IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT MUSOMA

ECONOMIC SESSION NO. 3 OF 2023

REPUBLIC

VERSUS

1. AMOS CHACHA MARWA

2. SALUM ISSA KITWALA

3. KHALID YUSUPH ADAM

4. SAMSON MWITA CHACHA @ KITARA

JUDGMENT

22nd June, & 24th July, 2023

ISMAIL, J.

Amos Chacha Marwa, Salum Issa Kitwala, Khalid Yusuph Adam and Samson Mwita Chacha @ Kitara are joint accused persons. The quartet stands charged with the offence of trafficking in narcotic drugs, an offence falling under the provisions of 15 (1) (a) of the Drugs Control and Enforcement Act, 2015, 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. 2019. The contention by the prosecution is that

the offence with which the accused persons are charged occurred on 27th January, 2021, at Gamarasa area, within Tarime District in Mara Region. They were allegedly found trafficking narcotic drugs known as cannabis sativa, otherwise known as *bhangi*. The weight of the drugs allegedly trafficked was 1746.3 kilograms.

The accused persons' alleged blemished conduct is gleaned from the information and its subsequent amendment, filed on 20th June and 21st June, 2023, respectively. Together with information are facts read over to the accused persons at the preliminary hearing conducted on 21st June, 2023. The cumulative sense made out of these facts revealed that the narcotic drugs, the subject matter of these trial proceedings, were allegedly seized from the accused persons.

The facts further revealed that the seized narcotic drugs were consigned as loose cargo, bundled into a truck bearing Registration No. T.465 DQJ and its trailer that bore Registration No. T.143 DEM. This vehicle was driven by the 1st accused person, assisted by the 3rd accused person, and that the same was allegedly hired by the 2nd accused person. These drugs were bound for Dar es Salaam where they would meet their ultimate consumers. Three of the accused persons, with the exception of the 4th accused person, were found in the said vehicle.

The accused persons denied any involvement in the charged offence by pleading not guilty to the charge. The plea of not guilty pushed the case a notch higher, to the level of trial that was preceded by the preliminary hearing, held on 21st June, 2023. During the preliminary hearing, the accused persons denied every allegation of wrong doing, save for their names, their arrest and arraignment in court on allegations in respect of which they denied any knowledge of.

At the trial, the prosecution enjoyed the usual service of its able attorneys, in this case, Messrs Mosses Mafuru and Yesse Temba; and Ms. Agma Haule, all learned State Attorneys. Their counterparts for the defence were Mr. Daudi Mahemba, learned advocate, who singly appeared for the 1st accused person; while Mr. Baraka Makowe and Ms. Mary Joachim jointly represented the 2nd and 3rd accused persons. The 4th accused enlisted the services of Messrs Daudi Mahemba and Evans Njau, learned counsel.

Several exhibits were tendered by prosecution witnesses. These are: Search Order (Exhibit P1); Certificate of Seizure (Exhibit P2); 1746.3 kg of bags containing narcotic drugs (Exhibit P3); Motor Vehicle Reg. No. T.465 DQJ and its trailer with Reg. No. T.143 DEM (collectively admitted as Exhibit P4); Report of the Government Chemist (Exhibit P5); Sample Submission Form (DCEA 001) (Exhibit P6); 80 envelopes containing samples (Exhibit P7);

Chain of Custody Forms for 80 bags of narcotic drugs (Exhibit P8); Chain of Custody Forms for samples (Exhibit P9); Report of the Weights and Measures Agency (WMA) for 80 bags of narcotic drugs (Exhibit P10); and Report of the Weights and Measures Agency (WMA) for samples (Exhibit P11).

In the case of witnesses, the prosecution procured the attendance of seven (7) witnesses, whilst the accused persons testified for themselves, as they neither called any other witnesses nor did they tender any documentary or physical exhibits. Those who showed up for the prosecution were: D.7207, D/Ssgt. Mponda Mchopa Madola (PW1), the arresting officer; Amos Obunya, Government Chemist (PW2); D/Sgt. Mohamed (PW3), the investigator of the case; Paul Siame (PW4), Weights Officer; Nyagayenga Machango (PW5), an Independent Witness; D/CPL Robert (PW6), a Police Officer who conveyed samples to Government Chemist Laboratory Agency; and D/Sgt. Ally (PW7), Exhibits Keeper.

