IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 11 OF 2022

REPUBLIC

VERSUS

SAID SALUM KAGHEMBE

JUDGMENT

6th, & 13th June, 2023

ISMAIL, J.

Said Salum Kaghembe is facing a criminal indictment. He stands charged with an offence of trafficking in narcotic drugs in violation of the provisions of section 15 (1) (a) 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.

The allegation by the prosecution is that the offence was committed on 7th June, 2020, at Mizani ya Zamani area, within Kibaha District in Coast Region. The subject matter of the charge is 155.55 kilograms of cannabis sativa, allegedly seized while on transit to Dar es Salaam, aboard Toyota Harrier with registration No. T 852 AYV.

From the facts, as narrated by the prosecution, the incident constituting the alleged wrong doing occurred in the night of 7th June, 2020, at Mizani Area, Kibaha, along Dar es Salaam-Morogoro road. In that fateful night, PW7, Sergeant Abdul, was on patrol, along with his colleagues, Casmir and Thomas Elisha. At around 11.00 pm, they waved a truck and ordered it to stop. In the course of inspecting it, they saw another vehicle, Toyota Harrier, attempting to overtake the truck in a restricted area, and they stopped it. It was silver in colour and it bore registration No. T 852 AYV. After normal enquiries, PW7 and his colleagues demanded that they carry out an inspection. In the interior of the vehicle, they found 10 polythene bags (sulphate bags) in which some substances were stuffed. They ordered that they be unloaded. In the course of doing that, thc accused person allegedly confessed that the substances in the bags were narcotic drugs by the name of bhangi.

The bags were seized, and a certificate of seizure was prepared and allegedly signed by all parties, including an independent witness. Subsequent thereto, the accused person, together with the seized exhibit, were taken to Kibaha Police station where they were handed over to CRO office which was under the care of Sgt. Sylvester (PW6) in the night. The consignment was then handed to Sgt. Mwamvita, PW2, an exhibits keeper. On 11th June, 2020

PW2 released the consignment and handed it over to Inspector Bubinga, PW5, for onward submission to the Government Laboratory for analysis by the Government Chemist. The analysis was carried by Joseph Jackson Ntiba, a Government Chemist who featured as PW 4. The latter's findings confirmed that the substances in the bags were narcotic drugs known as cannabis sativa commonly known as bhangi. They weighed 155.55 kilograms. The analysis report was admitted in Court as Exhibit P3, while the substance was tendered and admitted as Exhibit P5. Conclusion of the testing and analysis saw Exhibit P5 sealed and handed back to PW5 the latter of whom conveyed it back to PW2.

Investigation into the allegations returned a verdict that placed the accused person in a culpable role that triggered the prosecution's decision to institute the instant proceedings. The accused person pleaded not guilty to the charges, culminating in the trial process that saw the accused marshal the attendance of seven prosecution witnesses. The trial was preceded by a preliminary hearing during which the accused person denied all facts that linked him with the criminal undertaking in the matter.

Taking charge for the prosecution was Mr. Clemence Kato, learned State Attorney, whose counterpart for the defence was Ms. Mwanahamisi

Kilongo, learned counsel. The prosecution enlisted the assistance of seven witnesses who testified in support of its case, whereas the defence testimony was the accused person's own account of facts, narrated when he featured as DW1.

Those who gave their testimony for the prosecution were: E. 9970 D/Sgt. Ombeni (PW1); WP 3665 Sgt. Mwamvita (PW2); PF 20309 Inspector Michael Ambrose Millinga (PW3); Joseph Jackson Ntiba (PW4); Inspector Bumbinga (PW5); F. 1274 Sgt. Sylvester (PW6); and F. 3334 Sgt. Abdul (PW7).

In the case of exhibits, the prosecution tendered the following exhibits: Exhibit Register (PF16 – Entries No. 114 & 116) (***Exhibit P1***); Form No. DCEA 001 – Request for submission of samples (***Exhibit P2***); Form No. DCEA 009 – Investigation Report (***Exhibit P3)***; Sample Receipt Notification Form (***Exhibit P4***); 10 Sulphate bags containing substance believed to be narcotic drugs (***Exhibit P5***); Form No. DCEA 003 which is a Certificate of Seizure (***Exhibit P6***); and Motor Vehicle with Registration No. T852 AYV (***Exhibit P7***).

