

IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT MTWARA SUB REGISTRY
ECONOMIC CASE NO. 2 OF 2022
REPUBLIC
VERSUS
NURDIN AMIR MTEMBO

JUDGMENT

ISAYA, J.

The accused person Nurdin Amir Mtembo stands charged with offence of Trafficking in Narcotic Drugs contrary to section 15(1) (a) and (3)(iii) of Act the Drugs Control and Enforcement Act No. 5 of 2015 as amended by Act No. 15 of 2017 read together with paragraph 23 of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 RE. 200] “the EOCCA” as amended.

It is alleged in the Information that on 29th September, 2018 at Chinolo village within Masasi District, in Mtwara Region, the accused person trafficked in narcotic drugs, namely Cannabis Sativa (Bhangji) in nine sulphates bags weighing 149.12 kg Kilograms. The accused person pleaded not guilty to the Information.

At the trial, Ms. Tully Helela and Ms. Ellen Masululi, Learned State Attorneys represented the Republic, while Mr. Steven Lekey, Learned

Advocate, represented the accused person. I thank the team members of the bar for the hard work and their cooperation.

In a bid to prove the case beyond reasonable doubt against the accused person, the prosecution side called in seven (7) witnesses to testify, namely, Abdillah Kimuja (PW1), SSP Adam Amir (PW2), Gabriel Jacob Gabriel (PW3), ASP Manyasi (PW4), G7649 D/CPL Mussa (PW5), PF.21557 A/Inspector Fundi and E2957 SGT Audifast (PW7). They also tendered a total of five (5) exhibits, which were admitted, thus: Exhibit P1, Sample Submission Form DCEA 001; Exhibit P2, the letter from GCLA Mtwara to the OCCID Masasi dated 02/03/2020; Exhibit P3, the nine sulphate bags containing dry leaves of cannabis sativa; Exhibit P4, Certificate of Seizure and Exhibit P5, Government Laboratory Analyst Report, form no. DCEA 001. On the other hand, the accused person testified himself on affirmation as DW1 tendered one documentary exhibit, a bus ticket which marked as Exhibit D1.

In the main, the body of evidence of the prosecution's case presents that, following the information Imparted to PW1 by the informant on 29/9/2018 around evening hours, immediately the Police officers from Masasi Police Station led by PW2 went to the accused person's house accompanied by Village Executive Officer (VEO) one Shaibu. Inside the house, they found the accused person and his wife. That in the presence of the accused person and independent witnesses PW1, they conducted

search on the said house and retrieved nine sulphate bags containing dry leaves suspected to be Cannabis Sativa "Bhangi" (Exhibit P3). PW1 filled certificate of seizure (Exhibit P4) in which he listed all nine sulphate bags. Thereafter it was signed by the accused person, PW1 and two independent witnesses Upendo Anthony 'VEO' and Shaibu Maulid.

Consequently, the accused was arrested. Together with Exhibit P3 the accused person was taken to Masasi police station where he was kept in a lockup while Exhibit P3 was kept in safe custody by PW5. The Prosecution evidence reveal that on 01/10/2018 Exhibit P3 was handed to PW7 (Exhibits Keeper) until on 19/12/2019 when he handed over to PW4 for the purpose of transmitting the same to the office of the Chief Government Chemist 'CGC' Mtwara. At the CGC Mtwara it was received by PW1 via Exhibit P1 (sample submission form DCEA 001). PW1 weighed the Exhibit and got a total weight of 149.12 kg, thereafter he labeled the sulphate bags with letter A up to I, drew sample from each sulphate bag and each sample put on separate envelope and labeled the envelopes letters according to their respective sulphate bags. He kept the samples and handed back the nine sulphate bags to PW4 after sealing them with the GCLA sellotape and signed on the said bags.