The summary of the prosecution's testimony is straight forward. It runs back to the evening of 27th January, 2021, when PW1 received a tip off from an informer that there was a vehicle that carried an illicit consignment. PW1 relayed the information to his superior officers who gave him a nod to track the vehicle and report progress to them. PW1 mobilised his 'troops' and

headed to Gamarasa area. At a petrol station, they found a truck in question and they identified it as it had the name "Mshefa" on the cabin of the vehicle.

PW1 and his team introduced themselves as did the persons who were found in the vehicle. The driver, Salum Issa (1st accused) introduced himself as the driver of the truck and resident of Nzega, Tabora Region. His assistant was Khalid Yusuph, 3rd accused person, while the 2nd accused was Amos Chacha, the alleged owner of the alleged illicit consignment. The suspects were ordered to drive the vehicle to Central Police Station where they arrived at between 9 and 10 pm. The vehicle was parked and the suspects were put in custody as they awaited Officer Commanding the Station (OCS). The bags in the vehicle were counted but search and seizure was carried out on 28th January, 2021, the date on which the OCS issued a Search Order (Exhibit P1) to PW1. In the presence of two independent witnesses, one of whom was PW5, the said vehicle was searched. It was revealed that the bags which were disguised as having carried raw maize, contained dry leaves which were suspected to be narcotic drugs. Out of 95 bags that were seized, 80 bags were stuffed with the said drugs. The substances in the said bags, together with the vehicle and the trailer were ultimately seized vide Exhibit P2 which was signed by PW1, PW5, and the accused persons. The seized properties were handed to PW7, Sgt. Ally of the Charge Room (CRO) and Exhibits

keeper, together with three of the accused persons. Handing over of the seized items was documented through what was known as a Chain of Custody Form (Exhibit P8). This form was duly signed by PW1.

On 28 January, 2021, 80 bags containing what was suspected to be narcotic drugs were sent to the Weights and Measures Agency for scaling and the verdict that came vide Exhibit P10 and the testimony of PW 4 was that the said drugs weighed 1746.3 kilograms. On 25th May, 2021, PW3 handed 80 samples of the seized substance to PW6 the latter of whom took them to the Government Chemist. Transmission of the said samples was done vide a submission letter and a Sample Submission Form (Exhibit P6). The testimony adduced by PW2 and complimented by Exhibit P5, revealed that the samples were in fact cannabis sativa that contains a chemical known as Tetra-hydrocannabinol (THC).

After the closure of the prosecution's case, the Court sat and determined if the evidence with which the Court was treated carried any merit that established the accused persons' culpable role. This question was answered in the affirmative when the Court found that a *prima facie* case had been established and that the accused persons had a case to answer. They were put to their defence. They chose to defend themselves on oath and affirmation and their defence was composed of the accused persons'

own account. They did not call any other witness or tender any documentary of physical evidence in support of their case.

The common denominator in their defence is the valiant denial of the alleged culpability. While three of the accused persons admitted that they were arrested while aboard a truck (Exhibit P4), they denied that they were aware that the consignment in the truck contained narcotic drugs. On his part, the 4th accused person's defence was that he was neither in the vehicle nor was he party to anything that was recovered from the vehicle.

With regards to the 1st accused person, who featured as DW1, his contention is that, on the fateful day he received a call from Justine Kitara who told him to escort his maize consignment to Dar es Salaam. He further testified that he went to Nyamwigura village where he met the 2nd and 3rd accused persons with whom they moved to Gamarasa petrol station where they refueled. He contended that he joined his co-accused persons when the consignment had been loaded into the vehicle. It was while at Gamarasa that they were put under police restraint and ordered to go to the police station where they were incarcerated until the following day, when they witnessed the search and seizure of the bags which were alleged to contain substance believed to be narcotic drugs. After the seizure, they were taken

to Sirari where the drugs were weighed and samples extracted. He totally denied the allegation that he trafficked in narcotic drugs.

