

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
CORRUPTION AND ECONOMIC CRIMES DIVISION**

**AT ARUSHA**

**ECONOMIC CASE NO. 1 OF 2023**

**THE REPUBLIC**

**VERSUS**

**OLAIS SAMBEKE NDAPWALI**

**JUDGMENT**

12<sup>th</sup> and 22<sup>nd</sup> December, 2023

**KISANYA, J.:**

The accused person, Olais Sambeke Ndapwali faces a charge of trafficking in narcotic drugs which is predicated under section 15 (1) (a) and 3(iii) of the Drug Control and Enforcement Act, Cap. 95, R.E. 2019 ("the Drugs Act") as amended by section 18 of the Written Laws (Miscellaneous Amendments) (No. 5) Act No. 9 of 2021 read together with paragraph 23 of the 1<sup>st</sup> Schedule to, and sections 57 (1) and 60(2) of the Economic and Organized Crime Control Act, Cap. 200, R. E., 2019 (the EOCCA).

The allegation is that, on 23<sup>rd</sup> day of May, 2022 at Lenglong area within Monduli District in Arusha Region, the accused person was found trafficking in narcotic drugs namely, cannabis sativa commonly known as bhanghi weighing 500 kilograms. He pleaded not guilty to the information

The trial unfolded with the prosecution being represented by a team of learned State Attorneys, namely, Ms. Upendo Shemkole, Ms. Lydia Miyaye, and Ms. Neema Mwijage. On the opposing side, Mr. Michael Lengtambi, learned advocate, represented the accused person.

The prosecution sought to prove its case through the testimonies of six (6) witnesses and eleven (11) exhibits, all of which were admitted in evidence. In contrast, the defence side relied on the evidence of two (2) witnesses, including the testimony of the accused person.

The events leading to this case are evident from the evidence presented by both sides as follows: On the 21<sup>st</sup> of May, 2022, Insp. Wamba (PW2) received a tip from an undisclosed informant indicating the presence of an individual involved in the business of narcotic drugs at Ngaramtoni Market. Acting on that information, PW2, accompanied by fellow officers, including WP7631 CPL Zuweni (PW4) and H8843 D/C Optatus (PW6), successfully apprehended the accused person at Ngaramtoni Market around 1800 hours.

During subsequent interrogation conducted by PW2, the accused person confessed to possessing twenty (20) sulphate bags of cannabis sativa (bhangji), claiming they belonged to a friend. Further investigations unveiled

that the said bags, containing cannabis sativa, were stored in the accused person's house at Lenglong village within Monduli District.

On the 22<sup>nd</sup> May 2022, PW2 proceeded to Monduli police post, where the Officer in-Charge of the Police Station (OCS) issued him a search order (PF 91). In light of the quantity of sulphate bags mentioned by the accused person and the geographical location of Lenglong village, PW2 devised a plan to dispose of the narcotic drugs within that village. Recognizing the significance of presence of the stakeholder, he intended to bring both a State Attorney and a magistrate along. However, only the State Attorney, Janeth Masonu, was available, and despite efforts, they were unable to locate a magistrate. Responding to PW2's directive, additional police officers from Arusha joined the operation team, equipped with a weighing scale.

Around 2330 hours, PW2 led an operational team that departed from Monduli to Longlong village. Upon arrival at 0600 hours, they discovered that the villagers had evacuated the area. The accused person took the team to his compound (boma). In the presence of an independent witness named Saning'o Laizer, whose witness statement was admitted as Exhibit P11, PW2 conducted a search in the accused person's house. Subsequent to that search, twenty (20) sulphate bags containing fresh leaves suspected to be

cannabis sativa were found in the bedroom. The said bags were seized and documented via a certificate of seizure, signed by PW2 and the independent witness. The accused person affixed his thumbprint to the certificate of seizure. The search order and certificate of seizure were officially tendered and admitted in evidence as Exhibits P2 and P3, respectively.

Following the seizure, PW2 carefully labeled each sulphate bag from "1" to "20." He then proceeded to weigh each sulphate bag, and collectively, they totalled 500 kilograms. PW2 took two samples from each sulphate bag, resulting in a total of 40 samples. These samples were carefully packed into 40 envelopes, each appropriately marked. Throughout the sampling process, PW2 completed 20 sampling forms, with each form corresponding to two samples drawn from one sulphate bag. To substantiate this evidence, PW2 tendered twenty (20) sampling inventory forms, which were collectively admitted in evidence as Exhibit P5.

