IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 28 OF 2021

REPUBLIC

VERSUS

JUMA ANDREW WILSON @ KIPARA

MSENGA RAMADHAN ALLY

JUDGMENT

9th February, & 3rd March, 2023

ISMAIL, J.

The accused persons, **Juma Adrew Wilson @ Kipara** and **Msenga Ramadhan Ally,** being the 1st and 2nd accused persons, respectively, are jointly charged with the offence of trafficking in narcotic drugs, in contravention of the provisions of section 15 (1) (a) and (3) (iii) of the Drugs Control and Enforcement Act, Cap 95 R.E. 2019 ("DCEA"), read together with paragraph 23 of the First Schedule to the Act, and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act, Cap. 200 R.E. 2019 ("EOCCA").

Facts constituting the duo's alleged wrong doing are gathered from the information filed in Court on 13th October, 2022, and read over to the

accused persons at the Preliminary Hearing conducted on the 20th April, 2022. These facts revealed that the narcotic drugs constituting the subject matter of these trial proceedings were allegedly recovered from the accused persons.

Vide the said Information, the prosecution alleged that on 8th September, 2020, at Makurunge Mji Mpya area, along Bagamoyo-Msata road within Bagamoyo District, in Coast Region, the accused, jointly and together, trafficked in narcotic drugs, namely *Cathaedulis* (Mirungi). The drugs weighed 51.89 kilograms and were aboard a motor vehicle with registration number T.376 DFC, make Golden Dragon. Both of the accused persons pleaded not guilty to the charged offence, necessitating conducting of the trial. Noteworthy, as well, is the fact that, at the preliminary hearing held on 20th April, 2022, save for names and the fact that the accused persons were arraigned in court on allegations of trafficking in narcotic drugs, the rest of the facts read out to them were disputed.

The trial proceedings pitted Mr. Clemence Kato, Ms. Rose Ishabakaki and Gladness Mchami, all learned State Attorneys, for the prosecution, against Ms. Mwanahamisi Kilongo and Simba Kipengele, for 1st and 2nd accused persons, respectively.

At the trial, eight exhibits were tendered and admitted. These are Seizure Certificate (***Exhibit P1***); Inventory (***Exhibit P2***); Letter from Tanzania Revenue Authority (TRA) (***Exhibit P3***); Forensic Laboratory Submission Form (***Exhibit P4***); Sample Receipt Notification (***Exhibit P5***); Government Laboratory Analysis Report (***Exhibit P6***); Motor Vehicle with Registration No. T376 DFC (***Exhibit P7***); and Exhibit Register (***Exhibit P8***). Seven witnesses testified for the prosecution, against two for the defence. Those who showed up for the prosecution were: F. 6905 CPL. Francis who featured as PW1; Vedastus Peter Mwaria (PW2); Bryton Mwendi Ernest (PW3); G.1918 D/CPL Emmanuel (PW4); Faustine Gololi (PW5); PF. 23120 A/Insp. Gidion Peter (PW6); and E. 3325 D/Sgt. Amani (PW7). Those that featured for the defence were the accused persons themselves.

The abridged substance of the prosecution's testimony has it that, on 8th September, 2020, PW1 was stationed at Makurunge area within Bagamoyo District, along with G.5174 PC Hamis. At around 12.30 pm they waved and stopped a vehicle with registration No. T376 DFC, a bus owned by Tashrif Company. The bus plies between Tanga and Dar es Salaam, and it was accused of overtaking another vehicle at a prohibited area of the road. After stopping, the conductor of the bus alighted. He was instructed to call his driver who was to be informed of the traffic offence he was

involved in. Being alarmed by the heaviness of the bus, the police officer grew suspicious and ordered a search. Five boxes, closed in a khaki material were recovered. On interrogation, it was revealed that the substance in the impounded boxes was, in fact, narcotic drugs called Khat. Police officers got into the bus and enquired about the owner of the boxes but none of the passengers owned up to it. Ultimately, the boxes were seized, vide Exhibit P1 which was signed by Sharifu Omary, Patricia Thadei and the accused persons. Subsequent thereto, the 2nd accused person was allowed to proceed to the final destination of their trip. The 1st accused was put under restraint.