In a ruling of no case to answer that came after the closure of the prosecution's case, the Court held that the prosecution had led a testimony

that passed ***"sufficient evidential mark"*** that established a *prima facie* case. As a result, the accused person was held to have a case to answer, and was called upon to make a defence of the allegations. The accused person chose to testify on his own without calling any witness to support his case, and he did not tender any documentary or physical exhibit. He protested his innocence and downrightly denied any involvement in the trafficking in narcotic drugs or at all.

He particularly stated that he operates as a casual labourer whose place of aboard is Kibaha Picha ya Ndege. He recalled that on 1st June, 2020, he was at Kwetu Pazuri, a local brew shop, having a drink. At around 10.00 pm, police men raided the place and arrested some of the customers, him inclusive. They were taken to Kibaha central police station and spent a night. On the following day, the rest of the suspects were bailed out but he was not. On 16th June, 2020, the Regional Police Commander ordered that the inmates be arraigned in court. On 18th June, 2020, he was arraigned in court on allegations of trafficking in narcotic drugs the involvement of which he denied knowledge of. The accused person denied that he drove the vehicle alleged to have been seized with the narcotic drugs, or that he was at the

scene of the crime. He also denied to have appended his signature on the certificate of seizure, Exhibit P6.

After closing the trial proceedings, the parties came up with a prayer for filing closing submissions. This prayer was acceded to by the Court and, creditably, counsel for the parties complied with the filing schedule.

On the part of the prosecution, the entry point was what is contended to be the accused person's confession that was allegedly given orally to the police. This argument is premised on testimony of PW3 who stated that the accused person confessed that he was involved in the trafficking of narcotic drugs sourced from Morogoro. The prosecution relied on the definition of confession, as provided for under section 3 of the Evidence Act, Cap. 6 R.E. 2019, and argued that the accused person's account of how he sourced the drugs from Morogoro and meant for delivery to Dar es Salaam, coupled with his being found with the said drugs and signing of the certificate of seizure, drew the inference that he committed the offence he was charged with.

On the significance of the alleged confession, the prosecution argued that the words ***"unless it is in all circumstances impracticable to do so"*** used in section 57 (2) of Cap. 6, confers the meaning that recording of the interview in which the alleged confession was done is not mandatory. It was the prosecution's contention that this position was underscored in the

case of ***Director of Public Prosecutions v. Sharrif Mohamed @ Athuman & 6 Others***, CAT-Criminal Appeal No. 74 of 2016 (unreported). On why the interview was not recorded, the prosecution's contention is that PW3 operated in the circumstances where there was no power, a pen or a piece of paper thereby rendering the circumstances impracticable. It is why the interview was orally done. The prosecution urged the Court to take the path taken by the Court of Appeal of Tanzania in ***Nyerere Nyegue v. Republic***, CAT-Criminal Appeal No. 67 of 2010 (unreported), in which it was held that not every apparent violation of the law should lead into exclusion of the evidence. Learned Attorney urged the Court to ignore minor errors that there may be with regards to evidence of PW3.

Regarding credibility of witnesses, the contention by the learned State Attorney is that, the testimony by seven prosecution witnesses was coherent and consistent, and that all of them named the accused person as the person from whom Exhibit P5 was seized. He argued that all of the witnesses stated 7th June, 2020 as the date on which the incident occurred, warning that if contradictions arose then the same did not go to the root of the case. On this, the prosecution relied on the case of ***Nimo Samu v. Republic***, CAT-Criminal Appeal No. 31 of 2019 (unreported), wherein it was held that

credibility of a witness may be determined by considering their coherence and consistency apart from their demeanor.

Submitting on the defence of *alibi*, the prosecution argued that the defence was introduced as an afterthought since the same was raised during the defence, and not in the course of the prosecution's case. He urged the Court to take an inspiration from the case of ***Kubezya John v. Republic***, CAT-Criminal Appeal No. 488 of 2015 (unreported), in which it was held that the best *alibi* is that which an accused tells the police during arrest. He labeled the accused's defence as a lie that corroborates the prosecution's case, in line with what was stated in the case of ***Nkanga Daud Nkanga v. Republic***, CAT-Criminal Appeal No. 326 of 2013 (unreported).

