

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

(MOSHI DISTRICT REGISTRY)

AT MOSHI

ECONOMIC SESSION CASE NO. 03 OF 2023

REPUBLIC

VERSUS

1. ATHUMAN MOHAMED MWEGIO

2. MUSA OMARY MUSA.

J U D G M E N T

Date of last Order: 22/06/2023

Date of Judgment: 12/07/2023

K. D. MHINA, J.

The narcotic drug involved in this case is "*khat*", known by its scientific name as *Catha edulis* and commonly known as "Mirungi. For the locals, the other names for this drug are *Miraa* or *Gomba*.

In an article by Adam Ihucha, accessed at *Khat Or Miraa, 'Dubbed Green Gold' in Tanzania - Empire Voice*, it was also dubbed as the 'green gold' in northern Tanzania because of being one of the largest money minters in the area.

According to the information, the accused persons, Athuman s/o Mohamed Mwegio and Mussa s/o Omary Mussa (hereinafter to be referred to as "the 1st and 2nd accused person, respectively or the accused persons), were indicted before this Court facing the charges of Trafficking in narcotic drugs in contravention of the provisions of 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 3 May 2022, at Mamsera Village within Rombo District in Kilimanjaro Region, the accused persons were found in unlawful trafficking 529. 05 Kilograms of khat. The accused persons pleaded not guilty to the information.

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

The Republic thus brought **nine witnesses** to prove their case. The witnesses were Ass/ Inspector Ndaga Mwakasege Peter (PW1); WP 3175 D/ Sergeant Selestina (PW2); Innocent Elibariki Nyela (PW3); Baraka Sospeter Kabululu (PW4); F. 8476 D/ Corporal Paul (PW5); Elizabeth Paulo Mtei (PW6); Agness Julius Sebarua (PW7); Superintendent Vincent Lucian Msami (PW8); and Erasto Mbalamwezi Lawrence (PW9).

Besides, they tendered thirteen (13) exhibits, which were admitted as follows: Exhibit P1, Certificate of Seizure; Exhibit P2, three handing over certificates; Exhibit P3, Inventory Form; Exhibit P4, motor vehicle make Toyota Land cruiser with Registration No. STJ 7333; Exhibit P5, Two plate numbers with Reg No. TZM 4767 and T 806 APN; Exhibit P6, Handing over certificate dated 6/05/2022; Exhibit P7, Handing over certificate dated 6/5/2022; Exhibit P8, Handing over certificate dated 8/6/2022; Exhibit P9, Exhibit register with entry No. 51 of 2022; Exhibit 10, Certificate of destruction; Exhibit P11, sample submission form; Exhibit P12, Sample receipt notification form; Exhibit 13, Government Laboratory 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, Ms. Fay Gray Sadallah and Mr. Dennis Maro, learned counsel represented the 1st accused person, while Mr. Ulrick Michael Shayo represented the 2nd accused person.

Briefly, the prosecution evidence was as hereunder; **PW1 (Ass/Inspector Ndaga Mwakasege Peter)** testified that on 3 May 2022, he was with other police officers along Tarakea- Moshi Road at Mashati Rombo area inspecting the vehicles passed through there. While in the area, they saw a vehicle with Registration No. STJ 7333 make Toyota Land Cruiser from the direction of Tarakea to Moshi at high speed. They signalled to stop, but the driver did not stop.

They decided to chase the vehicle, and on top of that, he informed Corporal Robert, who was at the Mengwe police barrier and closed it. When they were close to the Mengwe barrier, they slowed down, expecting the vehicle they were chasing to stop. That vehicle did not stop as it manoeuvred to the left side of the road, passed through a pedestrian lane, and proceeded to run. They proceeded to chase that vehicle, and he told D/Corporal Michael to shoot the bullet in the air, but the vehicle still did not stop. When they reached Mengwe and Mamsera corner, he ordered D/Corporal Michael to

shoot the vehicle's tire, and he did so by shooting the right rear tire. Then the vehicle lost its balance and it stopped. Two people got out of that vehicle, and they apprehended them. After arresting those two people, they introduced themselves as Athuman Mwegio and Mussa Omar.

PW1 further testified that following the arrest, they searched for witnesses to witness the search of the vehicle. They got two people at Mengwe/Mamsera corner to witness what was inside the vehicle. The witnesses introduced themselves by their names as Elizabeth Mtei and Flumence John.

