IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 3 OF 2022

REPUBLIC

VERSUS

GOODLUCK KUNDAELI MBOWE

ALLY GEBRA @ MTENA

JUDGMENT

7th March, & 4th April, 2023

ISMAIL, J.

The accused persons are alleged joint offenders who were arraigned in court on a single count of trafficking in narcotic drugs, contrary to the provisions of section 15 (1) (b) of the Drugs Control and Enforcement Act, 2015, read together with paragraph 23 of the 1st Schedule to, and section 57 (1) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2019.

Facts, as gleaned from the statement filed prior to and read by the prosecution at the preliminary hearing, are to the effect that the accused persons were put under restraint on 15th October, 2017 while in possession of seven bags containing substances which were suspected to be narcotic drugs.

Their arrest followed a tip off received by the police that the accused persons were travelling on a motor vehicle with registration No. T847 DHT, Toyota IST, and that in the said vehicle there was a consignment of what is suspected to be narcotic drugs. Acting on the intelligence information, police officers from Kibaha District Police office laid a trap. The suspected car was stopped at a road block but the accused persons sped off unheeded. The police vehicle chased the accused to a point where the vehicle carrying the accused persons got involved in an accident that damaged the vehicle and injured the accused persons. The duo was put under restraint and the vehicle was searched. The search recovered seven bags of narcotic drugs suspected to be cannabis sativa, commonly known as bhangi. A seizure certificate was prepared and allegedly signed by all parties, including the accused persons.

The seized exhibits were taken to Kibaha Central police station and, subsequent thereto, to the Government Laboratory for analysis by the Government Chemist. The findings confirmed that the substances in the bags were narcotic drugs known as cannabis sativa, commonly known as bhangi.

Investigation conducted by the police put the accused in a blemished position that called for their arraignment in court on a charge of trafficking in narcotic drugs. Both of the accused persons pleaded not guilty to the charge.

This necessitated conducting of a trial to lead in evidence in support of and opposition of the allegations.

In conformity with the law and convention in criminal trial, trial proceedings were preceded by a preliminary hearing at which facts constituting the prosecution's case were read out to the accused persons. Out of the facts read during the preliminary hearing, the accused persons denied everything except their names and the fact that they were arrested and arraigned in court.

The trial proceedings saw Ms. Sofa Bimbiga and Mr. Gray Uhagile, learned State Attorneys, appearing for Republic, while the defence was represented by Mr. Nehemia Nkoko, learned advocate. Whereas nine witnesses showed up and testified for the prosecution, the defence had a defence evidence that was composed of the accused persons themselves. Featuring for the prosecution were: E. 8935 D/Sgt. Philemon (PW1); Theodory Ludanha (PW2); Daglous Enock Nkomolo (PW3); Hamisi Mwalizo (PW4);WP 3519 Sgt Nesa (PW5); F. 1410 Sgt. Majani (PW6); E. 9830 D/Sgt. Saleh (PW7); Adelina Anicet Nyamizi (PW8) and PF 20309 Inspector Michael Millinga.

In the course of tendering of an oral testimony, seven exhibits were tendered and admitted in support of the prosecution, while the defence

tendered two exhibits (Exhibits D1 and D2), exhibits tendered by the prosecution are: Submission Form No. DCEA 001 dated 19th October, 2017 (***Exhibit P1***); Report Form No. DCEA 009, Lab. No. 297/2017 dated 5th December, 2017 (***Exhibit P2***); Seven sulphate bags (***Exhibit P3)***; Motor vehicle Toyota IST, silver colour No. T847 DHT (***Exhibit P4***); Exhibit Register (PF16 – Entries No. 114 & 116) (***Exhibit P5***); Form No. PF 93 A112723 dated 17th October, 2017 (***Exhibit P6***); and Motor Vehicle Registration Card No. 7169568 for vehicle with Reg. No. T847 DHT (***Exhibit P7***).

