle with police officers who wore civilian dresses and others who wore police uniforms. Then they discovered that the person they quarrelled with them were police officers. They were taken to the Police Vehicle, where they found other people who were also arrested, and the police officers continued patrolling while they were in the vehicle until

morning when they were put in the lock-up. The police officers they quarrelled with vowed to retaliate as they said they wanted to take their girls.

They were taken to the car park at noon and found some people pushing a vehicle. Then the police told them they were with that vehicle the previous day, i.e. 29/2/2022.

Then the police officers asked for a bribe so that they could be released. His colleague communicated with his relatives, who sent TZS 2,000,000/= through his phone, which was in the hands of Paulo. His colleague gave him the "pin code" so that he could withdraw money.

On 31/2/2022, they were not released as promised; instead, they were given the documents to sign so they could be released. They signed with the hope of being released and taking into account that the police officer had already withdrawn the money from his colleague's phone.

DW1 also stated that it was his first time seeing Maneno (PW5) at the Court, and he did not know him before as he was living in Rombo and working as a painter.

On his side, DW2 had a similar story: on 29/1/2022 night, he was at Rombo Garden Bar together with the DW1 drinking beer. They decided to

buy beer for the barmaid who was serving them, who also decided to sit at their table.

Around 01:00 hours, two persons approached and asked them why they were still at the Bar up to that time and also if they knew the barmaid who was serving them. Those persons wanted to fight with the DW1, but when he intervened, they were overpowered and taken outside the bar, where they found a police vehicle. When they got into the vehicle, they found other persons who were also arrested, and the police continued with patrol while they were in the vehicle.

Further, they were asked why they were engaged with the other men's lovers

On the morning of 30/1/2022 were taken to the lock-up at Mkuu Police Station and taken

At noon, the two police officers, Abuu and Paulo, whom they had quarrelled at the bar, requested TZS 2,000,000/= for their release.

Again, they were taken to the car park and saw the people pushing the vehicle. The middle doors of the vehicle were opened, and the police officers told them that the luggage inside the vehicle was theirs. After that,

he was shocked and fell. Then a “good Samaritan” woman gave him “***soda and water***”.

In the evening, they were retaken out of the lock-up. At that time, Paulo had his phone and requested a “pin code” to withdraw money from the phone. He was beaten, and he decided to give him the money. Therefore, the money was withdrawn from the phone, and he was taken back to the lock-up with the promise that he would be released.

On 31/1/2022 morning, Paulo went with the already written documents, and he was threatened and forced to sign without knowing what he signed.

That was the brief evidence from both sides and after that, they filed their written submissions. I wish to appreciate the well-researched submissions by the parties. The submissions highlighted the key issues, such as chain of custody, seizure and issuance of receipt, contradictions and inconsistency in evidence versus the evidence on record.

Having considered the evidence on record, the main issue before this Court for determination is whether the prosecution has proved the case beyond a reasonable doubt. However, the determination of this issue rests on three other sub-issues, namely, **one**, *whether the seizure was conducted*

properly and the chain of custody was properly maintained; two, whether the substance contained in the exhibit was narcotic drugs and last, whether the defence case raised any reasonable doubt against the prosecution case.

In the determination of the first issue of *whether the search and seizure were conducted properly*, I would like to start by citing the following decisions of the Court of Appeal. In **Paulo Maduka and four others vs. The Republic**, Criminal Appeal No. 110 of 2007 (Unreported), it was held that;

"The idea behind recording the chain of custody is to establish that the alleged evidence is, in fact, related to the alleged crime..."

Further, in **Abas Kondo Gede vs. The Republic**, Criminal Appeal No. 472 OF 2017 (Tanzlii), the Court held as follows;

*"It is acknowledged that the movement of the exhibits from one person to another should be handled with great care to eliminate any possibility that may allow tempering. It must thus be shown that in handling the respective exhibits chances of tempering was eliminated based in the circumstance of each case. It is also noted that the desirable method of establishing the chain of custody is documentation of the chronology of events in the handling of exhibit from seizure, control, transfer until tendering in court at the trial as stated in **Paulo Maduka and 4 Others (supra)**."*

Also, in **Chacha Jeremiah Murimi and Three Others vs. The Republic**, Criminal Appeal No.551 of 2015 (unreported), it was held that;

"Documentation will not always be the only requirement in dealing with exhibits. Thus, the authenticity of exhibit and its handling will not fail the test merely because there was no documentation. It follows that depending on the circumstances of every particular case, especially where the tempering of exhibits is not easy oral evidence" will be taken to be credible in establishing the chain of custody concerning the handling of exhibits.