The 2nd accused person's defence was that, while it is true that he was the driver of Exhibit P4 and was hired by a Mr. Justine to carry his consignment to Dar es Salaam, he was under the impression, as Justine told him, that the consignment contained maize which were stuffed in 95 bags. He testified that he was convinced that it was maize because the cobs protruded on either sides of the bags and they were visible from the top of the bags. He stated that Justine who allegedly instructed him was not among the accused persons arraigned in court. He testified that he knew that narcotic drugs were stashed in the middle of the bags when the bags were let open and maize cobs were separated from the rest of the contents. He denied that he knew that what was loaded were narcotic drugs.

The same version of the story was narrated by the 3rd accused person, DW3 in the proceedings. He testified that they were on their way to Dar es Salaam. A short while after they left Nyamongo, they got to a village where they were stopped and one of the persons requested that his maize consignment be conveyed to Dar es Salaam. He further testified that they agreed on the price and loaded the vehicle before they took off. They were then surrounded by police officers at a petrol station in Tarime and were led

to a police station and incarcerated. A search conducted later on found that 80 of the bags contained leaves believed to be narcotic drugs. They were then arraigned in court on allegations that he denied any knowledge of.

The 4th accused person's testimony was brief. He introduced himself as Samson Mwita Chacha Mgaya and that he was arrested at a place called Buhemba in Tarime District. He said he was arraigned in court on allegation of drug trafficking. He denied knowing his co-accused or being involved in the alleged offence.

In general terms, the accused persons distanced themselves from the accusation and prayed for their acquittal.

Upon conclusion of the trial proceedings and, at the instance of the counsel for the parties, the Court granted a prayer for filing final submissions. Both sides duly complied with the scheduling order drawn by the Court.

Raising the curtain was the prosecution's counsel who stated that the submission was premised a number of areas. These are: search and seizure; credibility and reliability of witnesses; chain of custody; and proof of possession of and or trafficking in narcotic drugs. Regarding search and seizure, the prosecution relied on section 38 (1) of the Criminal Procedure

Act, Cap. 20 R.E. 2022, and contended that search and seizure were carried out by PW1, in compliance with the law and witnessed by PW5.

On credibility and reliability of witnesses, the contention is that witnesses who testified offered direct evidence which was coherent and gave a sequence of the events that was free from any contradictions. In the prosecution's view, the testimony was full of credence and consistent with the holding in ***Goodluck Kyando v. Republic*** [2006] TLR 363.

Regarding the chain of custody, the argument by the prosecution is that there is sufficient paper trail on how Exhibits P8 and P9 were handled. He also pointed out to the testimony of PW1, PW2, PW3, PW4, PW5, PW6 and PW7 as an oral account which provided a detail and a sequence of how these exhibits changed hands. In the prosecution's contention, there is nothing to suggest that there was any tampering of the exhibits. Relying on the case of ***Wallenstein Alvares Santillan v. Republic***, CAT-Criminal Appeal No. 68 of 2019 (unreported), the prosecution firmly contended that the chain of custody was unbroken.

With regards to trafficking, the prosecution began by scoffing at the contention by the defence that the accused persons were not aware of what was to be conveyed to Dar es Salaam. The argument is that the responsibility

lies with them to ensure that they know what the contents of what they are contracted to transport. The driver was under obligation to inspect the cargo. It was the prosecution's contention that in drug trafficking cases, possession is what is important and not knowledge. On this, the prosecution referred the Court to the decisions in ***Nurdin Akasha @ Haba v. Republic*** [1995] TLR 227; and ***Song Lei v. Director of Public Prosecutions & Director of Public Prosecutions v. XIAO Shaodan & 2 Others***, CAT-Consolidated Criminal Appeal No. 16A & 16 of 2017 (unreported). In the prosecution's view, it is unthinkable that the 2nd and 3rd accused persons would be unaware of what the consignment was made of. They refuted the defence's contention on knowledge by referring to the decision in ***Nabibakhsh Pirbakhsh Bibarde Mahamadhanif Nazirahmad Dorzade v. Republic***, CAT-Criminal Appeal No. 663 of 2020 (unreported), wherein it was held that the act of signing a certificate of seizure means that they acknowledged that drugs were found in their possession.

Further on knowledge, the prosecution has taken the view that circumstances of the case bring the impression that the accused persons were aware of what they were conveying to Dar es Salaam, or had reason to be aware because they were in control over the consignment as transporters. Resort was had to the reasoning in ***Simon Ndikulyaka v.***

Republic, CAT-Criminal Appeal No. 231 of 2014 (unreported), in which it was held that possession may be actual or constructive, and that control over the goods may be enough to find the accused culpable. It is fitting, in the prosecution's view, that the accused persons be held to have been in possession of the drugs.