The seized substance was handed to PW7 who registered it in Exhibit P8. On 11th September, 2020, PW4 handed the seized boxes to PW6 the latter of whom took them to the Government Chemist. The boxes, which contained 42 bundles of leaves, were accompanied with a transmittal letter and a Sample Submission Letter (Exhibit P4). PW5, who received the bundles, weighed them before he conducted an analysis that returned a verdict that the leaves were narcotic drugs known, in chemical parlance, as *Cathaedulis*, commonly known as Khat, or Mirungi, in Kiswahili. They weighed 51.89 kilograms. These findings were contained in Exhibit P6. The boxes were handed over to PW4 for onward submission to PW6. The latter stored them before PW7 took them to the District Court of Bagamoyo

District where PW2 ordered and supervised destruction of the seized substance. Regarding Exhibit P7, the prosecution was heard saying that findings from Tanzania Revenue Authority revealed that the owner was Tashrif Trans.

Conclusion of the prosecution's case saw the Court find both of the accused persons with a case to answer. This necessitated extension of the Court's invitation to the accused persons to defend themselves with a view to exculpating themselves from the alleged wrong doing. They chose to offer their defence testimony on oath and affirmation. They neither called other witnesses nor did they tender and documentary or physical testimony.

Their defence testimony was composed of a denial to any involvement in the charged offence. While admitting that they were in the bus that plied between Tanga and Dar es Salaam, and that they were stopped; the bus searched, and boxes unloaded from the boot of the bus to Toyota Brevis vehicle, they were fervently opposed to any suggestion that they were aware of what was in the boxes or that the same belonged to them. They took the position that they were not involved in loading any luggage into the bus as that is done by porters and in their absence. Their role was limited to running the bus to its final destination while delivery of the luggage to customers was done at the offices of the bus.

Regarding action taken subsequent to seizure of the boxes, DW1 and DW2 were unanimous that DW2 was allowed to travel to Dar es Salaam while DW1 was put under restraint. DW2 was to be joined in the proceedings on 13th October, 2020, following his incarceration the day earlier. In general terms, the accused persons distanced themselves from the accusation and prayed for their acquittal.

It is customary, in criminal trials, that once evidence of the prosecution and that of the defence is heard and taken, the court must first determine if evidence adduced by the prosecution has done enough or has what it takes to prove charges leveled against the accused, at the standard set for proof of criminal charges *i.e.* beyond reasonable doubt. This position takes into consideration the fact that, in criminal cases, conviction of the accused person must only be based on the strength of the prosecution's case and not on the weakness of the accused person's defence (See: ***Mohamed Haruna @ Mtupeni v. Republic***, CAT-Criminal Appeal No. 25 of 2007 (unreported)).

In the instant case, ascertainment of that factual and legal position requires answering of the broad question which is, whether there is any evidence to lead to an inference of guilt against the accused. Disposal of this grand question will be preceded by resolution of three crucial questions. These are:

(i) Whether the bundles contained in the seized boxes were narcotic drugs;

(ii) Whether search and seizure of boxes containing 42 bundles of narcotic drugs was regularly conducted; and

(iii) Whether chain of custody of the exhibit constituting the subject matter of these proceedings was maintained.

The testimony of PW5 answers the first question in the affirmative. This witness gave a blow by blow account on how the substance, brought from PW4, was received, registered and given Lab No. 2596/2020, weighed, samples extracted and analyzed. PW5 testified that the analysis produced a result which was contained in the Analysis Report (Exhibit P6) that concluded that the samples had chemicals known as *Cathine* and *Cathinone*. These are narcotic ingredients which were found in the seized bundles. The testimony of PW5 and Exhibit P6 bring out a unanimous verdict that the 51.89 kilograms of the seized bundles were narcotic drugs known as khat. This testimony has not been contradicted by any other testimony and, guided by the reasoning in the case of ***Sylvester Stephano v. Republic***, CAT-Criminal Appeal No. 527 of 2016 (unreported), this expert opinion has done what is necessary in helping me to form an independent judgment that disposes of this issue in the affirmative.