The testimony tendered by the prosecution presents a story which reveals that on 7th May, 2017, a tip off was passed on to PW3, and it was to the effect that a vehicle with Reg. No. T847, make Toyota IST was travelling from Morogoro to Dar es Salaam and that the said vehicle was stuffed with cannabis sativa. The police laid a trap at Kongowe village which is along Morogoro – Dar es Salaam road. Unfortunately for them, the vehicle sped off and a chase began. At Kibaha Kwa Mathias, the said vehicle knocked a hump and plunged into a trench and overturned. It was testified that the accused persons, both of whom were travelling in the said vehicle, were hurt and evacuated, before they were bundled into a police car which was parked close to the scene of the crime. News of the arrest of the accused persons was

conveyed to the Regional Crimes Officer (RCO) who directed Inspector Douglas (PW3), an officer on duty on the day, to go and inspect the car. On arrival, the said officer carried out a search, witnessed by the hamlet chairman, a ten cell leader and one other person. The search recovered seven bags of narcotic drugs commonly known as bhangi. It is alleged that these drugs were stashed under the passenger's seat. A certificate of seizure was prepared to that effect and all accused persons, together with witnesses, appended their signatures on it. As it were, the certificate was rejected by the Court for infringing provisions of rule 8(2) GN No. 267/2016). After signing the document, PW3 ordered D/Sgt Philemon (PW1) to take exhibits P3, P4, together with accused persons, to the police station and both of these exhibits were handed to an office known in acronym as CRO at which a certain Corporal Mokili was stationed in the night.

The testimony of PW1 further contended that on 16th October, 2017 the said exhibits (Exhibit P3 being stuffed in a bag known as *mkaja wa shangazi*) were delivered to CPL Nesa (PW5), an Exhibit keeper, and that these exhibits were registered in the Occurrence Book (OB).

On 19th October, 2017 PW5 released Exhibit P3 to CPL Silvery and CPL

Saleh both of whom conveyed it to the Chief Government Chemist (CGC) in Dar es Salaam for analysis. Mr. Theodory Ludanha (PW2) conducted the analysis and returned the verdict which was to the effect that the substance was, in fact, narcotic drugs known as cannabis sativa, commonly referred to as bhangi. This was contained in a report tendered in Court as Exhibit P2. On completion, PW2 sealed Exhibit P3 and handed over to PW7 who, upon return to the station, conveyed it back to PW5. The latter is said to have stored it to the date it was brought to the Court.

Closure of the prosecution's case was followed by a ruling of the Court. The ruling found both accused persons with a case to answer. They were both invited for defence, an opportunity that they seized to a good effect. They chose to offer their defence on oath and affirmation, and none called witnesses or tender any exhibits. They categorically denied to have committed the offence of trafficking in narcotic drugs or at all.

The 1st accused person featured as DW1 and told the Court that he is a taxi driver whose station (parking spot) was at Coca-Cola, Mwenge in Dar es Salaam. He testified that on the fateful day he was driving his sister's car with Reg. No. T847 DHT Toyota IST. While at Mwenge, he was picked by a

passenger that he drove to Ubungo. On his way back, he received a phone call from a passenger who requested to be driven to Mlandizi where they arrived at around 7:00 pm. He got paid TZS. 45,000/= as his consideration for the service and began his journey back to Dar es Salaam. At Kibaha Kwa Mathias, Coast Region, the witness was allegedly involved in an accident which involved a speeding cyclist who was right head on. In an effort to avoid him he hit a bump and the car overturned. He passed on after that and regained his conscientiousness while in a hospital bed at Tumbi Hospital, with his hands handcuffed. Upon inquiry from a police officer in the room he was informed that he was arrested for causing an accident that killed a cyclist.