With respect to the 4th accused person, the view by the prosecution is that the testimony adduced is insufficient to establish a guilty role by him.

The submission by the defence team catered for the 1st, 2nd and 3rd accused persons while none was preferred on behalf of the 4th accused person. The submission dwelt on two main issues. These were: whether the accused persons had *mens rea*; and secondly, whether the sample that was taken to GCLA is what was seized on 28th January, 2021.

With regards to chain of custody, the view by the learned counsel is that there is no record on the traceability of Exhibits P8 and P9 and proof that the same could not be tampered with. They contended that, whereas PW3 testified that he received it from the Exhibit Keeper, the truth is, Exhibit P9 was received from a Mr. Ernest. Learned counsel argued that this raised questions in the presence of a testimony by PW4 that he was the only custodian of exhibits and charged with the responsibility of issuing and

receiving exhibits for safe custody. The defence team has also taken an exception to the unexplained delay in conveying the exhibit handed to PW3 on 10th March, 2021, while it was also said that the same exhibit was said to be in the exhibit room on 24th May, 2021. In the defence's contention what is in document renders the witness' account immaterial, in terms of sections 61 and 63 of the Evidence Act, Cap. 6 R.E. 2022.

There is also a contention that chain of custody was broken when Exhibit P9 was handed over to Amani Samwel instead of PW2. This rendered Exhibit P5 lacking in legitimacy as it was allegedly founded on suspicious sources. The defence has taken the view that the said Amani Samwel should have testified to compliment what was stated by PW6 and PW2. The defence concluded that it is unsafe to rely on the findings of GCLA amidst lapses in the chain of custody.

Regarding *mens rea*, the argument is that the 1st, 2nd and 3rd accused persons were oblivious to what was contained in the consignment. The defence took the view that the prosecution bore the responsibility of proving that the accused had ill motive when they transported maize that had drugs inside the bags. The defence urged the Court to adhere to the principle that the accused can only be held criminally responsible if the prosecution proves

his guilt beyond reasonable doubt. They prayed for acquittal of the accused persons.

It is common knowledge, in the conduct of criminal trials, that on the conclusion of the trial proceedings which entails presentation of each party's case, the next task that awaits the trial court is to weigh the evidence adduced by the prosecution and make a finding as to whether the same has been able to discharge the duty cast upon it. The duty is that of proving the case against the accused persons. This involves putting the said evidence on a scale and determine if it has reached the threshold necessary for proving the offence. The standard is beyond reasonable doubt.

This requirement traces its legitimacy from the provisions of section 112 of the Evidence Act, Cap. 6 R.E. 2019, whose substance is as reproduced hereunder:

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."*

Numerous court pronouncements have echoed this imperative requirement. In ***Joseph John Makune v. Republic*** [1986] TLR 44, the Court of Appeal of Tanzania guided as follows:

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence. There are few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ...."*

In yet another reiteration, the upper Bench pronounced itself in that respect, in the case of ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported), in which it was accentuated as follows:

> *"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shift back to prosecution."*

From the foregoing, the broad question to be resolved is whether a case has been made out against any or all of the accused persons.

As stated earlier on, the accused persons are charged with the offence of trafficking in narcotic drugs, contrary to section 15 (1) (a) of the Drugs Control and Enforcement Act (supra), 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 (supra). To prove the offence of trafficking in narcotic drugs, the prosecution must be able to prove that the accused persons were found in possession of narcotic drugs; and that there was an act of trafficking the said drugs, within the meaning of section 2 of the Act; and that the government chemist must prove that the substance found in the accused's possession is really narcotic drugs. For clarity, section 2 defines trafficking as follows:

> *"trafficking" means the importation, exportation, buying, sale, giving, supplying, storing, possession, production, manufacturing, conveyance, delivery or distribution, by any person of narcotic drug or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer but shall not include...."*

See also: ***Alberto Mendes v. Republic***, CAT-Criminal Appeal No. 473 of 2017; and ***Hamis Mohamed Mtou v. Republic***, CAT-Criminal Appeal No. 228 of 2019 (both unreported).