Subsequent thereto, the substances in the sulphate bags seized from the accused person were disposed of through burning. PW2 kept the empty sulphate bags. That was after filling an inventory of seized exhibits for disposal. He also completed a certificate of destruction in which, the substances suspected to be narcotic drugs were recorded to have been

destroyed. The certificate of destruction was signed by the State Attorney, Janeth Masonu. It was admitted in evidence as Exhibit P7.

Later on, PW2, along with the operation team, proceeded to Monduli District Court. There, he briefed the Resident Magistrate, Patricia Kisinda (PW3) on the details of the operation. Based on the information provided by PW2, PW3 endorsed the inventory of seized exhibits for destruction (Exhibit P6). A few days later, PW3 certified the photographs purportedly taken during sampling and destruction of exhibits.

Following the meeting with PW3, PW2 headed to Arusha Central Police Station. He handed 20 empty sulfate bags and 40 envelopes containing samples over to PF 23258 A/Insp. Secilia (PW1), who served as an exhibit keeper. The said handing over was documented through a court exhibit register (PF16) and a chain custody form. PW1 registered the exhibits in PF16 under Entry No. 90/2022. A certified copy of Entry No. 90/2022 of PF16 was presented and admitted in Court as Exhibit P1.

On 26<sup>th</sup> May 2022, PW4 collected forty (40) samples of dry leaves suspected to be cannabis sativa for analysis. She dispatched the said samples to GCLA - North Zone in Arusha. Erasto Mbalamwezi Laurance (PW5), a chemist, received the samples from PW4. Upon receipt, PW5 weighed and

registered the samples as NZL 611/2022. He acknowledged the receipt by signing the sample submission form No. DCEA 001 (Exhibit P8) and the sample receipt notification form (Exhibit P9), both of which were issued to PW2.

Subsequently, PW5 conducted the analysis and confirmed that the samples were indeed narcotic drugs, namely cannabis sativa, commonly known as bhang. In support of this testimony, PW5 tendered in evidence, a Government Chemist Report dated 08/06/2022 (Exhibit P10).

Following the closure of the prosecution's case, the Court found that the accused person had a case to answer. He was then called upon to present his defence.

The accused person, appearing as DW1. He asserted that his name is Olais Sambeke and not Olais Sambeke Ndapwali. He vehemently denied any involvement in the alleged trafficking of narcotic drugs. While admitting to being arrested on the 21<sup>st</sup> May 2022 at Ngaramtoni market, DW1 disputed the assertion that he was found in possession of narcotic drugs. According to his testimony, he identified himself as a resident of Emselegi Village within Monduli District, not Lengilong village where the narcotic drugs were purportedly discovered.

DW1 further contended that, following his arrest, he was taken to an unfamiliar village where he claimed to have been subjected to physical torture and coerced into signing certain documents. Finally, the accused person appealed to the Court to find him not guilty and acquit him of the charges.

Ndigwa Naitishe (DW2) testified that he was with the accused person when the latter was arrested at Ngaramtoni market on the 21<sup>st</sup> May 2022. According to DW2, the arresting officers did not disclose the reasons for apprehending the accused person. It was only three days later that they learned of the allegations against the accused person, as trafficking in narcotic drugs. DW2 contended that the accused person was a resident of Emselegi village and engaged in the business of cattle, not narcotic drugs.

Having considered the evidence presented by both sides, the primary issue to be determined is whether the case against the accused person has been proven. In criminal cases, the prosecution is duty bound to give evidence that establishes, beyond a reasonable doubt, all elements of the offence charged. If the burden shifts to the accused person, the standard of proof is on the balance of probabilities. It is crucial to note that, the accused person is not obligated to prove his innocence, and any conviction must be based on the strength of the prosecution's case and not the weaknesses in

the defence. This principle was illustrated in cases such as **R vs. ACP Abdallah Zombe & 12 Others**, HC-Criminal Sessions Case No. 26 of 2006 (DSM-unreported).