According to **PW6 (Elizabeth Paulo Mtei)**, that day, she was at her shop in Mengwe area along Tarakea-Moshi Road near the police roadblock. She testified that she saw a vehicle make Land Cruiser with registration number STJ 7333, coming from Tarakea to Moshi's direction. Police officers stopped the vehicle but did not stop; instead, it passed through the left side of the pedestrian lane. That vehicle was chased by a police vehicle.

After a while, one policeman named Robert told her that police officers needed her in Mengwe – Mamsera area. Upon arrival at the area, she found the police officers by the names of Ndaga Peter and Hassan. Also, she was

introduced to two persons by the names of Athuman Mohamed and Mussa Omary Musa. At the area, there was the police vehicle and the Toyota Land Cruiser with registration number STJ 7333. She was informed that she was needed to witness the search.

PW1 further testified that he ordered the driver of the vehicle with registration number STJ 7333, Athuman (DW1), to open the car doors in the presence of Elizabeth Mtei and Flumence John. When the front doors were opened, they found two vehicle logbooks. Then the central doors were opened, and they found six sacks commonly known as "***sulphate bags***" in the back seat. Two sacks were green with red line, and the four were white in colour but also with red line. Also, he found two plates number with the number T. 806 APN.

After tearing the sacks, they found bundles of leaves suspected to be khat wrapped by pieces of newspaper. Upon counting the bundles in the presence of the accused persons and the two independent witnesses, he found the bundles to be 830. Upon completing the search, he filled out and signed the certificate of seizure. The accused persons and two witnesses, Elizabeth Mtei and Flumence John, also signed the certificate of seizure. To this effect, he tendered

- i. Certificate of Seizure (form No. DCEA 003) dated 3/5/2022 at 07:51Hrs) as Exhibit P1.*
- ii. Motor vehicle make Toyota Land Cruiser white in colour with Reg. No. STJ 7333 as Exhibit P4.*
- iii. Two white plate numbers with Reg. No. T806 APN as Exhibit P5.*

PW6 who was present during the search and seizure, testified that she witnessed when the car doors were opened, and six sacks of narcotic drugs suspected to be khat were retrieved therefrom. The drugs were wrapped in pieces of newspaper with white sellotape. When counted, the bundles were 830 in number. Also, inside the vehicle, two plates number with Registration No. T 806 APN were found. After that, she signed the certificate of seizure (Exhibit P1).

According to **PW8 (ASP Vincent Msami)**, he arrived at the scene when the accused persons were already arrested and the exhibits seized. Still, he inspected the scene where there was a Toyota Land Cruiser with registration number STJ 7333 (Exhibit P4), the six sacks of suspected khat. Four sacks were white, while two were green, both with red lines. He also asked the accused persons' names, and they introduced themselves as Athuman and Mussa Omary. They left together for the Police Station, and he was in a separate car behind other cars.

Thereafter, **PW1**, with the seized exhibits, and the two accused persons went to Mkuu Rombo Police Station, where he (PW1) handed over the same to **PW2 (WP 3175 D/ Sergeant Selestina)**, the exhibit keeper, in the presence of the accused persons.

To this effect, he tendered

- i. Handing over certificate dated 3 May 2022 as Exhibit P2 (collectively).*

Then **PW2** labelled the seized exhibits with a case reference number MKR/IR/444/2022, recorded them in the exhibits register as entry No. 51/2022 (P9), and stored them in the exhibit room. To this effect, she tendered:

- i. Exhibit Register (PF 16) as Exhibit P9.*

On 6 May 2022, **PW2** handed 830 bundles to **PW5 (F. 8476 D/ Corporal Paul)**, who submitted the same to the Government Chemist Laboratory Agency at Arusha for analysis. To this effect, she tendered:

- i. Handing over certificate dated 6 May 2022 as Exhibit P6.*

At the Government Chemist Laboratory Agency, **PW5** submitted the exhibit to the Government Chemist, **PW9 (Erasto Mbalamwezi Lawrence)**. He submitted to him six sacks containing 830 bundles of narcotic drugs suspected to be khat. To this effect, he tendered:

- i. Laboratory submission form (Form DCEA 001) dated 6 May 2022 as Exhibit P11.*

In his evidence, **PW9** stated that after he was handed the six sacks, he opened the same and counted the bundles of fresh leaves suspected to be khat, wrapped by newspapers and sellotape and happened to be 830 bundles. After that, he signed the submission form (Exhibit P11). Then, he registered the exhibit in the Laboratory by registration number NZL 527/2022. He removed the leaves from their packages and measured their weight. He found the weight to be 529.05 kilograms.