The next question requires the Court to pronounce itself on the propriety or otherwise of the search and seizure of the substance believed to be narcotic drugs. Evidence on this subject is mainly that of PW1 and corroborated by Exhibit P1. The narration by PW1 is that search and seizure of the boxes containing the drugs was done at Makurunge, and that this event was witnessed Sharifa Mohamed and Patricia Thadei both of whom appended their signatures on Exhibit P1. The testimony by PW1 is that the search was conducted on an emergency basis. While Exhibit P1 built the impression that the boxes were opened at the scene of the crime and in the full glare of the witnesses, what came out is that none of the witnesses saw the boxes when they were opened. This is precisely because these boxes were opened at the police station where neither of the witnesses were present to witness the opening.

What is evident is that those that purport to have appended their signatures on Exhibit P1 were not at the police station, where the boxes were opened and bundles unpacked. This implies that the purported certificate of seizure has signatures of persons who did not witness it and, since the form was filled at a place other than the scene of the crime, the same is as bad as it can get. It is in mould of seizure certificates whose filling and signing were abhorred in the case of ***David Athanas @ Makasi***

& Another v. Republic, CAT-Criminal Appeal No. 168 of 2017 (unreported), wherein it was held:

> *"…. the certificate of seizure ought to have been signed at the place where the search was conducted and in the presence of an independent witness."*

It is common knowledge that any seizure of items is preceded by a search, conducted in terms of the provisions of the CPA. In the case of emergency searches, the applicable provision is section 42 (3) of the CPA which guides that the search must be conducted at the scene of the crime and overseen by an independent witness. It is this same witness who eventually appends his signature on the seizure certificate, in this case Exhibit P1. As stated earlier on, the testimony reveals that, whilst the boxes were recovered from the vehicle at Makurunge, the rest of the processes, including the seizure, were conducted at Bagamoyo Police Station.

Learned defence counsel has decried the speaking failure, by the prosecution, to lead in evidence which would prove that these imperative requirements of the law were conformed to. In her view, this amounted to failure to call material witnesses and called upon the Court to draw an adverse inference against the prosecution. She premised her arguments on the holdings in the cases of ***Samwel Japhet Kahaya v. Republic***, CAT-

Criminal Appeal No. 40 of 2017; and ***Boniface Kandakira Tarimo v. Republic***, CAT-Criminal Appeal No. 350 of 2008 (both unreported). As I subscribe to learned counsel's view, I wish to cement this position with a captivating view, set in the case of ***Jibril Okash Ahmed v. Republic***, CAT-Criminal Appeal No. 331 of 2017 (unreported), in which the upper Bench held as follows:

> *"It is an obvious fact that an independent witness is important because he is able to provide independent evidence. However, for the requirement to be absolute and indispensable, it should be backed by law. 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 need of an independent witness to sign the seizure certificate if present. That is the legal position."*

It is my conviction that the issue that relates to search and seizure of the boxes that constitute the subject matter of this case was bungled, and it cannot be said that the said search and seizure were conducted regularly. In my view, the entire process left a lot to be desired, and the net effect of all this is to hold the answer to the second issue is in the negative. The search and resultant seizure were irregularly conducted.

Before I delve into the discussion on the third issue, it behooves me to throw a line or two on the apparent variance between the testimony of PW1 and contents of Exhibit P1, and what they portend. In my own assessment, the variance is colossal and reduces the potency and veracity of the testimony adduced with respect to the manner in which the search and seizure of the said drugs was done. The disharmonious message conveyed by these pieces of testimony is irreconcilable and has the effect of corroding the central story. Discrepancies pointed out are not modest or trifling and, as such, the same are neither ignorable nor of little or no consequence. When that happens, the settled position of the law is to have the same disregarded. This has been held in a multitude of court decisions.