With regards to failure to bring an independent witness to testify in court, the view by the prosecution is that failure to parade him or her in court is not a fatal omission. Learned Attorney cited the case of ***Jibril Okash v. Republic***, CAT-Criminal Appeal No. 331 of 2017 (unreported), wherein it was held:

> *"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 it should be backed by the law. In the present case the trial Judge discussed sections 48 (2) (c) (vii) of the DCEA*

and section 38 (3) of the CPA and found that the former doesn't imperatively provide for the need of an independent witness to sign the seizure certificate if present. That is the legal position."

The prosecution contended that, since the accused person signed the certificate of seizure to show that he was found in possession of the drugs, it was not important that the independent witness should testify. In any case, the prosecution contended, the law has not set the number of witnesses the prosecution is bound to bring to testify. After all, the defence did not object to the tendering of the exhibit, the learned Attorney argued.

The defence submission was quite brief and focused on a question whether the prosecution's case failed when material witnesses were not called. In the view of Ms. Mwanahamisi Kilongo, the defence counsel, an independent witness, by the name of Ms. Magdalena David Urio and arresting officer, a certain D/C Thomas, were crucial persons on testimony of arrest and seizure. Learned counsel recalled the testimony of PW7 and Exhibit P6, and argued that the duo participated in the seizure of the narcotic drugs and the vehicle that carried them. As such, their testimony ought not to have been excluded without any explanation. She urged the Court to draw an adverse inference of their absence, consistent with what was stated in

the case of ***Boniface Kundakira v. Republic***, CAT-Criminal Appeal No. 351 of 2008 (unreported).

Ms. Kilongo submitted that, while it is true that section 143 of Cap. 6 does not put a number of witnesses that a party must call for testimony, the settled principle is that failure to call key witnesses during trial entitles the Court to draw an adverse inference, as provided under section 122 of Cap. 6. The defence counsel buttressed her contention by citing the case of ***Aziz Abdallah v. Republic*** [1991] TLR 91. It was Ms. Kilongo's further contention that, if the said persons were not available the alternative was to invoke the provisions of section 34B of Cap. 6 and have their statements tendered as evidence. She prayed that the Court should hold that the prosecution has not proved the case beyond reasonable doubt.

It is an accustomed practice, in fact a norm, in criminal trials, that once evidence of the prosecution and that of the defence is heard and taken, the question that calls for the court's consideration and determination is whether the prosecution's evidence has proved the charges against the accused, beyond reasonable doubt. This question takes into account the fact that it is the prosecution that bears the legal and evidential burden of demonstrating an accused person's guilty indulgence in the offence with which he is charged. This legal reality has been judicially highlighted by courts across

jurisdictions. In our own, the case of ***Joseph John Makune v. Republic*** [1986] TLR 44, serves to cement the prosecution's unenviable duty. 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."*

As stated earlier on, the prosecution marshalled the attendance of seven witnesses and seven exhibits, both physical and documentary. Whilst the testimony of PW1, PW2, PW3 and PW7, together with Exhibit P6 clearly demonstrate that Exhibit P5 was indeed narcotic drugs known as cannabis sativa, the testimony that the prosecution relies on in linking the accused with the drugs is that of PW1, PW3 and PW7. In the case of PW7, his testimony is to the effect that he participated in the arrest of the accused person and recovery of the narcotic drugs. He stated that the accused person was arrested while driving the vehicle which was seized and tendered in court as Exhibit P7.

The question that follows is whether this testimony proved the prosecution's case beyond reasonable doubt. The view held by the prosecution is that this testimony has established the accused person's guilt and that he is guilty of the offence of trafficking in narcotic drugs. The

accused person contends that, in the absence of the arresting officer, D/C Thomas, and Ms. Magdalena David Urio, the independent witness, the chain of what is alleged to be the accused person's wrong doing is broken. The view held by Ms. Kilongo is that the prosecution failed to bring these key witnesses to testify and that, in their absence, the Court was treated to half-truths. She has implored the Court to draw an adverse inference against the prosecution. The prosecution takes the view that the law does not prescribe the number of witnesses to be paraded for testimony.