After measuring the weight, he took the samples from the bundles. When that exercise was completed, he returned the exhibit to the sacks, tied and labelled the same with the laboratory registration number, NZL 527/2022 and handed back **PW5**.

To that effect, he tendered;

- i. Sample Receipt Notification (GCLA 01) dated 6 May 2022 as Exhibit P12.*

On the same day, **PW5** returned to Rombo Police Station and returned the exhibit to the keeper (**PW2**). In her evidence, **PW2** stated that the handing over was done on the same day at about 22:50 hours. To that effect, she tendered;

- i. Handing over certificate dated 6 May 2022 at 22:50 hours as Exhibit P7.*

At the Government Chemist Laboratory Agency, **PW9**, after taking the samples from each bundle, he registered, labelled and put the same in the envelopes. The envelopes were kept in the locker, with the key to that locker in his custody.

Later he conducted a laboratory analysis by running two tests. First, he used the **Chen-kao test**, which resulted in a blue precipitate after grinding the leaves and mixing them with reagents. He stated that blue precipitates mean the samples contained cathinone and cathine, the chemicals found in khat leaves. Second, he used **Thin Layer Chromatography** (TLC), where he found that the TLC plate developed violet and pink colours after the process. He stated that the violet colour indicated the presence of cathinone, and the pink indicated the presence of

cathine, the substance found in khat leaves. After that, he filled and signed the laboratory analysis report. To that effect, he tendered;

- i. Government Laboratory Analysis Report (Form No. DCEA 009) as Exhibit P13.*

Again, on 9 May 2022, **PW2** (the exhibit keeper) handed to **PW1**, 830 bundles of khat to submit to the Court for the purpose of requesting the inventory. According to **PW1**, the handing over occurred at 08:00 hours at Mkuu Rombo Police Station. To that effect, he tendered;

- i. Handing over certificate dated 9 May 2022 as Exhibit P2 (collectively).*

PW1 took the exhibits to Rombo District Court to request the issuance of inventory. At the Court, **PW3 (Innocent Elibariki Nyela)**, Resident Magistrate, attended them. At the Court, the bundles were counted in the presence of the accused persons. After that, **PW3** signed the inventory and ordered the bundles of khat to be destroyed.

To that effect, he tendered;

- i. Inventory (DCEA Form No. 006) dated 9 May 2022 as Exhibit P 3.*

According to **PW3**, he stated that he received **PW1**, who was with the accused persons and the exhibit (six sacks). After informing the accused persons of the purpose of their visit, he opened the sacks and found bundles of khat wrapped using newspapers; they counted the same and found them to be 830 bundles. Then he issued and signed the inventory, ordering the destruction of the khat. (Exhibit P3). The accused persons also signed the same.

On the same date, **PW1** returned to exhibit to **PW2**. To that effect, he tendered;

- i. Handing over certificate dated 9 May 2022 as Exhibit P2 (collectively).*

According to **PW2** (the exhibit keeper), on 8 June 2022, she handed the 830 bundles of khat to **PW8** to take to destroy it. To that effect, she tendered;

- i. Handing over certificate dated 8 June 2022 as Exhibit P8.*
- ii. Exhibit Register (PF 16) with entry No. 51/2022 as Exhibit P9.*

PW8 testified that after he was handed the exhibits, which were six sacks of leaves of khat wrapped in the newspapers by signing the handover

certificate (Exhibit P8) and exhibit register (Exhibit P9), he took the same to Holili area where there was a waste incinerator to destroy the exhibit.

On arrival at Holili, **PW8** met with **PW 4(Baraka Kabululu)**, the Resident Magistrate from Rombo, District Court, Amina from Government Chemist Laboratory Agency, and the representatives from the offices of DSO, NEMC, PCCB, Police Force, and NPS. The accused persons were also present.

PW4 supervised the destruction exercise. According to **PW4** and **PW8**, the exhibit (khat), i.e., six sacks containing 830 bundles wrapped in newspapers, were put into the incinerator, fuel was poured, and the fire was set. The khat burned into ashes, and the exercise was completed at 10:30 hours.