I will begin with the 4th accused person whose manner of arrest is different from those of his co-accused persons. The testimony adduced D/Sergeant Mohamed (PW3) reveals that he and other police officers arrested the 4th accused on 21st December, 2021, while seated at a pub in Buhemba, Tarime District. The arrest was made 12 months after the rest of the accused persons had been arrested and arraigned in court. The testimony further reveals that the 4th accused person was not found with anything relating to the charges that he is currently facing. His connection to the case arises from the fact that he is allegedly the person who instructed the rest of the accused persons to traffic in the drugs. While the rest of the accused persons are in unison that the consignment of the seized drugs was loaded on the instructions of a Mr. Justine Kitara, none of the said accused persons identified the 4th accused as Justine Kitara that is alleged to be the owner of the consignment.

This testimony corroborates what PW3 testified on during cross-examination. He admitted that the 4th accused person denied that his name was Justine Kitara but he was arrested because PW3 realized that Kitara was one of the 4th accused person's names. In my view, resemblance of names alone would not be enough to rope in the 4th accused person, and hold him culpable for an offence while his involvement had not been established.

One may be tempted to assume that the 4th accused person is the most sought after Justine Kitara that the accused persons mentioned, and hold the contention that the his inclusion in the proceedings is based on the testimony of the co-accused persons. In this case, none of the accused persons testified anything against the 4th accused person. Where such testimony exists, the trite position is that the same may ground a conviction but only if it conforms to certain imperative requirements. This was accentuated by the Court in ***Republic v. ACP Abdallah Zombe & 12 Others***, HC-Criminal Sessions Case No. 26 of 2006 (DSM, unreported), in which it was held:

> *"It is also a truism that whether in the form of a confession, or any other types of evidence of a co-accused, to ground a conviction, it must be corroborated as a matter of law (in case of confessions) (s 33 (2) of the Evidence Act) or of practice in any other types of evidence of a co-accused (see Pascal Kitigwa v. R (1994) TLR (CA)."*

Notably, the foregoing subscription constitutes a general rule whose exception was stated in ***Pascal Kitigwa*** (supra), wherein the Court of Appeal of Tanzania guided that it is not illegal to convict an accused person based on an uncorroborated testimony of the co-accused. The condition

precedent, however, is that the court must warn itself of the dangers of relying on the uncorroborated testimony. The upper Bench took the view that corroboration may be in the form of circumstantial evidence or based on the accused's conduct or words. The superior Court further held:

> *"However, as correctly observed by the trial magistrate and the learned judge, even though the law is such that a conviction based on uncorroborated evidence of an accomplice is not illegal, still as a matter of practice, the then Court of Appeal for Eastern Africa and this Court have persistently held that it is unsafe to uphold a conviction based on uncorroborated evidence of a co-accused. In this case, the trial magistrate as well as the learned judge on first appeal apart from warning themselves of the danger of convicting on uncorroborated evidence of the second accused (DW2), went further to look for other evidence implicating the appellant. It is common ground that corroborative evidence may well be circumstantial or may be forthcoming from the conduct or words of the accused."*

On the weight to be attached to the evidence, the view held by the Supreme Court of India in ***State v. Nalini,*** Criminal Appeal No. 325 of 1998, is that that is a matter in the discretion of the court and, as a matter of prudence, the court may look for some more corroboration if confession is

to be used against a co-accused. In this case, however, none of such testimony lends any credence capable of building the impression that it was an implication by a co-accused as to require an assessment as to whether the same should be corroborated or not.

In sum, I find nothing on which to hold the 4th accused person culpable of the offence with which he is jointly charged. Not a semblance of evidence has been adduced to hold him to any blemished account. This tallies with the prosecution's concession that the evidence adduced established no blemished responsibility for the 4th accused person. It follows, therefore, that he is found not guilty and acquitted of the charges and set free.

I now turn on to the rest of the accused persons. As unanimously held, these accused persons were found in the vehicle in which the consignment of maize was seized. In the middle of the said maize, narcotic drugs were stashed, and these are the ones that have landed the said accused persons into the current predicament. The defence by the accused persons is that they knew nothing about the narcotics, and that there is no way they would have known that what was seemingly bags of raw maize that they were hired to convey to Dar es Salaam was in fact a consignment of narcotic drugs.