Having cited the above decisions, I start to scrutinise the chronological evidence, both documentary (paper trail) and oral evidence, from the arrest and seizure to when the exhibit was submitted to GCLA for Laboratory analysis up to when the same was tendered at this Court.

After arrest, PW3 seized the exhibits indicated in Exhibit P3 (Certificate of Seizure). According to Exhibit P3, among the seized exhibit were the six sacks commonly known as *sulphate bags*. Two sacks were green, while four were white, loaded with a total of 1153 bundles of suspected khat. Though when PW3 was cross-examined, he stated that he did not remember the colour of the sacks.

PW3 also testified that the independent witnesses, including PW7, signed Exhibit P3. But when shown Exhibit P3 and cross-examined, he admitted there was no PW7's signature in Exhibit P3. PW6, a police officer who witnessed the search and seizure when cross-examined, stated that the independent witness did not sign Exhibit P3 and did not know why.

On her part, PW7 (independent witness) said she did not sign Exhibit P3 because she was not told to sign the same.

When P3 handed the exhibits to PW4 (exhibit keeper) as indicated in Exhibit P2 collectively (Handing over certificate dated 30 January 2022), the six sacks were labelled the six sacks as M, M1, M2, M3, M4 and M5, respectively.

PW4 stated that after receipt of the seized exhibits from PW3, he labelled the sacks with A, A1, A2, A3, A4 and A5, respectively. Further, the sacks were yellow and white in colour.

From the above piece of evidence, the following can be noticed;

One, there is inconsistency in PW3's evidence. At first, he stated that PW7 signed the certificate of seizure, but when cross-examined, he admitted that PW7 did not.

Two, there are contradictions between the evidence of PW3, PW6 and PW7. While PW3 stated that PW7 signed Exhibit P3, PW6 testified that PW7 did not. The same as PW7, who testified that she did not sign Exhibit P3.

On these two above, I am aware that section 48(2)(c)(vii) of the DCEA does not impose the mandatory requirement to call for an independent witness in offences of this nature as held by the Court of Appeal in **Jibril Okash Ahmed vs. The Republic**, Criminal Appeal No. 331 of 2017 (Tanzlii), where it held that;

"In the present case, the learned trial judge discussed sections 48(2)(c)(vii) of the DCEA and 38(3) of the CPA and found that the former does not imperatively provide for the need for an independent witness while the later requires an independent witness to sign the seizure certificate if present. That is the legal position".

But my point here is the inconsistency in PW3 evidence and contradictions raised by PW3 versus the evidence of PW6 and PW7.

In Goodluck Kyando v. R [2006] TLR 363, it was stated that:

"It is a 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."

In my view, the inconsistency and contradictions above tainted PW3's credibility, considering that when PW7 was cross-examined, she stated that she witnessed the search at the Police station. Though in Re-examination, she changed her story again by saying the search was conducted at Mamsera area. And further consideration, when DW1 and DW2 testified in the defence, they said they were forced to sign papers for which they did not know what was written at the Police Station.

Three, the contradictions between the evidence of PW3, PW4 and Exhibit P4 on the colour and labelling of the exhibit. Though PW3 stated that he did not remember the colour of the sacks containing suspected khat, his handing over report to PW4 (Exhibit P2 collectively) indicated the colours of the sacks were white for four sacks and green for two sacks. On the other hand, PW4 testified that he was handed the yellow and white sacks. During the handing over, PW3 stated that the sacks were labelled as M, M1, M2, M3, M4 and M5, respectively, while PW4 testified that the sacks were labelled as A, A1, A2, A3, A4 and A5, respectively. These witnesses, PW3 and PW4, are crucial in the chain of custody—especially PW4(exhibit keeper), who have a significant role in ensuring that the chain of custody is properly

maintained. Further, having gone through the Handing over certificate dated 30 January 2022, the labelling issue was not indicated.