According to **PW4**, he filed and signed the destruction form. The accused persons also signed the destruction form. The same was also done by the representatives from the Government Chemist Laboratory Agency, offices of DSO, NEMC, PCCB, Police force and NPS, who signed the destruction form. To that effect, he tendered;

- i. Certificate of Destruction (Form No. 1) dated 8 June 2022 Exhibit P10.*

According to **PW8**, he stated that in their investigation, they discovered that the vehicle make Land Cruiser with registration No. STJ 7333 (Exhibit P4) belonged to Arusha City Council. **PW7 (Agness Julius Sebarua)**, who was the Transport officer at Arusha Municipal Council, testified that the vehicle was the property of the Arusha City Council and was driven by Athuman Mohamed (1st accused person). On 3 May 2023, the vehicle was missing from their "yard", and she reported to the Human Resource Officer.

Later, together with the Administrative Officer, they were sent by the City Director to identify the vehicle at Rombo. At Rombo Police Station, she identified the Toyota Land Cruiser vehicle with registration No. STJ 7333 (Exhibit P4), as the property of Arusha City Council.

According to PW1 and PW6, the suspected khat was found in that Toyota Land Cruiser vehicle with registration No. STJ 7333 (Exhibit P4).

In their defence, the 1st and 2nd accused persons testified under oath as DW1 and DW2, respectively, categorically denied having committed the offence of trafficking in narcotic drugs.

DW1 told the Court that on 3/5/2023, he was at Tarakea for the Eid holiday. When he was at the bar drinking, a police officer, whom he did not know his name, approached and told him that he was needed at Mkuu Rombo Police Station. At the police station, he was taken to the lock-up, where he found three persons, including the 2nd accused person therein.

While at the Police Station, he was given the papers to sign and informed that they were suspected of trafficking narcotic drugs. In his defence, he denied knowing PW7 and exhibit P4. He further stated that he signed the certificate of destruction (P10) when he was at the prison. He insisted that he was not working with Arusha Municipal Council as testified by PW 7, but he was a Disco/ Music D. J.

On his side, DW2 stated that on 3/5/2022, he was at Mwika area escorting his friend Goodluck Tesha to attend the burial of his mother.

While he was at a nearby shop buying water, he was arrested by a police officer dressed in Civilian clothes, taken to Mkuu Rombo Police Station, where he threatened to be beaten and then given a form to sign.

Later he was transferred to another lock-up where he met with other people. He told the court that it was the first time to see the 1st accused

person at the police station. He prayed for the court to set him free because the said narcotic drugs, namely Khat, were not brought before the court to prove the offence.

In a nutshell and briefly, that was the evidence from both the prosecution and defence witnesses, and on 22 June 2023, both sides prayed to file their final submissions. This Court granted their prayer and ordered the submissions be filed latest by 28 June 2023. The prosecution side filed their written submissions as scheduled, but unfortunately, the defence side failed to file their submissions.

On my part, having gone through the submission, I thank the prosecution side for a brief but well-researched submission which highlighted the key areas in which the parties are at issue.

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 four other sub-issues, namely, **one**, *whether the search was conducted correctly and the items recorded in the certificate of seizure were retrieved from accused persons. Two*, *whether the chain of custody was maintained; three*, *whether the substance contained in the exhibit was narcotic drugs*

and **last**, *whether the defence case raised any reasonable doubt against the prosecution case.*

Starting with the first issue of *whether the search was properly conducted and the items recorded in the certificate of seizure were retrieved from accused persons.*

The entry point on this is section **48(2)(c)(vii) of Cap 95**, which is the relevant law governing search and seizure under the Drug Control and Enforcement Act. The section reads;

"Searches for an article used or suspected to have been used in the commission of an offence shall:

(vii) record and issue a receipt or fill in the observation form an article or thing seized in a form set out in the third schedule to this Act."

It is the evidence of **PW1** that they apprehended the accused persons at Mengwe/ Mamsara area after they chased them from Mashati area. Following the arrest, he seized the items found in the vehicle and the vehicle itself. **PW 6**, an independent witness, was called to witness the search. According to both PW1 and PW6, the following were retrieved from the vehicle six sacks commonly known as **"sulphate bags"** (two with a green

and red line, and four with white colour also with red line), two-vehicle logbooks, and plates with the number T. 806 APN. When the sulphate bags were opened, 830 bundles of suspected khat were uncovered, and the bundles were wrapped using newspapers and sellotape. The same items and the vehicle, Toyota Land Cruiser STJ 7333, were recorded in the certificate of seizure (Exh. P1) except the logbooks.