Evidence shows that on 19.12.2019 evening hours PW4 took nine sulphate bags and handed over to PW6 for safe custody. PW1 took nine envelopes containing samples of Exhibit P3 to the Chief Government

Chemist Dar es salaam where PW3 conducted a Laboratory analysis over the samples which revealed that indeed the nine (9) sulphate bags contained narcotic drugs commonly known as "Bhangi", PW3 prepared an analyst report (Exhibit P5) showing the samples are narcotic drug namely cannabis sativa, and PW1 wrote a letter showing the weight report (Exhibit P2).

Nevertheless, since the accused person was found with a case to answer in respect of the offence charged with, he defended himself under affirmation. His evidence is to the extent that, on the fateful day he was at Nyangao village, Lindi District. He went on to state that he left to Nyangao on the 27th day of September 2018 leaving behind his wife at his home. That on 30th September 2018 he went to Masasi police station having been phoned by one Hassan Mpunga who informed him that his wife has been arrested by police at Masasi. After his arrival at Masasi Police station he met with PW2 who took DW1 to the reception where DW1 met his wife. Thereafter, PW2 ordered one Kamongo to arrest DW1. Kamongo, a police officer, arrested the accused person, searched him in his person and kept him on lock up until on the 04th October 2018 when he was arraigned in the court. To support his evidence DW1 tendered a bus ticket showing that he travelled from Nyangao to Masasi on 30th September 2018(Exh.D1).

It is a cardinal principle that in criminal matters, it is the duty bound to prosecution to prove the case beyond reasonable doubt against the accused person. In answering the question as to whether the prosecution side proved her case to the required standard the issues for determination are; **One**, *whether Exhibit P3 is narcotic drugs namely Cannabis Sativa (Bhangi) weighing 149.12 kg.* **Two**, *whether exhibits P3 was retrieved from the accused person's house.* **Three**, *whether chain of custody of Exhibit P3 was maintained and* **four** *whether there is any doubt raised against prosecution case.*

In determination of the first issue, I will dwell to consider the evidence of PW1, a Chemist at GCLA Southern Zone, Mtwara and the evidence of PW3, a Chemist at GCLA Dar es salaam. In his testimony PW1 On 19/12/2019 he received nine bags with dry leaves (Exhibit P3) from PW4 through Exhibit P1 and a letter from the OCCID Masasi. Having received them, he weighed the exhibits and found a total of 149.12 kg. Thereafter he took samples from each bag and put them in a khaki envelope and registered the samples with the Lab. No. SZL/66/2019. He too labelled the Exhibit P3 and its respective samples in envelopes with letters A, B, C, D, E, F, G, H and I and lab No. SZL/66/2019. He kept the samples in a place for safe custody as he waited to take them to Dar es Salaam.

It is the evidence of PW1 and PW3 that, on 21/02/2020 PW1 took the samples (9 khaki envelopes) to the Chief Chemist Laboratory Dar es Salaam where the samples were received by PW3 who registered them with HQ Lab. No. 739 of 2020. Thereafter PW3, in the presence of PW1 did the preliminary analysis and discovered that the samples in the 9 envelopes were narcotic drugs called bhanghi. PW3 went on to state that PW1 left and he kept the samples in cabinet for safe custody for later confirmatory test. On the day of conducting confirmatory test, he prepared the samples and took them to the machine called Gas Chromatography Mass Spectrometer, after being insured that it was in a good working condition. PW3 processed the 9 samples in the machine which showed the presence of the chemical Tetrahydro cannabinols (THC) which confirmed that the samples were bhanghi because the chemical is available in bhanghi leaves only.

After that, on 27/02/2020 he prepared analysis report (Exhibit P5), he signed and the head of department signed too. He stamped it too. According to PW3, he completed the report on 27/02/2020. The evidence of PW1 further showed that on 01/03/2020 he received the Exhibit P5 from GCLA Dar es salaam. He also prepared his report (Exhibit P2) on how he dealt with the Exhibit P3 and how he took samples. He submitted to the OCCID Masasi.