The oral evidence of PW3 and PW4 raised contradictions in the exhibits' labelling and the sacks' colours. There is no documentary evidence on this to indicate the labelling of the exhibits. Unfortunately, PW4, in his evidence, stated that he registered the exhibits in the Exhibit Register (PF No. 16), but the same was not tendered as an exhibit in this case.

The procedure and practice of labelling the exhibit and recording the same in the exhibit register are provided under The Police General Order (PGO) 229.

Paragraph 8 of that PGO directed the labelling of the seized exhibits. It read that;

"The investigating officer shall attach an Exhibit Label (P.F. 145) to each exhibit when it comes into his possession. The method of attaching labels differs with each type of exhibit. In general, the label shall be attached so that there is no interference with any portion of the exhibit which requires examination".

The Court of Appeal in **Alberto Mendes vs. The Republic**, Criminal Appeal No. 473 of 2017 (Tanzlii) explained the applicability of paragraph 8 of PGO 229 by stating that;

"Considering the requirements of paragraph 8 of PGO No. 229, the requirement of labelling the exhibit is inescapable".

Further, paragraph 16 of the same PGO directed that;

Particulars of each exhibit shall be recorded in columns 1 to 5 of the exhibits register (P.F. 16) by the O/C. Station or other Police Officer deputed by a commanding officer to keep the register as soon as the exhibit has been brought to a station.

Therefore, the two paragraphs above mean that the labelled exhibits must be recorded in the exhibit register (PF 16). In my opinion, the main reasons for labelling the exhibit and recording the same in the exhibit register are to distinguish that exhibit from other exhibits, connect the exhibit with the suspect(s), and ensure that the exhibit is/are properly kept without being tampered. The key one is to make sure that the chain of custody is maintained.

From the above discussion, I am aware that in a chain of custody, documentation is not the only requirement in dealing with exhibits, and the chain of custody will not fail the test merely because there was no documentation. See **Marceline Koivogui vs. The Republic**, Criminal Appeal No. 469 of 2017, CAT (Tanzlii). But in the circumstances of this case where PW3 and PW4 orally contradicted themselves on the labelling and

colour of the exhibits (the sacks), the documentation was essential to clear the contradictions that arose from the oral evidence of these two crucial witnesses. The Exhibit Register (PF 16) was necessary to confirm the labelling and the colour of the exhibits handed to PW4. Had that been done, it would have assisted in confirming that the exhibits seized were actually the same handed to PW4 for safe keeping in the exhibit room to distinguish them from other exhibits. The question is how these two key witnesses differ and contradict themselves on essential points dealing with the issue of chain of custody.

On further analysis of the evidence, PW4 testified that he handed the exhibits to PW6 to submit the same to GCLA (Exhibit P7). That handing-over report indicated PW4 handed to PW6 six sacks (two with green colour and four with white) containing 1153 bundles of fresh leaves of suspected khat, a vehicle make Toyota Land Cruiser white in colour with Reg. No. STK 5211; a copy of the vehicle's registration card; two plate numbers with Reg. No. T404 CFM, and a salary slip.

In his testimony, PW6 stated that he was handed six sacks of suspected khat labelled M, M1, M2, M3, M4 and M5. After submitting the sample to GCLA, he returned the exhibits to PW4 (Exhibit P8). That handing-

over report indicated PW6 returned to PW4 the six sacks containing 1153 bundles of fresh khat leaves with a total weight of 483.6 kilograms.

From the above evidence, the following also can be noticed from the movement of exhibits from PW4 to PW6 and vice versa.

One, what PW6 was handed by PW4 differed from what PW4 kept in the exhibit room. While PW4 stated that he received the yellow and white sacks, which he labelled A, A1, A2, A3, A4 and A5, respectively. PW6 testified that he was handed by PW4 green and white sacks labelled M, M1, M2, M3, M4 and M5, respectively.