DW1 further stated that on discharge from hospital, he was arraigned in court on Traffic Case No. 7 of 2017 in the District Court Kibaha at Kibaha, and entered a plea of guilty to the charge, in consequence of which he was ordered to pay a fine of TZS. 110,000/=. To his astonishment, he was taken back to the cell from which he met the 2nd accused and joined in another case that culminated to the instant proceedings. He denied being involved in trafficking in narcotic drugs, insisting that he was all alone in the car, with no luggage. He maintained that the 2nd accused was a stranger to him and with

whom he had no connection.

Fending for himself, the 2nd accused took the witness box as DW2. His story runs from 15th October, 2017 at 11:00 pm. He testified that on that day and time, he was at his Loliondo home in Kibaha, Coast Region. He stated that he was visited by three police officers who put him under restraint and conveyed him to a police station on accusations of stealing a motorcycle. Unfazed by the denial, the police officers held on to him and perpetrated torture onto him, resulting to amputation of his toe.

DW2 further stated that on 18th October, 2017, he was taken to Tumbi Hospital for treatment after which he was taken back to Maili Moja Police Station where he was held until 24th October, 2017, when he was joined with the first accused person, and arraigned in the District Court for trafficking in narcotic drugs known as bhangi. He attributed his tribulations to the bad blood he had with Insp. Millinga who linked him to a previous incident of theft of a motor cycle. He stated that that case was settled out court by agreeing to give out a sum of TZS. 400,000/= and drop the charges. DW2 contended that he paid TZS. 200,000/=, while the balance remained due and unsatisfied. It is the delayed payment of the said sum that DW2 considers to be the trigger of

what he contends to be trumped up charges against him. He denied being involved in an accident or knowing the first accused person. He virulently denied to have ever involved himself in trafficking in narcotic drugs.

Having given due regard to the testimony adduced by the witnesses of the rival parties, three issues arise. These are:

(i) Whether the accused persons were found with Exhibit P3;

(ii) Whether chain of custody of Exhibit P3 was properly maintained; and

(iii) Whether, after consideration of the two issues above, the prosecution has proved its case beyond reasonable doubt.

With respect to the first issue, the settled position of the law is that any seizure of the property constituting the subject matter of the offences with which an accused person is charged must conform to the requirements of the law, particularly, section 48 (2) (c) (vii) of the Drug Control and Enforcement Act, Cap. 95 R.E. 2022. This provision states as follows:

> *"(2) For purposes of subsection (1), an officer of the Authority and other enforcement organs who-*
>
> *(c) searches for an article used or suspected to have been used in commission of an offence shall-*

(viii) record and issue receipts or fill in the observation form an article or thing seized in a form set out in the Third Schedule to this Act."

While the prosecution alleged that this requirement was complied with, the uncontested fact is that what was purported to be a seizure certificate failed an admissibility test, mainly on account of the fact that its tendering flouted the provisions of rule 8 (2) of the Economic and Organized Crime Control (The Corruption and Economic Crimes Division) (Procedure) Rules, 2016, GN. No. 267 of 2016 (the "Rules"). Whilst refusal to admit the said document dealt a serious blow to the prosecution, it should not be lost on anybody that an oral account would still serve the purpose. This would come from persons who witnessed the search, and the only condition precedent is that such oral account must be credible. This position was accentuated in the case of ***Simon Shauri Awaki @ Dawi v. Republic***, CAT-Criminal Appeal No. 62 of 2020 (unreported), in which it was held (at p. 26):

"It is stance of law that oral evidence can prove the case in the absence of documentary evidence and mount a conviction provided the said oral evidence is credible and sufficient to prove the offence concerned "

See also: ***Emmanuel Mwaluko Kanyusi & 4 Others v. Republic***, Consolidated Criminal Appeals Nos. 110 of 2019 and 553 of 2020; and ***Saganda Saganda v. Republic***, CAT-Criminal Appeal No. 53 of 2019 (both unreported).