While I am aware of and subscribe to the prosecution's view that number of witnesses to be availed for evidence is in the discretion of the prosecution, I wish to add that what holds the sway in cases is the quality of evidence and not the numerical strength in terms of the parties' witnesses. This has been held in numerous court pronouncements. In ***Hamisi Mohamed v. Republic,*** CAT-Criminal Appeal No. 297 of 2011 (unreported), it was held:

> *"... In terms of section 143 of the Evidence Act, Cap 6 R.E. 2002, there is no specific number of witnesses required for the prosecution to prove any fact. See* ***Yohanes Msigwa v. R*** *(1990) TLR 148. What is important is the quality of the evidence and not the numerical value. The burden of proof is always on the prosecution to prove the case beyond reasonable doubt. The burden never shifts to the accused person."*

The upper Bench's decision in the extracted quotation was emphasized in the case of ***Hamisi Selemani v. Republic***, CAT-Criminal Appeal No 30 of 2011 (unreported). It was held:

> *"Turning to the non-calling of the ten cell leader and that PW1 and PW2 were related, we find this to have no merit. We wish to inform the appellant that the prosecution is not required in law to produce all witnesses who witnessed or saw the incident in question. For that matter a single witness may prove a criminal charge."*

The foregoing position notwithstanding, where some missing links or holes are apparent in a case and that such links or holes would be plugged by having witnesses who are better placed to come and testify but are not availed, the court may be entitled to enter an adverse inference. This position has become a household norm that has been accentuated in many a decision. Thus, in ***Aziz Abdallah v. Republic*** (supra), it was held:

> *"Where a witness who is in a better position to explain some missing links in a party's case is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one."*

It is instructive to note that the stance expressed in the just quoted excerpt was propounded by the defunct Court of Appeal for Eastern Africa in ***R v. Uberle*** (1938) 5 EACA 58, wherein it was guided as follows:

> *"The court is entitled to presume that evidence which could be but is not produced would if produced be unfavourable to the person who withheld it."*

So fatal is the omission that in ***Pascal Mwinuka v. Republic***, CAT-Criminal Appeal No. 258 of 2019 (unreported), the Court of Appeal of Tanzania concluded that absence of material witnesses and without explanation was a fatal irregularity that could not be tolerated. It was held:

> *"Particularly, in the circumstances of the appeal before us, we are entitled to draw an adverse inference on account of PW1 and PW32's questionable credibility and the failure of the prosecution to summon some important witnesses like DC Lwata and Boniface Siame who signed exhibit P3. We hold this firm view because, even PW4 a police officer, who testified at the trial to have witnessed the search, did not sign exhibit P3 and no explanation was given. On the contrary, DC Lwata who signed and despite being the person who led the search and found exhibit P1 (the Leopard hide) was not summoned to testify and no plausible explanation was given by the prosecution."*

Looking at the nature of the prosecution's case, presence of the testimony of the arresting officer, the independent witness, and the owner of the vehicle allegedly driven by the accused person, had the significance of proving the following:

(i) That the vehicle belonged to the accused person or was entrusted with it by its owner to drive it ;

(ii) That the accused person was duly licensed to drive the vehicle and that his license was impounded during his arrest;

(iii) That the narcotic drugs, subject matter of these proceedings, were seized from the vehicle allegedly driven by the accused person.

As submitted by learned defence counsel, these questions are so pertinent and answers to these questions are profoundly decisive in determining guilt or otherwise of the accused person. The answers would discharge the burden of proof that firmly rests on the shoulders of the prosecution. My scrupulous review of the testimony and submissions by the parties confirms the worries shared by the defence, that the testimony presented by the prosecution is insufficient and falling below the threshold set by the law. The testimony has not been responsive to the questions posed above. This is largely because key witnesses who would have these

answers had their date with 'destiny' denied and, as repeatedly stated, no reason was assigned for this inability. In particular, the areas of grave concern are as follows:

1. That the owner of the vehicle was not called to testify on whether he engaged the accused as his driver and entrusted him with the vehicle;
2. There is nothing tendered in court to prove that the vehicle in which the narcotic drugs were allegedly stashed was being driven by the accused person. While PW7 testified that the accused person had his license surrendered and inspected, there is no testimony to the effect that, after inspection the said license was returned back to accused person. In an unexplained way, as well, the said license was not tendered in court to prove that the accused person was the driver of the seized vehicle at the time. PW1, the investigator, did not say anything on the license, while PW2's testimony did not hint that the driving license was among the items which were kept in her custody. Exhibit P1, the Exhibits Register, contains no entry relating to the license. This implies that nothing of the type was seized. Not even PW7 tendered anything of the sort.