According to PW 1 and PW6, the accused person witnessed the search. After a search, PW1 seized and recorded the seized properties in Exhibit P1, the certificate of seizure (DCEA 003)

Then PW1 (Arresting Officer), PW 6 (Independent witness) and the accused persons signed the certificate of seizure. In fact, the accused person signed and put their thumbprint.

In their defences, the accused person stated that they were given "papers" to sign when they were at the police station, and after they were threatened, they signed the papers. When the accused persons were cross-examined, both admitted to having signed Exhibit P1 (the certificate of seizure).

Furthermore, the accused persons neither cross-examine PW1 and

PW6 on such vital aspects of the case nor objected to the admissibility of DCEA 003 (Exhibit P1). They failed cross-examined those two witnesses regarding the search, seizure and the signing of the DCEA 003 (Exhibit P1). That failure means that the accused persons had admitted the prosecution evidence regarding that fact.

There is a plethora of authorities of Court the Court of Appeal on the failure to cross-examine or object to tendering of the exhibit. In **Anna Moises Chissano vs. The Republic**, Criminal Appeal No. 273 of 2019(Tanzlii), it was held that;

"An accused is expected to challenge a witness's testimony by way of cross-examination or object to the tendering of a documentary or physical exhibit during the trial. Once certain evidence goes into the record unchallenged, it is, in law, taken to have been admitted by the accused".

Therefore, the assertion that the signed Exhibit P1 at the Police Station is an afterthought. The credible evidence of PW1 and PW6 indicated that the accused person witnessed the search and signed the certificate of seizure (Exhibit P1) to acknowledge that exhibits were seized from them.

The Court of Appeal in **Song Lei vs. DPP** and **DPP vs Xiao Shaodang, Chen Jialin and Hu Liang**, Consolidated Criminal Appeal No. 16A of 2016 & 16 of 2017 (Tanzlii), insisted that upon signing the certificate of seizure, the accused persons acknowledge being found with an exhibit.

From the above discussion, the search and seizure were not only properly conducted but also conducted even beyond the imports of section 48(2)(c)(vii) of the DCEA. The cited section does not impose the mandatory requirement to call for an independent witness.

The requirement of calling for an independent witness is under the Criminal Procedure Act. Therefore, the search and seizure also were aligned with Section 38 (3) of the CPA. The Court of Appeal in **Jibril Okash Ahmed vs. The Republic**, Criminal Appeal No. 331 of 2017 (Tanzlii), when discussed the applicability of 48(2)(c)(vii) of the DCEA and 38(3) of the CPA, 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 latter requires an independent witness to sign the seizure certificate if present. That is the legal position".

Therefore, the search and seizure were conducted properly according to the law.

In the further determination of the sub-issue, I am aware of Section 48(2) (c)(vii) of Cap 95, which requires the arresting or seizing officer to record and issue a **receipt** of the seized items. But the Court of Appeal in **Papaa Olesikaladai@Lendemu vs. The Republic**, Criminal Appeal No. 47 of 2020 (Tanzlii) has already settled a position that where the certificate of seizure is issued, the receipt is unnecessary. It held that;

"non-issuance of a receipt will have no place in cases where a certificate of seizure is issued.

A certificate of seizure is issued and is signed by the accused person, the same constitutes evidence even without receipt".

Therefore, flowing from the above discussion, the law was complied with; during the arrest, search and seizure of what was retrieved from the vehicle, make Toyota Land Cruiser with registration No. STJ 7333.

Coming to the second sub-issue on whether the chain of custody was properly maintained, the entry point is the decision of the Court of Appeal in **Allan Duller vs. The Republic**, Criminal Appeal No. 367 of 2019 (Tanzlii), where it was held that;

"It is, we consider, well established in law that movement of exhibits from the time of its seizure, investigation and production in court must be of such nature that will eliminate the allaying fears about the possibilities of its tempering are avoided".

Further, it was settled in **Chacha Jeremiah Murimi and three Others vs. Republic**, Criminal Appeal No. 551 of 2015, CAT (unreported) that: -

*"In establishing chain of custody, we are convinced that the most accurate method is on documentation as stated in **Paulo Maduka and Others vs. R**, Criminal Appeal No. 110 of 2007 and followed in **Makoye Samwel @ Kashinje and Kashindye Bundala**, Criminal Appeal No. 32 of 2014 cases (both unreported). However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked at depending on the prevailing circumstances in every particular case. For instance, in cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in **Paulo Maduka** (supra) would be relaxed."*

Therefore, the key issue here is whether or not the prosecution evidence maintained the chain of custody by documentary and/ or oral evidence.