The issue relating to search of the vehicle and recovery of Exhibit P 3 is closely connected to the allegation that the accused persons were both found in the car (Exhibit P4), meaning that the duo was connected and appear joint offenders. This mainly came from PW1 who allegedly evacuated them from the car before he put them under restraint. Strangely, however, neither PW3, the searching officer, nor PW4, the independent witness of the search, testified to the effect that they saw when the two accused persons were allegedly removed from the car. Silence of these witnesses would be taken care by other police officers who are alleged to have been in the company of PW1, chasing the vehicle in which the accused persons were travelling and trafficked the drugs. These were not called to testify. Absence of this testimony casts a serious doubt on whether the 2nd accused person, who claims to be unrelated to the 1st accused person, was also in the same vehicle and that both were on the same mission.

I am mindful of the legal position, as set out in section 143 of the Evidence Act, Cap. 6 R.E. 2019, that the prosecution enjoys the discretion to

call any witnesses they require to attend. The condition attached to it is that such discretion should only be done to promote fairness (See: Privy Council's decision in ***Adel Muhammed el Dabbah v. Attorney General of Palestine*** [1944] A.C. 156). I am not oblivious, either, to the legal position that in criminal cases the prosecution's failure to call a material witness who is under reach may have an adverse impact. This has been stated in many a case. In ***Aziz Abdallah v. Republic*** [1991] TLR 7, it was held:

> *"The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to 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."*

See also: ***Mashaka Mbezi v. Republic***, CAT-Criminal Appeal No. 162 of 2017 (unreported).

In the instant case, nothing has been stated on the whereabouts of PW1's companions in the mission, or their unavailability and inability to testify in court in corroboration of what appears to be a controvertible testimony on whether the drugs were recovered from Exhibit P7 and that the accused persons were in that car. I consider the would be testimony to be critical in

lending credence to what was contended that both of the accused persons were recovered from Exhibit P4 and bundled into a police vehicle. It is on that basis that that I consider their unavailability carrying a serious adverse consequence to the prosecution's case.

Since neither PW3 nor PW4 stated with any semblance of precision that what they contend to be a seized substance (Exhibit P3) was in the vehicle in which the accused were allegedly evacuated from, the question on whether the said drugs were seized from the accused persons remains hazy. It is unsafe to make any finding of guilt out of evidence that is less coherent and carrying a lot of loose ends.

Turning on to the second issue, the question to be resolved is whether the chain of custody of Exhibit P3 was properly maintained from the time it was seized and placed in the custody of the police to the time it was tendered in court.

It is a cardinal rule in criminal trials that the chain of custody of the subject matter of the proceedings must remain unbroken from the time it is seized, submitted for analysis (in the case of narcotic drugs), to the time it is tendered in court for testimony. This has been stated in numerous decisions of this Court and the Court of Appeal of Tanzania. In the case of ***Moses***

Muhagama Laurence v. The Government of Zanzibar, CAT-Criminal Appeal No. 17 of 2002 (unreported), the upper Bench reasoned as follows:

> *"There is need therefore to follow carefully the handling of what was seized from the appellant up to the time of analysis by the Government chemist of what was believed to have been found on the appellant."*

A fabulous articulation on the matter came in the subsequent decision of the superior Court in ***The Director of Public Prosecutions v. Shirazi Mohamed Sharif***, CAT-Criminal Appeal No. 184 of 2005 (unreported), wherein it was observed:

> *"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."*

Ascertainment of whether the chain of custody was observed in a certain case requires tracing the movement of the exhibit and the manner in which it changed hands, and getting to see if any human intervention did not result in the tampering of the said exhibit. This position was underscored in the case of ***Chacha Jeremiah Murimi and 3 Others v. Republic***, CAT-Criminal Appeal No. 551 of 2015 (unreported), in which the Court stressed that:

> *"In order to have a solid chain of custody it is important to follow carefully the handling of what is seized from the suspect up to the time of laboratory analysis. Until finally the exhibit seized is received in court as evidence...The movement of exhibit from one person to another should be handled with great care to eliminate any possibility that may have been to tempering of that exhibit."*