In ***Luziro s/o Sichone v. Republic***, CAT-Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal of Tanzania observed:

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which count."*

Significantly, the position in the foregoing took an inspiration from the superior Bench's another fabulous decision in ***Disckson Elia Nsamba Shapwata & Another v. Republic***, CAT-Criminal Appeal No. 92 of 2007

(unreported). In arriving at the conclusion, the following passage was quoted from ***Sarkar's Code of Civil Procedure Code***:

> ***"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time,*** *due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person.* ***Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do.***" [Emphasis added]

See also: ***Mukami w/o Wankyo v. Republic*** [1990] TLR (CA); and ***Bikolimana s/o Odasi @ Bimelifasi v. Republic***, CAT- Criminal No. 269 of 2012 (unreported).

The gravity of these discrepancies emboldens my resolve to find and hold that the seizure alleged to have been done at the scene of the crime and allegedly witnessed by the two witnesses was not seizure that meets the test set out in the law. Accordingly, the same is censured and the conclusion is that this issue is answered in the negative.

Moving on to the third issue, the Court is called upon to determine the issue of chain of custody of the seized substance, and the question is whether the same was observed in the handling of the narcotic drugs allegedly recovered from the accused persons. While I am not oblivious of the fact that lapses in the chain of custody have the potential of denting the chain of custody, a closer look at the manner in which the said substance was handled remains a crucial component that deserves a little space in this decision. The evidence relied upon by the prosecution is that of PW1, PW2, PW4, PW5, PW6 and PW7, and documentary testimonies constituting Exhibits P1, P2, P4, P5 and P8. PW1 has stated that he was oblivious of what was contained in the seized boxes. It was not until they got to the police station, and boxes opened that he got to know that they were a substance suspected to be narcotic drugs. He handed them to an officer in charge of CRO.

There is also a testimony of PW7, the investigator of the case, who received the boxes from a certain CPL Wilson who works at CRO, and that the former handed the boxes to PW6. Whereas the said drugs were seized on 8th September, 2020, PW6 testified that he received them on 9th September, 2020. From this set of factual account there arises a few questions. One, why did it take many hours (a full day) to have the drugs handed to PW6? Two, where were they kept prior to delivery to PW6 and

in which state? Three, are we sure that there was no tempering with the said substances during the period between seizure and handing over to CRO? Four, who is this CRO officer to whom the drugs were handed? Five, why wasn't he procured and offered for testimony in court?

In general, it is fair to argue or contend that no shred of evidence was led by the prosecution to prove that chain of custody was upheld or conformed to in this case. There clearly appears to be a missing link between what PW1 did and the role that PW7 played. While it was testified that PW1 handed the boxes to CPL Wilson the latter of whom subsequently handed them to PW7, there is no evidence on whether these boxes were actually handed to him by CPL Wilson or any other person from CRO, and when! This would gain clarity had CPL Wilson, or whoever was in charge of CRO, been called to testify on the fact. Absence of that testimony leaves some serious uncertainties on how the exhibit in question changed hands from PW1 to PW7.

That the entire chain of handlers must be involved in establishing the chain of custody is a settled matter. The prosecution is cast with a duty of making sure that evidence that reveals the entire chain of handling exhibits testifies on the changing of hands of the exhibits. In the case of ***Abuhi Omari Abdallah & Others v. Republic***, CAT-Criminal Appeal No. 28 of

2010 (unreported), the Court of Appeal of Tanzania made the following observation on the subject:

> *"The absence of the evidence of Kenyela, Linus, the undisclosed cleaners, tester and the post office man, totally destroyed the essential chain of custody of the said pellets. This leads to a strong and irresistible suspicion that those pellets might have been tempered with. It was not for the defence to justify the suspicion. It was for the prosecution to bring cogent evidence to dispel or rule out these lingering reasonable doubts or suspicions. Settled law is to the effect that in such a situation, an accused person is entitled as a matter of right, to the benefit of the doubt or doubts."*