During PW1's cross examination by the defense counsel, he admitted a contradiction on variation of weight of Exhibit P3 as recorded in Exhibit P2, charge and oral evidence of PW1 that Exhibit P3 has weight of 149.12 kg. However, in real and proper calculations the said Exhibit P3 has 149.44 kg. PW1 defended that the said variation is a mathematical error or miscalculation. It is a settled principle of law that, it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled. See the case of **Said Ally Ismail vs. Republic**, Criminal Appeal No. 249 of 2008, Court of Appeal at Mtwara (unreported). At the end of the day, the said error in computing the weight of exhibit P3 is cured under section 388 of the Criminal Procedure Act, cap 20 RE. 2022.

From the evidence and legal position above, it is my considered view that the said error is not fatal since it does not prejudice the accused person in any way thus does not go to the root of the case. Therefore, in terms of Section 48A (2) of the Drugs Control and Enforcement Act, Cap 95, Exhibit P5 is conclusive proof that Exhibit P3 is narcotic drug namely Cannabis Sativa (Bhangi) and Exhibit P2 evidenced and proved the charge on Bhangi weighing 149.44 Kilograms instead of 149.12 as reflected in the information and Exhibit P2 itself.

Coming now to the second issue, it is the evidence of PW2 that he retrieved Exhibit P3 from the accused person's house on 29th September 2018 in the presence of two witnesses and the accused person. He filled in Exhibit P4, thereafter took the same together with the accused person to Masasi Police Station where he handed over the exhibit and the accused person to PW5. PW5 kept the said Exhibit and opened the casefile too. The evidence of PW2 is by Exhibit P4 (certificate of seizure) which was signed by the Accused person himself, PW2 and two other persons, namely; Upendo Anthony and Shaibu Maulid. On the other hand, the accused person after being properly raised his defence of alibi through his Counsel he however failed to cross examine PW2 on his presence at the time of search and seizure. Sadly, this implies that he conceded this fact. {See the case of Martin **Masara vs. The Republic**, Criminal Appeal No. 428 of 2016, CAT at Mbeya (unreported). Again, in the case of **Song Lei vs the DPP, and the DPP vs Xiao Shaodan and two others**. Consolidated Criminal Appeal Nos.16'A' of 2016 & 16 of 2017, CAT at Mbeya (Unreported), the Court of Appeal stated that;

"...having signed the certificate of seizure which is in our considered view valid, he acknowledged that the horns were actually found in his motor vehicle".

In the case at hand, the accused person having signed in exhibit P4 signified that he conceded that Exhibit P4 was retrieved from his house.

Further scrutiny of the of the issue at hand, it is apparent that the prosecution failed to parade two important persons in connection with this issue who are allegedly to have witnessed the search and seizure of Exhibit P3. In this regard, it is only PW2 who stated that he searched the house of the accused person without any supporting evidence from the said; Upendo Anthony and Shaibu Maulid persons who purported to have witnessed the search without stating any reason for such failure to parade them to the court as witnesses. It is the trite law that the court shall draw adverse inference against the prosecution case for failure to call material witness, see the case of **Samwel Japhet Kahaya vs Republic**, criminal Appeal No. 40 of 2017, CAT at Arusha (unreported) and the case of **Boniface Kandakira Tarimo vs Republic**, Criminal Appeal No. 350 of 2008, CAT (unreported).

In the light of the above legal positions, I find it unsafe and dangerous for this court to conclude in this case that the evidence of PW2 and Exhibit P4 alone are sufficient proof that the search was conducted in the accused person's house and Exhibit P3 retrieved from the said house. What's more it is not sufficient to state that the two stated persons signed in Exhibit P4, it was desirable that at least one of them could testify in court.

But again, it is the evidence of PW2 that, when he went to search in the house of the accused, he found him with his wife inside. However,

there is no place he testified if he or any other person who investigated the case at hand interrogated or examined the accused person's wife.