I have unfleetingly reviewed the testimony adduced by the prosecution with respect to the chain of custody of Exhibit P3. What comes out is a story which, though weaved meticulously, it brings out a disparity and pregnant disharmony on when and to whom Exhibit P3 was entrusted subsequent to its seizure. The version of the arresting officer (PW1) is that he handed Exhibit P3, packed in sulphate bags and what is commonly known as "Mkaja wa

shangazi", and that the same were conveyed to CRO and handed to Corporal (CPL) Mokili who could not hand it to the exhibit keeper that evening.

PW1 testified further that he met the exhibit keeper, a certain Corporal (CPL) Nesa (PW5), and handed it to her the following morning. This version sharply varies with that of PW9 whose account of facts was to the effect that the recovered substance was handed to CPL Mokili who was in charge of CRO, on the day and that the latter handed them to CPL Nesa. The latter version brings the impression that the handing over of Exhibit P3 to CPL Nesa was done on the same day, while the former suggests that Exhibit P3 spent a night in the hands of CPL Mokili, and that handing over to CPL Nesa was done the following morning. This variance is irreconcilable, and the duty to reconcile it rested on the shoulders of the prosecution, consistent with the holding in ***John Joseph @Pimbi v. Republic,*** CAT-Criminal Appeal No. 262 of 2009 (unreported), in which it was guided as follows:

> ***"In Mohamed Said Matula v. Republic*** *(1995) TLR 3 this Court has stressed the point that where contradictions show up in evidence it is the duty of the trial court to either resolve them or explain them away. This has not been done in the present case. The contradictions are fundamental because the complainant admitted he did not know the identities of*

the three persons who robbed him on 16/8/2002 but learned of the recovery of the bicycle on 17/8/2002."

All in all, gauging from the evidence adduced in this case, it cannot be said that movement of this exhibit was handled with great care as to eliminate any possibility of tempering. I take the view that the chain of custody in this respect of Exhibit P3 was not foolproof.

There is yet another anomalous indulgence by the prosecution that heavily suggests that the chain of custody of the Exhibit P3 was shrouded in a prolonged breakage. It is not lost on the fact that the said exhibit was a subject matter of proceedings registered as Economic Case No. 3 of 2021. In this matter, whose hearing was truncated thanks to the *Nolle Prosequi* entered by the DPP, Exhibit P3 was tendered and admitted as evidence. What came from PW7 (in cross-examination) is that subsequent to termination of the said proceedings, custody of Exhibit P3 remained in the hands of the Republic but no record was availed to demonstrate that custody of Exhibit P3 reverted to the exhibits keeper. Strangely, the said exhibit found a re-entry into the record from an unknown source.

I take the view, so firmly, that PW7 who tendered the exhibit in the

instant proceedings chose to be economical with facts on where exactly he sourced the said exhibit from, and this leads to the conclusion that custody of the Exhibit P3 was marred by irregularities which cannot be wished away. It compels me to pick an inspiration from the reasoning in ***Linna Romana Muro v. Republic***, CAT-Criminal Appeal No. 550 of 2021 (unreported) at page 20-21, in which a similar indulgence was abhorred by the upper Bench. It was held:

> *"More glaring weakness in the prosecution evidence is the fact that, the chain of exhibit P2 was broken from the moment an attempt was made to tender it before the Ilala District Court in the Economic case and the prosecution entered nolle prosequi and that from that moment, exhibit P2 remained in the custody of the republic, according to PW1, and did not return to PW7 the exhibit keeper."*

That the handling of Exhibit P3 was shoddy and wanting, resulting in the change of form or shape, has been attested to by PW2 (the Government Chemist) who tendered it during trial. He conceded as much during cross examination, when he said:

> *"It is true that Exhibit P3 had a different appearance from*

how it was tendered before. It is true that I didn't know how the exhibit came back to this Court."