The evidence revealed that, on 2 May 2022, after **PW1** seized the six sacks containing 830 bundles of suspected khat and other items, he handed over the same to **PW2** (The exhibit keeper). The handing over was done by the handing over certificate (Exhibit P2 collectively) duly signed by PW1 and PW2. Then PW2 labelled the seized exhibits with a case reference number MKR/IR/444/2022, recorded them in the exhibits register as entry No. 51/2022 (Exhibit P9), and stored keep the same in the exhibit room except the vehicle, which was parked in the police yard.

On 6 May 2022, PW2 handed 830 bundles to PW5 to submit the same to the GCLA; they both signed the handing over certificate (Exhibit P6). At the GCLA, PW5 submitted the exhibit to the Government Chemist (PW9). The handing over was done by Laboratory submission form DCEA 001 (Exhibit P11).

Then PW9, after counting and finding 830 bundles of suspected khat wrapped in newspapers and sellotape, registered the exhibit with Laboratory Registration No. NZL 527/2022, measuring the weight and taking samples. Then returned the bundles to the sacks, tied and labelled the same with the laboratory registration number, and handed back PW5. This was done using a sample Receipt Notification (GCLA 01) [Exhibit P12].

PW5 returned the exhibit to the exhibit keeper (PW2) on the same date at about 22:50 hours. The handing over was done by a handing-over certificate (Exhibit P7)

Again, on 9 May 2022, PW2 (the exhibit keeper) handed to PW1, 830 bundles of khat to submit to the Court for the purpose of requesting the inventory as per the handing over dated 9 May 2022 (Exhibit P2 collectively). At Rombo District Court, PW3 (The Resident Magistrate) counted the bundles of suspected khat in the presence of the accused persons. They then issued an inventory using DCEA Form No. 006 dated 9 May 2022 (Exhibit P 3).

On the same date, PW1 returned to exhibit to PW2 as per the handing over certificate (Exhibit P2 collectively).

On 8 June 2022, PW2 (the exhibit keeper) handed over the 830 bundles of khat to PW8 to take to the incinerator located in Holili area to be destroyed. The handing over was done by handing over a certificate dated 8 June 2022 (Exhibit P8) and Exhibit Register (PF 16) with entry No. 51/2022 (Exhibit P9).

At Holili, PW4, who supervised the destruction, stated that before the destruction, they opened the sacks and counted 830 bundles of khat; the same was destroyed as per exhibit P10.

Therefore, from the above narration and by looking at the totality of evidence on record in totality, I have the following;

One, the sequence of events as narrated and demonstrated above and borne out by the record does not suggest any chances of narcotic drugs, namely khat, being tempered. Further, the items seized were labelled, sealed and registered in PF 16 immediately after being seized. Further, it was sealed again at the GCLA by PW9.

In my further analysis, though the narcotics drugs (khat) passed through different hands from PW1, PW2, PW3, PW4, PW5 and PW8 but the evidence (paper trail) and oral testimony show how and what exactly was received from each stage, from seizure to destruction.

Therefore, the chain of custody is intact based on oral and documentary evidence (paper trail), and there was no evidence to suggest that the chain was broken.

Two, the nature of the exhibit involved, i.e., 529.05 kilograms of a narcotic drug, namely khat, how it was handled and without any contradictions from the prosecution witnesses it was not easy to be tempered with. I cement my position with the case of the Court of Appeal in **Moses Mwakasindile vs. Republic**, Criminal Appeal No. 15 of 2017

(Tanzlii), whereby the appellant was charged with transporting 42.44 kilograms of khat. The Court held;

"There was no proof that the chain of custody was broken because the contraband does not change hands easily and that there was no danger of it being destroyed, polluted or tampered with".

Three, the evidence of prosecution witnesses regarding the chain of custody was not challenged by way of cross-examination, and the documentary evidences (exhibits) were not objected to its admission. As I alluded to earlier as per **Anna Moises Chissano** (Supra), the effect of this is that once certain evidence goes into the record unchallenged, in law, it is taken to have been admitted by the accused person.

Therefore, there was no break of chain in the trail and oral testimonies from when the narcotic drugs were seized until they were handed over to the Government Chemist for analysis and the destruction at Holili area, nor was there any chance of witnesses tempering with the exhibits.