The offense of trafficking in narcotic drugs, as outlined in the charges against the accused, is governed by section 15(1)(a) and (3) (iii) of the Drugs Act as amended by Act No. 9 of 2021. To prove this offence, the prosecution must prove that, the accused person trafficked in narcotic drugs; and that the where the narcotic drugs under consideration is cannabis sativa, the quantity of cannabis sativa exceeded one hundred kilograms.

In light of the stated position of law, the particulars of the offence, and the available evidence, the issue whether the prosecution has effectively proven its case revolves around three issues as follows: *Firstly*, whether the accused person was found in possession of twenty (20) sulphate bags containing substances suspected to be narcotic drugs. *Secondly*, whether the substances found in the said bags were cannabis sativa. *Thirdly*, whether the weight of cannabis sativa reached 500 kilograms.

First for consideration is the issue whether the accused person was in possession of twenty (20) sulphate bags containing substances suspected to be narcotic drugs. The arresting and seizing officer, PW2, testified that the



accused was apprehended at Ngaramtoni market. Following interrogation, the accused confessed to harboring twenty sulphate bags of cannabis sativa in his residence, attributing ownership to a friend. Subsequently, PW2, armed with a search order (Exhibit P3), conducted a search at the accused person's house at Lenglong area. The search transpired in the presence of an independent witness, Sening'o Laizer, as attested by both PW2 and PW6. This sequence of events forms a critical juncture in determining the veracity of the accusation regarding the accused person's possession of the specified narcotic substances.

Considering that PW2 obtained a search order at the police station, this court finds that the search and seizure were conducted in accordance with section 38 of the Criminal Procedure Act, Cap. 20, R.E. 2022 (the CPA). In line with subsection (3) of this provision, a certificate of seizure is required to be signed, among other parties, by the person who witnessed the search, if such a witness was present.

In the present case, PW2 testified that he discovered 20 sulphate bags containing fresh leaves suspected to be bhangi in the bedroom, which were subsequently seized. The seizure process involved the issuance of a certificate of seizure, listing the items confiscated from the accused person. PW2 stated

that, Sening'o Laizer signed the certificate of seizure, and the accused person affixed his thumbprint. To corroborate this account, PW2 tendered both the search order and certificate of seizure, Exhibits P3 and P4 respectively. However, Sening'o Laizer failed to appear as a witness, with the prosecution attributing his absence to being untraceable. In light of this, the prosecution tendered his witness statement (Exhibit P11) under section 34B of the Evidence Act [Cap. 6, R.E. 2022].

Upon careful examination of the contents of Exhibits P3, P4, and P11, this Court has noted that they bear the signature of the sole witness to the search, Sening'o Laizer. In the exercise of its powers under section 75(1) of the Evidence Act (supra), the Court has undertaken a comparative analysis of the signatures to verify their consistency. Following this scrutiny, the Court finds that the signature of Sening'o Laizer on Exhibits P3 and P11 markedly differs from the signature on Exhibit P4. This disparity is deemed a critical flaw in the case. Considering the accused person's denial of possessing narcotic drugs, this discrepancy raises concerns about the reliability of PW2's assertion that the alleged substances were indeed found in the possession of the accused.

Further to the foregoing, the accused person purportedly admitted to storing twenty (20) sulphate bags containing narcotic drugs at his residence and guided the officers to the location where the substances were seized. However, the accused person's cautioned statement, containing his admission, was not tendered as evidence. Consequently, it was not proved that the house, where the sulphate bags were discovered and seized, unequivocally belonged to the accused person. This becomes particularly significant considering the absence of testimony from local leaders, neighbors, or village members attesting to the ownership of the implicated house by the accused. The mere fact that villagers were found to have fled from the village did not automatically bar the gathering of evidence regarding the house's ownership. Notably, there is no indication that efforts were made to collect such evidence subsequent to the seizure.

In light of the preceding consideration, the Court finds that there is insufficient evidence to establish, beyond a reasonable doubt, that the accused person was in possession of twenty sulphate bags containing fresh leaves suspected to be cannabis sativa. This finding is reinforced by the fact that, following his arrest on 21/05/2022, the accused person remained under the custody of PW2. And as the search was conducted two days later on,

23/05/2022, he lacked control over the events transpiring at his residence during when he was under the custody.