The question is whether there is any credible testimony that is able to discharge the prosecution's burden of proof and demonstrate the accused's guilty role. It is discernible that the entirety of the testimony that the prosecution relies on is direct evidence extracted from the prosecution's witnesses. This is mostly in the form of the testimony of PW1 through to PW7. This is read together with Exhibits P1, P2, P3, P4, P5, P6 and P7. Of significance here is the testimony of PW1, who stated that he led the team that arrested the accused persons and seized the items which were tendered in Court as Exhibits P3 and P4 and Exhibit P5. These pieces of testimony were tendered in court by PW2. The combination of these pieces of testimony proved that what was seized from Exhibit P4 was narcotic drugs known as cannabis sativa. The significance of PW2's testimony is that he carried out an analysis that concluded that the substance allegedly seized from the accused persons, as testified by PW1 and PW5, were narcotic drugs. PW2 went as far as detailing the damaging effect that comes with the consumption of the drugs. With regards to possession of the said drugs, the 1st, 2nd, and 3rd accused persons have admitted that the bags of maize which were let open brought out 80 bags of cannabis sativa which were stashed in the middle of the maize bags. The accused persons' defence is that they were under impression that the bags contained maize and nothing else.

It is my considered view that the totality of all this proves a trio of things. ***One***, that Exhibit P3 were narcotic drugs and that the same were certified as such. ***Two***, that these drugs were found in the possession of the 1st, 2nd and 3rd accused persons. ***Three***, that these drugs were destined to Dar es Salaam where they would be delivered on the instruction of a Mr. Justine Kitara. It is fair to conclude that the key ingredient of trafficking in narcotic drugs has been proved by the prosecution and I settle the question on whether there was an act of trafficking in narcotic drugs in the affirmative.

There is another key question, and this relates to the question as to whether the accused persons were aware if what they were found with were narcotic drugs as to constitute. This is what the defence called absence of *mens rea*, and their contention is that this is a key ingredient in criminal cases. The view taken by the prosecution is that in drug trafficking cases mere possession is enough, and that the question of knowledge isn't of any significance.

I am in full agreement that in offences involving trafficking in narcotic drugs, the key ingredient is possession of the said drugs and the cases cited point to some truth in the prosecution's argument. However, while I agree that knowledge is not a key prerequisite in cases involving trafficking in narcotic drugs, there is no denying that circumstances of this case are

peculiar, and call for a little scrutiny on whether the accused knew of what was in the consignment that they carried. It not only determines the intent of an accused persons but also their resolve or decision to take the risk that they took. Thus, in my view, in this case, successful trial on the part of the prosecution would entail the prosecution's ability to prove that the accused persons knew or had the reason to believe that the consignment that was seemingly row maize contained narcotic drugs. In the instant case, the available testimony, especially that of PW1 and PW5, has revealed in no uncertain terms that it took a tip off from an anonymous source to know that the consignment had some drugs in it. PW5 was categorical that the way the bags were packaged, the general outlook was that of maize that had just been harvested with cobs protruding on the sides and the upper part of the bags. It would be difficult for a normal person to suspect that these were drugs concealed in and disguised as maize. PW1 has also testified that it took his prowess in sensing smell to be able to know that the consignment contained some substance that smelled like cannabis sativa.

The clear indication is that an unsuspecting person who does not have what it takes to sense smells would not have realized that something else, other than maize, had been stashed in the bags filled with maize. Significantly, as well, none of the witnesses has been able to rebut the

defence's contention that they were not aware of what the bags contained other than maize. This satisfies me that the accused persons, who were not part of the packaging of the bags must have been oblivious of whatever else that was in the bags apart from the visible items that were maize in the cobs. In my unflustered view, the prosecution's failure to prove that the accused persons became aware of presence of drugs debilitates the prosecution's push to have the accused persons held responsible for trafficking in narcotic drugs. In the circumstances of this case such failure operates against their tide.

As I move towards the tail end of my analysis of the matter, it is apt that I should throw a line or two on the all important aspect of chain of custody. This issue has featured in the course of trial and the submissions, and the prosecution's contention is that the chain of custody was not broken, and that the testimony adduced by the witnesses showed that chain of custody was maintained. The defence has singled out the handling of the exhibit by PW3 and PW6, and the fact that the sample was handed to Amani Samwel instead of PW2, the analyst who eventually issued Exhibit P5.