The third sub-issue is whether the substance contained in the exhibit was narcotic drugs. In this sub-issue, the relevant evidence is of PW9 and the Laboratory analysis report (Exhibit P13), the evidence which was not controverted by the defence side.

First, in his oral evidence, PW9 confirmed that the 830 bundles weighing 529.05 kilograms he received from PW5 were the narcotic drugs known as Khat. After running both the Chen-kao test and Thin Layer Chromatography (TLC) test, the results were that the samples contained cathinone and cathine, the chemicals found in khat leaves.

It is from the evidence of PW9 on the issue that khat is characterised by the presence of cathine and cathinone, "I lead" me to the publication released by the ***European Monitoring Centre for Drugs and Drug Addiction***, accessed at [Khat drug profile | www.emcdda.europa.eu](http://www.emcdda.europa.eu) where it was provided that analysis of khat relies on the characteristic appearance of khat and the presence of cathinone and cathine.

Further, in the publication by **Mansoon's Tropical Infections Diseases (Twenty-third Edition)**, 2014, titled ***Catha Edulis Extract***, accessed at [Catha Edulis Extract - an overview | ScienceDirect Topics](#), the author pointed out that, I quote;

*"More than 40 compounds have been identified in khat extract, among which are the controlled substances **cathinone** and **cathine**, both sympathomimetic amines with an identical*

structure to amphetamine and adrenaline". [Emphasis provided]

Therefore, the scientific documents above confirmed what was testified by PW9.

Second, the documentary evidence tendered by PW9, the Government Laboratory Analysis Report (Form No. DCEA 009), tendered as Exhibit P13, indicates that after analysis, the exhibit was found to be khat due to the presence of cathinone and cathine chemicals.

According to Section 48A (2) of Cap 95 as amended, that report (Exhibit 13) is conclusive unless rebutted. The section read

"Notwithstanding anything contained in any other law for the time being in force, any document purporting to be a report signed by a Government Analyst shall be admissible as evidence of the facts stated therein without formal proof, and such evidence shall, unless rebutted, be conclusive."

[Emphasis provided].

This position of law was underscored by this Court in **Wilson Ramadhani Magome vs. Republic**, Criminal Appeal No. 66 of 2019, Tanzlii (HC-Moshi) while citing **Mwinyi Bin Zaid Mnyagatwa vs. Republic** [1960] EA 218 (HCZ) where it was held that;

*"The prosecution in the offences related to narcotic drugs has a duty to submit expert analysis which is mandatory as **its result is final, conclusive** and it provides check and balances that warrants convicting. [Emphasis provided]"*

The only exception to the conclusiveness of the Government Analyst report is when it is rebutted. But from the record of this case, there is no evidence to rebut the findings of the Government Chemist, **Erasto Mbalamwezi Lawrence** (PW9).

Therefore, in such a situation, the law dictates that the analysis report (Exhibit P13) be treated as conclusive proof that the exhibit was a narcotic drug, namely khat.

Further, PW9 was competent to tender Exhibit P.13 because he thoroughly established his knowledge of the narcotic drug, namely khat, which he had weighed, counted, examined, marked, and labelled at the Government Chemist Laboratory. In the end, he filled and signed Exhibit 13. Therefore, his evidence established the foundation of his ability to identify and authenticate the khat and the techniques he employed to analyse that narcotic drug scientifically.

Therefore, there is no dispute that the 830 bundles of leaves were

narcotic drugs, namely khat.

The last issue is whether the defence case raised any reasonable doubt against the prosecution case.

On this, it is trite that the general duty of the accused person in criminal matters is only to raise doubt against the prosecution case and not otherwise. See, **The D.P.P vs. Ngusa Kejela @ Mtangi and another**, Criminal Appeal No. 276 of 2017, CAT (Tanzlii).

In this case, apart from a general denial of the commission of the offence, the accused persons raised the following issues.

One, both testified that there were not at the scene of crime when the offence was committed. In other words, they were not arrested by PW1 on 3 May 2022. DW1 stated that on the material day, he was at Tarakea enjoying his “drinks” at the Bar celebrating the Eid Holiday. On the other hand, DW2 stated that on 3/5/2022, he was at Mwika area escorting his friend Goodluck Tesha to attend the burial when he was arrested by a police officer dressed in Civilian clothes. Therefore, in short, both raised the defence of alibi in their defences.