Section 48 (2) (c) of the Drugs Control and Enforcement Act, Cap

95 RE. 2022 "The DCEA" provides inter alia that

"For purposes of subsection (1), an officer of the Authority and other enforcement organs who, investigates an offence shall, examine orally every person acquainted with the facts and circumstances of the crime committed..."

In the case at hand, it is clear from the records (committal proceedings) that the case was investigated and also among other witnesses who are conversant with facts of this case is the accused person's wife, who was neither examined, included as a witness nor charged in this case. This leaves doubt if it is true that Exhibit P3 was found in the accused person's house.

Having discussed the factual and legal basis regarding the second issue, it is my considered opinion that the omissions noted herein above that is, failure to call material witnesses who witnessed the search and failure to include accused's wife in any way is fatal omissions. I therefore find that the second issue is abortive.

The third issue examines as to the maintenance of chain of custody. In so doing, I will consider the evidences of PW1, PW2, PW4, PW5, PW6

and PW7. It is the evidence of PW2 that he retrieved Exhibit P3 from the accused person's house on 29th September 2018 in the presence of two witnesses and the accused person. That he filled in Exhibit P4, he thereafter took the said exhibit together with the accused person to Masasi Police Station where he handed over the exhibit P3 to PW5 who kept the said Exhibit until on 01st October 2018 when he handed over to PW7. PW7 stated that after receiving exhibit P3 on the said day he labeled with Exhibit No. 88 of 2018 and he kept them until on 19/12/2019 when he handed over to PW4 for the purpose of taking the said exhibit to CGC office at Mtwara. It is the evidence of PW4 that after receiving the exhibit P3, PW4 took it together with a letter from OCCID Masasi and Exhibit P1 to the CGC Mtwara where the exhibit was received by PW1. He received Exhibit P3 (dry leaves in nine sulphate bags) from PW4 through Exhibit P1 and a letter from the OCCID Masasi. After receiving them, he weighed the exhibits and found 149.12 kg.

Thereafter PW1 took samples from each bag of Exhibit P3 and put them in khaki envelopes and registered the Exhibit P3 with the Lab. No. SZL/66/2019. He too labelled the Exhibit P3 and its respective samples in envelopes with letters A, B, C, D, E, F, G, H and I and lab No. SZL/66/2019. He signed on all sulphate bags and sealed them with the office seal of Government Chemist Laboratory Authority "GCLA". Thereafter, he handed over the exhibit P3 (9 sulphate bags) to PW4. It is the evidence of PW4

that after receiving exhibit P3 he took them back to Masasi police station where he handed over to PW6. PW6 in his testimony stated that after receiving Exhibit P6 he entered in Exhibit register in the entry No. 88 of 201. The exhibit was labeled by PW5 with RB No. MSS/RB/3881/2018. Thereafter he kept exhibit P3 in the exhibits room. Further evidence of PW7 shows that on 09/02/2023 he took exhibit P3 to the court for the purpose of this trial.

In this case the prosecution produced both oral and documentary evidence to prove maintenance of chain of custody of exhibit P3 (Bhangi within nine sulphate bags). Also, there is a justification that Exhibit Keeper was not present during the weekend that is why PW5 stayed with Exhibit P3 for two days before handing over to PW7. Again there is no missing link on the movement of the exhibit in question between PW2, PW5, PW7, PW4, PW1 and PW6.

However, there is no single prosecution witness who told the court the one who labeled the IR number MSS/IR/1883/2018 and RB number MSS/IR/3881/2018 to the exhibit P3, instead it is PW6 who said that IR number was labeled by PW5. PW6 did not tell the court at what time and circumstances PW5 labeled the exhibit and why in his testimony PW5 did not testify to that effect. Therefore this court shall warn itself to the invitation of PW6 in this aspect of labeling of exhibit P3.