3. Absence of the arresting officer and the person who allegedly witnessed the search and seizure to confirm that the person who was arrested, searched and from whom the said drugs were allegedly seized, was none other than the accused person. The duo would also clarify and answer the question on whether two other suspects who were also arrested but not arraigned in court were arrested along with the accused person. It lends credence to the defence's contention that his arrest was effected elsewhere and in respect of a different allegation.

These glaring inadequacies justify my presumption that the missing testimony would, if produced, be unfavourable to the prosecution, as was held ***R v. Uberle*** (supra). I say so because no ordinary prosecution plan would spurn the opportunity to line up these key witnesses and choose to line up low value witnesses who do not hold a decisive position on the accused person's culpability.

Before I conclude, it behooves me to make a remark on the contention by the prosecution that the accused person confessed to the offence. In the prosecution's contention, the confession was done in the presence of PW1. The accused person has not seriously challenged this contention, and one would be tempted to consider the

accused person's silence as an admission of what the prosecution alleged.

The settled position is that oral confessions or admissions are, in certain circumstances, admissible and can be the basis for finding an accused person guilty. Courts are warned, however, that they must exercise extreme care before they make a decision to give value and weight to such testimony. Thus, in the case of ***John Peter Shayo & 2 Others v. Republic*** [1998] TLR 198, it was held:

> *"As a general rule, oral confessions of guilt are admissible though they are to be received with great caution."*

See: ***Ndalahwa Shilanga & Another v. Republic***, CAT-Criminal Appeal No. 247 of 2008; and ***Posolo Wilson @ Malyengo v. Republic***, CAT-Criminal Appeal No. 613 of 2015 (both unreported).

The most elaborate guidance on oral confessions came in the case of ***Zabron Joseph v. Republic***, CAT-Criminal Appeal No.447 of 2018 (unreported), in which it was held as follows:

> *"Therefore, what we take from the above decisions of the Court, as regards oral confessions, is that* ***one****, the reliability of the witnesses to whom the oral evidence*

*was made should be considered, and **two**, that oral confessions must be received with great caution.*

*In the present case, the oral confession is not without glaring concerns, **first**, there was a police officer when the confession was recorded and the appellant was not cautioned prior to making his admission/confession. **Second**, the oral confession was made in the presence of a few people, that included PW1, PW2 and PW3 in which case one cannot eliminate or disregard the possibility of intimidating the appellant. Without doubt, such a confession required corroboration before it should have been accorded any weight leave alone being relied upon."*

In the instant case, what is considered by the prosecution as an oral confession to the commission of the offence was a two-man affair that allegedly involved the confessor, the accused person, and the police officer. It did not involve any third party. In such circumstances, the possibility of threats and intimidation cannot be ruled out. Furthermore, this is a confession which was allegedly made to a police officer without cautioning the accused person, prior to his alleged confession, of the implications and adverse consequences of his confession. As if the irregularities are not serious enough, nothing has been tendered in court to corroborate the

alleged confession with a view to giving weight to this testimony. It is in view thereof, that I find the contention by the prosecution underwhelming and I disregard it.

In the upshot of the foregoing, I hold that the testimony adduced by the prosecution has failed to discharge the burden of proof. It is on that basis that I find the accused person not guilty of the offence with which he is charged. Accordingly, I acquit him and order that he be set at liberty immediately, unless held for a lawful cause.

Simultaneous with acquitting the accused person, I order that exhibit P5, the narcotic drugs, be destroyed in the full participation of the Court, and that vehicle with Reg. No. T852 AYV, Toyota Harrier, whose owner is unknown be confiscated by the Government for its use and ownership.

Order accordingly.

Right of appeal duly explained to the parties.

DATED at **DAR ES SALAAM** this 13th day of June, 2023.

M.K. ISMAIL

JUDGE

13.06.2023