Even if one were to affirm the first issue, the second issue arises concerning, whether the substances within the sulphate bags were indeed narcotic drugs namely, cannabis sativa. According to established legal principles, the analysis of substances suspected to be narcotic drugs falls within the mandate of the GCLA. This position was underscored in the cases of **Omary Said Athumani vs R**, Criminal Appeal 58 of 2022, 2022 TZCA 270 (Tanzlii), and **Charo Said Kimilu vs R**, Criminal Appeal No. 111 of 2015 (unreported).

The prosecution contends that the substances suspected to be narcotic drugs were disposed of, as evidenced by Exhibits P6 and P7. Prior to their destruction, two samples were extracted from each of the sulphate bags allegedly found in the possession of the accused person's house. These samples remained in the custody of PW2 until they were handed over to PW1. On 26/05/2022, PW4 retrieved the samples from PW1 for submission to the GCLA. Subsequently, she submitted the samples to GCLA-Arusha, where PW5, a chemist, received them through Exhibits P8 and P9. The findings of PW5's analysis, as documented in the Government Chemist Laboratory Report

(Exhibit P10), confirm that the samples indeed comprised narcotic drugs namely, cannabis sativa. And pursuant to section 48A(2) of the Drugs Act, unless successfully rebutted, the evidence of facts outlined in Exhibit P10 is deemed conclusive.

The Court has thoroughly examined whether the process leading to the analysis (as per Exhibit P10) and the subsequent destruction of narcotic drugs adhered to the stipulations of the law. According to Section 36(1) of the Drugs Act, the Drug Control and Enforcement Authority (DCEA) is vested with the authority to dispose of narcotic drugs. This authority is exercised when there is a perceived vulnerability to theft, substitution, constraints related to proper storage or space, or other considerations.

In conformity with this provision, the seizing officer handling the narcotic drugs is required to prepare an inventory documenting various details, including the description, quantity, mode of packing, marks, and numbers of the narcotic drugs. The inventory should further take in particulars facilitating the identification of the narcotic drugs, details regarding the packaging, country of origin, and any other information essential to establish the identity of the narcotic drugs. The foregoing statutory framework underscores the necessity for documentation in the handling,

analysis, and disposal of narcotic substances, ensuring compliance with legal procedures and safeguarding the integrity of the process

Furthermore, section 36(3) of the Drugs Act delineates additional procedures that the seizing officer must adhere to. According to this provision, the seizing officer is mandated to submit an application to a magistrate for the purpose of: (a) certifying the correctness of the inventory; (b) overseeing the capturing of photographs of the narcotic drugs in the officer's presence; and (c) permitting the drawing of samples of the narcotic drugs, with the magistrate certifying the correctness of any list of samples drawn. However, the requirement for the magistrate's presence during the taking of photographs and the drawing of samples may be dispensed with only in cases where it is impracticable to secure the presence of the magistrate. It is clear that, the stated requirement ensures judicial oversight in the process. Thus, there is a need for certification by a magistrate to ensure the accuracy and integrity of the inventory, photographs, and samples of the seized narcotic drugs.

In our case, it is evident that PW2 did not seek the certification of the correctness of the inventory, as required by section 36(3)(a) of the Drugs Act.

This non-compliance raises doubt about the procedural adherence in handling the seized narcotic drugs.

Moreover, the contents of the inventory of seized exhibits for the disposal (Exhibit P6) suggest that the magistrate (PW3), issued an order for the disposal of the narcotic drugs. Such evidence in Exhibit P6 contradicts the testimony of PW2, PW3, PW4, and PW6, who state that the suspected narcotic drugs were destroyed in the absence of the magistrate (PW3). The inconsistency is significant; especially considering that section 36(5) of the Drugs Act mandates the trial court to treat the inventory as primary evidence. Therefore, the stated contradiction is not trivial. It introduces doubt regarding the accurate account of the whereabouts of the narcotic drugs central to this case. Consequently, the Court deems this contradiction not only substantial but also indicative of a violation of the law in obtaining Exhibit P6.