Two, according to Exhibit P7, PW6 was handed other exhibits tendered in this case, such as a vehicle make Toyota Land Cruiser white in colour with Reg. No. STK 5211 (Exhibit P5); a copy of the vehicle's registration card (Exhibit P9); two plate numbers with Reg. No. T404 CFM (Exhibit P6), and a salary slip (not tendered). But according to Exhibit P8, he returned to PW4 only the six sacks containing 1153 bundles of fresh khat leaves with a total weight of 483.6 kilograms. Nothing on record indicates if PW6 returned to PW4, Exhibit P5, 6 and 9, even in oral testimony of PW4 and PW6. That

means those exhibits remained in the custody of PW6 until they were tendered at the Court.

The question is whether the inconsistency, contradictions and gaps indicated above are minor or not and if they can affect the chain of custody.

The test on whether the anomaly is minor or material is well-expounded by the Court of Appeal in **Bahati Makeja vs. The Republic**, Criminal Appeal No. 118 of 2006 (unreported), where it was held that;

"Another observation worth making here is that while normal discrepancies do not corrode the credibility of the witness, material discrepancies do. Normal discrepancies are those which are due to normal errors of observations, memory errors due to lapse of time, or due to mental disposition such as shock and horror at the time of occurrence of the event. Material ones are those going to the root of the matter or not expected of a normal person."

In my opinion, contradictions, inconsistency and gaps in the prosecution case are not minor as they go to the root of the case as far as the chain of custody is concerned. The contradictions and inconsistency of prosecution witnesses, especially the testimonies of PW3 and PW4, who were the important witnesses in building the chain of custody and making

sure that it remained unbroken, affected their credibility and turned their evidence into untrustworthy. For instance, the contradictions and discrepancies in the labelling of the key exhibit cannot be taken as a normal error because it affects what was seized, what was kept in the exhibit room and registered in the exhibit register and what was submitted to the GCLA for analysis. This raises doubt as to whether the exhibit (khat) seized was the same stored/ kept in the exhibit room and later submitted to the GCLA for Laboratory analysis. The contradictions, inconsistency and gaps go to the extent of dismantling the prosecution case.

Therefore, the chain on whether the seized khat were the ones PW3 handed to PW4 for safe custody and PW4 handed to PW6 to submit to the GCLA for Laboratory analysis was broken due to the reasons above, which go to the root of the matter. Further, the chain for other exhibits, such as Exhibits P5, 6 and 9, which were handed to PW6, their whereabouts remained unknown until they were tendered at the Court; therefore, the chain of custody was also broken. The inconsistencies and discrepancies in a detailed account of how the exhibits were handled from the crime scene to the GCLA affected the chain of custody and the prosecution case in general.

Flowing from above, the first sub-issue is decided negatively as the chain of custody was improperly maintained. The chain was broken at the early stages of the process. In such circumstances, it is trite that it is not safe to rely on the evidence of a witness who is not credible and to rely on material contradictory evidence.

In view of the preceding analysis, the prosecution evidence, both oral and documentary, regarding the chain of custody has to be ignored due to the discrepancies, inconsistency of the witnesses and gaps in the prosecution case, which not only affected their credibility but also touched and affected the root of the matter. And once the chain of custody is broken, the remaining evidence, in this case, is insufficient and cannot sustain a conviction.

Therefore, I think it will be an academic exercise to determine other remaining sub-issues since both relied on the chain of custody.

In the final analysis, the prosecution failed to prove the information beyond a reasonable doubt because of the abovementioned reasons that affected the chain of custody. That means no credible evidence against the accused persons supporting the information. In the circumstances of this

case, there were doubts created by contradictions, inconsistency and gaps in the prosecution witnesses' evidence; those doubts should benefit the accused persons.

Consequently, the information on Trafficking in narcotic drugs contrary to section 15 (1) (a) (2) and (3) (iii) of the **Drugs Control and Enforcement Act**, [Cap 95 R: E 2019], as amended by the Written laws [Misc. Amendment] Act No. 5 of 2021, read together with paragraph 23 of the 1st Schedule to and sections 57 (1) and 60 (2) of the **Economic and Organized Crime Control Act**, Cap. 200 R.E. 2022, is hereby dismissed. As a result, the accused persons are acquitted and released forthwith from Prison unless they are otherwise lawfully held.

It is so ordered.




K. D. MHINA
JUDGE
12/072023