This should not detain me long because it was never raised by the

defence before the commencement of the prosecution case or when they cross-examined PW1, PW6 and PW8. Therefore, I accord no weight to such a defence because it was brought contrary to Section 194(4) of the Criminal Procedure Act read together with Section 42 of EOCCA (Cap 200). To cement my position, I quote the decision of the Court of Appeal in **Jason Pascal and another vs. The Republic**, Criminal Appeal No. 615 of 2020 (Tanzlii), where it was held that;

*In their evidence, the appellants claimed to have to been arrested in Muleba at the residential house of a person called Hashimu. They did not, however, through their advocate, raise this defence while cross-examining PW1 and PW2. The trial court having regarded the defence raised in the appellants evidence as alibi, accorded it no weight for the reason that, it was not preceded by prior notice or particulars of alibi as per section 194(4) of the Criminal Procedure Act read together section 42 of EOCCA. **For the reasons above discussed, it was quite right.** [Emphasis provided]*

Two, DW2 raised a defence that the prosecution side failed to tender the alleged narcotic drugs, namely khat, before the Court to prove the case. This also should not detain me long because the law allows the destruction or disposal of narcotic drugs.

According to Section 36(2) (3) and (4) of Cap 95, the disposal is done by way of an inventory for disposal of seized exhibits and should be certified by the Magistrate.

Further, section 36(5) of Cap 95 provides that the inventory shall be treated as primary evidence regarding such offence.

In this case, PW3 testified that he followed the procedures and certified the inventory by allowing the narcotic drugs to be destroyed in the presence of the accused persons, who also signed the inventory (Exhibit P3)

Further, according to PW4 and PW8, the narcotic drugs were destroyed in the presence of the accused persons, who also signed the destruction form (Exhibit P10)

Therefore, since exhibit P3 is primary evidence regarding the destroyed narcotic drugs and the fact that accused persons witnessed and signed when inventory was issued and the narcotic drugs were destroyed, the defence of DW2 cannot raise doubt in any way against the prosecution case.

Three, the defence side also lamented the prosecution's failure to tender photos when narcotic drugs were destroyed. On this, I have the following;

First, as submitted by the Republic in their final submission, not all violations render exclusion of evidence in question, as per **Jibril Okash Ahmed (Supra)**. Therefore, failure to take photos in any way cannot dismantle the prosecution's evidence.

Second, according to regulation 14 (1) of the Drugs (General) Regulation, 2016 GN 173;

"The destruction of seized narcotic drug or psychotropic substances except for drug mentioned under Tanzania Food and drug authority Act, shall be carried out in the presence of;

- (a) Judge or Magistrate, as the case may be."*
- (b) a representative of the commissioner General of Police, Director of Public Prosecutions, Chief Government Chemist;*
- (c) a representative from National Environment Management Council and the Tanzania Intelligence Security Services;*

While Under 14 (5) provide further that,

"Upon the destruction of the seized drug or psychotropic substance in accordance with sub-regulation 4, the Judge

or Magistrate in attendance shall, if satisfied that the destruction of all seized substance is complete, fill in a certificate of destruction prescribed in form 1 of the second schedule to these regulations”.

In this case, the exercise of disposition of the khat seized was properly conducted in the presence of all necessary parties as per the cited regulations, which was substantiated by Exhibit P10 (Destruction Form).

Therefore, from above, the absence of photos indicating the disposition of narcotic drugs, namely khat, cannot “demolish” the prosecution case.

The last issue raised by the defence side was the prosecution’s failure to tender packaging, i.e., six sacks made of sulphate. This was raised during cross-examination. This also should not detain me long because it is not a new phenomenon in our jurisdiction as the Court of Appeal has already settled a position in **Livinus Uzo Chime Ajana vs. The Republic**, Criminal Appeal No. 13 of 2018 (Tanzlii) cited by the Republic in their written submission. The settled law is that packaging has nothing to add to the value obtained by oral testimonies.

Therefore, non-tendering of packaging cannot raise any doubt; by the way, both PW4 and PW8, when cross-examined, stated that the packagings were also destroyed with narcotic drugs.

Flowing from above, having analysed and considered the defence case, it fails to raise any doubt against the prosecution case.

In the upshot and cumulatively, the prosecution side proves their case to the hilt against the 1st and 2nd accused persons, and consequently, I find the 1st and 2nd accused persons guilty of the offence charged. I convict them forthwith for the offence of Trafficking in narcotic drugs c/s 15 (1) (a)(2) and (3) (iii) of 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 Cap. 200 R.E. 2022.

It is so ordered.



K. D. MHINA
JUDGE
12/07/2023