I should state here and now, that establishment of chain of custody constitutes an imperative obligation by the prosecution, and that failure to do so, especially in drug trafficking cases is fatal. This means that, where

the chain is proved to have been broken, the inevitable consequence is that proof of the case against the accused person becomes a serious challenge. (See: ***John Joseph @Pimbi v. Republic,*** CAT-Criminal Appeal No. 262 of 2009; and ***Majid John Vicent @ Mlindangabo & Another v. Republic,*** CAT-Criminal Appeal No. 264 of 2006; (both unreported). In ***Majid John Vicent @ Mlindangabo*** (supra), it was held:

> *"...Indeed that would help in allaying any fears about the "chain of custody" in handling the exhibit before its production in evidence at the trial. We say so because presumably in the course of tendering the exhibit PW4 would have been in a better position to tell the court how it was handled from the date of the appellants arrest to the date of its production in evidence at the trial such evidence would have been important in ascertaining whether or not there was any possibility of tampering with the exhibit in the process..."*

The rationale for all these stringent requirements is to ensure that handling of exhibits is a foolproof process that does not allow the possibility of manipulation or tampering to the accused person's detriment. It is why courts grant benefit of doubt to the accused person whenever it is evident that the chain of custody was broken. This was accentuated in the case of

The Director of Public Prosecutions v. Shirazi Mohamed Sharif, CAT-Criminal Appeal No. 184 of 2005 (unreported). It was held:

> *"Compliance with internal procedures was essential to ensure that the movement of tablets was monitored to exclude the possibility of tampering of the evidence to the detriment of the respondent. We would like to stress the fact that we do not question the credibility of the witnesses up to the time they witnessed the respondent excreting the tablets/capsules from his bowels.* ***What we are saying is that the whereabouts of the tablets/capsules was not accounted for about five days and no explanation has been forthcoming from the prosecution witnesses****. This is certainly not a minor irregularity as the learned trial magistrate would make us believe .... We entertain doubts that the prosecution proved its case to the required standard in criminal cases.* ***The benefit of doubt must go to the respondent****."* [Emphasis added]

The testimony of PW1 is to the effect that, after the vehicle had been impounded and conveyed to the police station on 27th January, 2021, the accused persons were consigned to a cell where they spent a night, leaving everything in the vehicle, until the time, in the following day, when search and eventual seizure was done. PW5 has also testified that he was invited to witness the search on 28th January, 2021, and found the vehicle at the

police station. PW1 did not give a convincing explanation on the safe guards that were put on the consignment during the time the vehicle was placed in the control of the police and before search and seizure were done.

There is also an issue with respect to Exhibit P8 which was released from the custodian on 4th March, 2021 and handed to PW3 D/Sgt. Mohamed, only to be handed to PW6 on 24th May, 2021. Nothing is known on what happened during the period of more than two months within which the said exhibit was out of the PW7's custody. As if this was not enough, there is a serious doubt on the security of Exhibit P8 when PW6 handled it between 24th May, 2021 when he was handed it and 25th May, 2021, when he finally conveyed it to GCLA. The cumulative effect of these lapses is to cast a serious and legitimate doubt that chain of custody was not sufficiently explained, drawing a conclusion that the same was broken. Based on the decision in ***The Director of Public Prosecutions v. Shirazi Mohamed Sharif*** (supra), I am constrained to hold that the benefit of doubt is granted to the accused persons.

Overall, I am of the settled view that the prosecution has failed to prove the case against the 1st, 2nd and 3rd accused persons. Like the 4th accused persons, I hold them not guilty of the offence of trafficking in

narcotic drugs. Accordingly, I acquit them and order that they should be immediately released, unless held on other lawful reasons.

It is also ordered that the narcotic drugs be immediately destroyed and in full participation of the Court and relevant law enforcement agencies. It is further ordered that vehicle with Registration Number T.465 DQJ and its trailer with Reg. No. T.143 DEM (collectively admitted as Exhibit P4) be immediately confiscated and be the property of the Government of the United Republic of Tanzania.

Order accordingly.

Right of appeal duly explained to the parties.

DATED at **DAR ES SALAAM** this 24th day of July, 2023.

M.K. ISMAIL
JUDGE
24.07.2023