There can be nothing as stunning as the concession by PW2 on the non-compliance, and the irresistible conclusion is that the law with regards to chain of custody was trampled. The second issue is, therefore, answered in the negative.

The last issue requires the Court to pronounce itself on whether, on the basis of the evidence adduced by the prosecution, a case against the accused persons has been proved beyond reasonable doubt. On this issue, the intention is to establish if evidence tendered exhibited the guilt of the accused persons, jointly or severally. This question is drawn in realization of the fact that the prosecution bears an unenviable legal and evidential burden of proving the case, and that the standard of proof is beyond reasonable doubt. A multitude of court decisions have underscored the critical importance of this role. Thus, in the case of ***Joseph John Makune v. Republic*** [1986] TLR 44, it was held:

"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."

A more scintillating position was underscored by the High Court of Kenya (Ojwang, J., as he then was) in ***Republic v. Cosmas Mwaniki Mwaura***, H.C. Criminal Case No. 11 of 2005 (as quoted in ***R v. Elizabeth Nduta Karanja & Another*** [2006] e KLR). It was held:

> *"The basic principle applicable in criminal trial is that any doubts in the prosecution case, at the end of the trial, will lead to the acquittal of the accused. The corollary is that the prosecution case, before the accused is accorded a chance to respond, must be so definitely cogent as to bear compelling need for an answer. Without such prima facie justification, there is no legal basis for putting the accused through the trouble of having to defend himself. It is the responsibility of the court to determine, upon a careful assessment of the evidence, whether to conclude the proceedings by early judgment, or to proceed to the motions of hearing both sides before pronouncing judgment. The logical inference is that whereas the prosecution must be heard in a criminal case, the accused does not have to be heard. The accused can only be heard if the court determines that the weight of the evidence laid on the table is so implicative of the accused, that considerations of justice demand that he be accorded a chance to answer."*

In this case, proof of the case beyond reasonable doubt would entail, not only weighing the entirety of the evidence and say if it brings an irresistible

conclusion of guilt against the accused persons, but also assessing the answer to the first two issues. The findings in respect of the questions that preceded this issue have cast serious aspersions on the credence that should be attached to the testimony adduced by the prosecution. Lack of clarity in the testimony that links the 1st and 2nd accused persons and whether both of these were found in the same vehicle; speaking disharmonies in the testimony of PW1 and PW9; failure to bring witnesses to testify on material issues; absence of a search order and certificate of seizure, are some of the significant maladies 'diagnosed' in the course of my analysis. In my unflappable view, these shortfalls and the manner in which the chain of custody of Exhibit P3 significantly erode the little weight that the prosecution evidence carried, thereby weakening the prosecution's case in a mammoth way. It cannot be said, as a result, that charges against the accused persons were proved, at any lesser standard, let alone at the optimum standard set by law *i.e.* beyond reasonable doubt.

It is my conviction that what constitutes the testimony against the accused persons is paltry and wobbly, unable to put the accused persons in any blemished position. It would amount to taking a calamitous path if the Court were to bring the accused persons in guilt. It is in view thereof, that I entertain grave doubts as to whether the accused persons are the people from

whom the said narcotic drugs, tendered in court as Exhibit P3, were recovered or seized.

Consequently, I find the accused persons not guilty of the offence with which they are charged and, accordingly, I acquit them and order that they be set at liberty forthwith unless held for any lawful cause. As I do that, I order that exhibit P3, the narcotic drugs, be destroyed in the full participation of the Court, and that vehicle with Reg. No. T847 DHT, Toyota IST, be immediately released and returned to its registered owner.

Order accordingly.

Right of appeal duly explained to the parties.

DATED at **DAR ES SALAAM** this 4th day of April, 2023.

HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION

M.K. ISMAIL

JUDGE

04.04.2023