The period from 29/09/2018 to 19/12/2019 it is a long time for exhibit P3 to be kept at the store from the time it was seized to the time of taking the same to the Chief Government Chemist for analysis. In addition to that there is no evidence that at what time Exhibit P3 was sealed before being taken to the Chief Government Chemist. In my considered view, the period of more than twelve months is considerably unreasonable long time and without good explanation for such delay from the prosecution side. Indeed, Exhibit P3 was at stake of being tampered. As stated earlier, there is no any reason advanced by the prosecution as to why there was a delay of more than twelve months for the Exhibit P3 to be taken to the Chief Government Chemist for analysis. The learned brother, Luvanda J, in the case of **Republic vs Mashaka Nathael @Magia**, Economic case No. 2 of 2021, TZHCCECD at Tabora where this court faced the situation like this one, he once stated that,

*"More importantly, it was unexplained as to why it took such long period of time to pack and submit the sample in respect of exhibit P2 to the chemist for analysis, to wit from 5/8/2017 to 16/1/2019. **At any rate a period of one year and five months which was not accounted for, is disproportionately excessive and therefore inexcusable.**"*[Emphasis is mine].

I agree with the Learned Judge as he held as herein above, the integrity of chain of custody of exhibit cannot be solely determined by the

documentation and/or credibility of the evidence rather by time, reasons and purpose in which the same pass from one hand to another. Having said that it is my opinion that this issue falls short.

Reverting to the fourth issue, there is a contradiction on IR number written in Exhibits P1 and P2 in which Exhibit P1 written MSS/IR/1883/2019 and Exhibit P2 written MSS/IR/1883/2018, PW4 in his testimony clarified that is it was a slip of the pen therefore the correct year is 2018 and not 2019.

Regarding clarification made by PW4 it is my considered opinion that PW4 is a credible and reliable witness and there is no any reasons which can make the court not to believe him. But again, the contradiction is minor which did not go to the root of the case as well stated in the case of **Said Ally Ismail** (Supra)

DW1 properly raised a defense of alibi, in which accused person stated that on the material date he was not at the crime scene rather he was at Nyangao village within Lindi district. On the other hand, during cross examination by the prosecution, the accused person failed to state where he got exhibit D1 while all of his belongs remained at police station. He too admitted that even if he was not at home but properties in his house are his belongings. It is very unfortunate, however that in the case at hand the prosecution failed to call crucial witness (es) to prove that, the accused person was arrested at his home, at Chinolo village and that

Exhibit P3 belonged to the accused person. In the case of **Azizi Abdallah v. Republic [1991] TLR 71**: it was held that;

"...the general rule and well-known rules are that the prosecutor is under prima facie duty to call those witness who, from their connection with the transaction in question; are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution. "

All said, I hesitate and find it very difficult to connect a person with the crime where an independent witness (es) did not testify during the trial to testify on search and seizure, and no reason advanced by the prosecution for that failure to parade them as witnesses before the court. I therefore find this issue fit to be answered in affirmative, and I so do.

Having addressed all issues raised in this case, the court finds the prosecution evidence has failed to prove the case to the hilt against the accused person for an offence of trafficking in narcotic drugs contrary to section 15(1)(a) and (3)(iii) of Act the Drugs Control and Enforcement Act, No. 5 of 2015 as amended, read together with paragraph 23 of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act Cap. 200 RE. 2002 as amended "the EOCCA".

Consequently, I find the accused person not guilty and I hereby acquit him of the offence charged. He is hereby set free.

It is so ordered.



G.N. Isaya
Judge
24/03/2023



Court:

Judgment delivered through visual court this 24th day of March, 2023 in the presence of the accused person, Mr. Gideon Magesa, State Attorney, Mr. Steven Lekey, Advocate for the accused person and Hon. Chilemba Chikawe (JLA).



G.N. Isaya
Judge
24/03/2023

Right of Appeal fully explained



G.N. Isaya
Judge
24/03/2023



ORDER:

Exhibit P3 be destroyed in accordance with the Drugs and Enforcement Act, [Cap. 95 R.E 2019] with its Regulations.

Order accordingly.



G.N. Isaya
Judge
24/03/2023