Significantly, the quoted excerpt highlights what is already a well-established position with regards to chain of custody and the significant role it plays in criminal prosecution. Multitude of the decisions of this Court and the Court of Appeal of Tanzania emphasize on this indispensable requirement. The holding in ***The Director of Public Prosecutions v. Shirazi Mohamed Sharif***, CAT-Criminal Appeal No. 184 of 2005 (unreported), reiterates the mighty importance of this settled position. It was held as follows:

> *"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."

The totality of all this leaves me with the conclusion that the prosecution's evidence failed the test that what is said to have been seized from the accused persons and found to constitute narcotic drugs was free from human interventions that would make them susceptible to tempering in an injurious manner to the accused persons.

As I pen off, I feel heavily indebted to remark on the arguments raised by counsel regarding the accused persons' involvement in handling of the luggage loaded in the bus they were serving in. The contention by the defence is that, while boxes were found in the bus (Exhibit P7) in which they were working, they were neither aware of their presence nor were they in the knowledge of what was contained therein. Both of the accused

persons have testified that the loading and unloading of the luggage is done by the porters that are hired by the bus owner and, in the case of the said boxes, both found them loaded alongside other luggage.

The prosecution was far from convinced by this contention. Its counsel has taken the view that the 1st accused was in control of the boot into which the boxes were loaded, meaning that he was aware of the presence of the boxes. The argument was cemented by several decisions. These were: ***Yanga Omari Yanga v. Republic***, CAT-Criminal Appeal No. 132 of 2021; ***Song Lei v. DPP & DPP v. Xiao Shaodan & 2 Others***, CAT-Consolidated Criminal Appeal No. 16A of 2016 & 2017; and ***Nyerere Nyegue v. Republic***, CAT-Criminal Appeal No. 67 of 2010 (all unreported).

While the prosecution's argument is impressive and makes some plausible sense, that plausibility alone would not be enough for the prosecution to carry the day. The prosecution ought to have gone a step further and lead in evidence that would prove the accused's knowledge of the boxes and contents thereof, and that the loading of the boxes was part of their responsibility. That would be done by either the owner of the bus or any of the accused's superiors at their place of work. This was not done, leaving the prosecution's case fairly bruised and lacking the necessary cutting edge that would serve as the basis for conviction. The question of

awareness plays a vital role in cases involving possession of illegal items. In the case of ***Moses Charles Deo v. Republic*** [1987] TLR 134, it was held:

> *"for a person to be found to have had possession, actual or constructive, of goods it must be proved either that he was aware of their presence and that he exercised control over them, or that the goods came albeit in his presence, at his invitation and arrangement."*

As I find the accused persons not guilty of the offence they are charged with, I feel compelled, in a profound way, to conclude by quoting the reasoning of Lord Reid ***S (an infant) v. Manchester City Recorder and Others*** [1969] 3 All E.R.1230, when he aptly stated as follows:

> *"the desire of any court must be to ensure so far as possible that only those are punished who are in fact guilty.* ***The duty of a court to clear the innocent must be equal or superior in importance to its duty to convict and punish the guilty. Guilt may be proved by evidence...."*** [Emphasis added]

Finding that the accused persons' blemished conduct has not been sufficiently established, I consider them innocent and choose to clear both of them. Consequently, I find the accused persons not guilty and I acquit them from the charged offence. Accordingly, I order that they be

immediately set free, unless held for other lawful reasons. It is ordered that Exhibit P7, the bus from which the narcotic drugs were recovered should be returned to the owner.

Order accordingly.

Right of appeal duly explained to the parties.

DATED at **DAR ES SALAAM** this 3rd day of March, 2023.

M.K. ISMAIL

JUDGE

03.03.2023