It is further not disputed that the samples were taken in the absence of the magistrate. The crucial question remains unanswered: was it impracticable to secure her presence during the sampling process? This critical question was left unaddressed by PW2. According to him, he encountered the magistrate when meeting the Officer Commanding Station (OCS) on 22/05/2022 at 10:30 pm, a time that preceded the seizure of the

alleged narcotic drugs. As stated earlier on, section 36(3) of the Drugs Act specifies that the application to the magistrate or his/her presence is necessary once the narcotic drugs have been seized.

Given that the drugs were seized in the morning of 23/05/2022, PW2 should have testified about the impracticability of securing the magistrate's attendance on that date. PW2 cited challenges related to distance and road conditions from Monduli District to Lenglong. However, the witness statement (Exhibit P11) of the independent witness, who resided in Lenglong village, contradicts this claim by stating that police vehicles were encountered. The relevant of Exhibit P11 reads:

*"Nakumbuka mnamo tarehe 23.05.2022 majira ya saa 06.30 hours mimi nilikuwa naelekea kitongoji cha Lenglong kwa ajili ya kutafuta mahitaji ya kununua maharage kwa ajili ya kutumia nyumbani .... wakati nikiwa njiani niliweza kuona magari pamoja na askari polisi waliovaa sare za jeshi la polisi na wengine waliokuwa wamevaa nguo za kiraia baada ya kufika sehemu mara alitokea mtu mmoja ambaye alijtambulisha kwangu kama INSP. WAMBA ... na kuomba niende kuwasaidia kuwa shahidi huru..."*

The above words may be translated as follows:



*"I remember that on 23<sup>rd</sup> May 2022, around 06.30 AM, I was heading to Lenglong hamlet to buy beans for domestic use ... while on my way, I saw cars and police officers dressed in police uniforms, as well as other in civilian attires. Upon reaching a certain location, one person approached me, introduced himself as INSP. WAMBA and requested that I go and assist them as an independent witness."*

In view of the above evidence, this Court is unconvinced that PW2 and his team faced obstacles in securing the presence of the magistrate during the sampling process. The lack of a compelling explanation raises doubts about the compliance with the statutory requirement and the overall integrity of the sampling procedure.

The complexities in this case are further compounded by discrepancies in the sampling process. Notably, the sampling inventory forms (Exhibit P5) indicate that the samples drawn from the sulphate bags labeled 5, 17, 18, and 20 were not marked. This ambiguity raises uncertainty regarding whether the samples from these particular bags are indeed the same ones received at the Government Chemist Laboratory Agency (GCLA) and marked 5A, 5B, 17A, 17B, 18A, 18B, 20A, and 20B, as stated in Exhibits P8, P9, and P10.

Given these uncertainties, the Court is of the view that, the analysis conducted by the GCLA is affected due to the procedural irregularities in the sampling and marking process, as well as the disposal of the narcotic drugs. In the interest of justice, these doubts must be resolved in favor of the accused person. Consequently, the second issue is answered not in the affirmative.

Last for consideration is the issue whether the cannabis sativa found in the possession of the accused person weighed 500 kilograms. The Government Chemist Report (Exhibit P10) shows the weight of samples, not the actual narcotic drugs. Since the GCLA received samples, the gross or net weight of the narcotic drugs should have been documented during the sampling process, as set out by regulation 16(c) and (d) of the Drug Control and Enforcement (General) Regulations, 2016. However, none of the sampling forms (Exhibit P5 collectively) indicates the gross or net weight of the narcotic drugs subject to this case.

The absence of this crucial information raises questions about why PW2 chose to record the weight of samples without documenting the weight of the narcotic drugs in each sulphate bag. In PW3's examination chief, it was stated that each sulphate bag weighed approximately 25 kilograms. Despite this, the

lack of specific weight records for the narcotic drugs in each bag leads to the conclusion that it has not been proven that the total weight of the narcotic drugs (cannabis sativa) reached 500 kilograms.

In the culmination of the analysis, this Court finds that the prosecution has not succeeded in proving that the accused person committed the offence of trafficking in narcotic drugs. Consequently, the accused person is found not guilty, and he is hereby acquitted. It is also ordered that the 20 empty sulphate bags (Exhibit P2) be destructed in accordance with the law.

DATED at ARUSHA this 22<sup>nd</sup> day of December, 2023.



  
S.E. KISANYA  
**JUDGE**  
22/12/2023