

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

AT ARUSHA SUB-REGISTRY

ECONOMIC CASE NO. 5 OF 2022

REPUBLIC

VERSUS

LOSIEKU SIRAI @MOLLEL

JUDGMENT

29th March & 6th April, 2023

KISANYA, J.:

Losieku Sirai @Mollel was arraigned before this Court for an offence of Trafficking in Narcotic Drugs contrary to section 15 (1) (a) and (3) (iii) of the Drug Control Enforcement Act, Cap. 95, R.E. 2019 (henceforth "the DCEA), read together with paragraphs 23 of the First Schedule to, and section 57(1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200, R.E. 2019 (now R.E. 2022). The particulars of the offence are to the effect that, on 30th June, 2020, at Mwandeti Village within Arumeru District in Arusha Region, the accused person was found trafficking 725.6 kilograms of Cannabis sativa, commonly known as "Bangji".

The accused person pleaded not guilty to the information. In its endeavour to prove the case, the prosecution marshalled a total of five (5)

witnesses and tendered exhibits namely, a search order/seizure certificate (Exhibit P1), an exhibit/sample submission form (Exhibit P2), a sample receipt notification–GCLA 001 (Exhibit P3), a certificate of destruction (Exhibit P4), a certified copy of the exhibit register-PF16 (Exhibit P5), motorcycle with Reg. No. MC 845 BQP (Exhibit P6, henceforth “Exhibit P6A”), an inventory form- Form No. DCEA 006 (Exhibit P6, henceforth “Exhibit P6B”) and a scientific laboratory analysis report (Exhibit 7).

Pursuant to the evidence on record, the prosecution case was to the effect that: On 30th June, 2020, an officer working in the Drugs Commission Enforcement Authority (henceforth “the Authority”), one Insp. Violeth (PW1) led a team which went to Mwandete Village within Arumeru District in Arusha Region. The Authority had been tipped by an informer that in that village there were people dealing with trafficking in narcotic drugs. PW1 was issued with a search order before heading to Mwandete Village.

On arrival, PW1 and her team surrounded the accused person’s house which was shown to them by the informer. The accused person was found at his house. He was told that he was under arrest. Two police officers called one Maximillian Silayo (PW2) to witness the search. Following a search conducted in the accused person’s main house, 33 sulphate bags were found therein and opened. In the said sulphate bags, PW1 and her team found dry leaves suspected to be *bhangi*. The

certificate of seizure (Exhibit P1) was filled at the scene. It was signed by PW1 and PW2. As for the accused person, he appended his thumb thereon. Apart from the sulphate bags, one motor cycle with Registration Number MC 845 BQP (Exhibit P6A) and one mobile phone make Techno and one mobile phone make Oking were seized and listed in the certificate of seizure (Exhibit P1).

Thereafter, the accused person, one motorcycle and 33 sulphates bags containing *bhangji* were taken to Usariver Police Station at Babati where a case file with number DCEA/AR/1R 02/2020 was opened. PW1 handed over the said exhibits to the exhibit keeper one, PF 2467 D/SGT Henry (PW3).

On 1st July, 2020, PW3 handed over the 33 sulphates bags to PW1 for inventory sampling. The said exhibit (33 sulphate bags) was weighed by PW1. She also drawn two samples from each sulphate bag. This exercise was conducted in the presence of a resident magistrate one, Hon. Nestory Baro (PW4) and other officers from the Government Chemist Laboratory Agency (GCLA) and National Prosecutions Service (NPS). PW1 stated that the 33 sulphate bags were found with gross weight of 728.9 kilograms and net weight of 725.6 kilograms.

Thereafter, PW1 handed over the exhibit to PW3. She then ferried the samples to the GCLA-North Zone at Arusha. At the office of GCLA, the samples were handed over to PW5. The samples submission form and sample receipt notification were tendered in evidence and admitted as Exhibits P2 and P3.

On the next day, 2nd July, 2020, PW3 handed over 33 sulphate bags to PW1 for purposes of destruction. PW1 told the Court that the said exhibit (33 sulphate bags) was disposed of by burning, at Majani ya Chai duple, in the presence of PW4, Amina from the office of GCLA, Charles Mukama from NEMC and the accused person. PW1 tendered the inventory of disposing the exhibits which was admitted in evidence as Exhibit P4.

On his part, Maximillian Silayo (PW2) testified that he was a resident of Tengeru within Arumeru District. It was his evidence that, on the material day, he was at Mwadenti and that he met two police officers who asked him to witness the search at the accused person's house. He further testified that 33 sulphates bags, two mobile phones and one motorcycle were seized from the accused person's house. PW2 stated to have signed the certificate of seizure (Exhibit P1) in which the items seized from the accused person were listed.

Another witness was an exhibit keeper at Usariver Police Station one, PF2467 D/SGT Henry (PW3). He testified that, on 30th June, 2020, he received two exhibits namely, 33 sulphates bags containing leaves suspected to be *bhangĩ*, and one motorcycle with registration number MC 845 BQP, Make Toyo. Upon receiving the said exhibits, PW3 registered them in the exhibit book as Exhibit No. 83/2020. He told the Court that, on 1st July, 2020 at 0830 hours, 33 sulphate bags were taken for sampling. PW3 went on stating that, PW1 returned the said exhibit at 1615

hours. He further stated that on 2nd July, 2020, 33 sulphates bags were handed over to PW1 for purposes of destruction. His evidence was supported by the exhibit register (Exhibit P5) and one motorcycle with registration number MC 845 BQP (Exhibit P6A).

There came a resident magistrate namely Nestory Baro (PW4). He was stationed at the Resident Magistrate's Court of Arusha. PW4 told the Court that on 30th June, 2020, he received a letter requesting for a magistrate for purposes of witnessing the narcotic drugs. PW4 stated that he went to the police station as requested. According to him, 33 sulphates bags were weighed by officers from the Authority. It was his further testimony that two samples were drawn from each sulphate bag. PW4 could not recall the weight of narcotic drugs. He told the Court that the samples were labelled by officer from DCEA and forwarded to the GCLA. He further stated that, on 2nd July, 2020, 33 sulphate bags with narcotic drugs were disposed of at Maji ya Chai and that he is the one who issued the said order. He tendered the inventory of disposing exhibit which was admitted in evidence as Exhibit P6.

The last witness for the prosecution was Erasto Lawrance (PW5), a Government Chemist from GCLA, North Zone- Arusha. PW5 recalled that on 01/7/2020, he was summoned to go at Arumeru Police Station with a scale balance. He stated that 33 sulphate bags with leaves suspected to be *bhangi* were weighed

and two samples drawn from each sulphate bag by PW1. It was his evidence that the exercise was conducted in the presence of the accused person, magistrate and other officers. PW5 testified that exhibit (33 sulphate bags) weighed a net weight of 725.6 kilograms and that the said weight was recorded by PW1. He also stated to have recorded the said weight.

PW5 further stated that, on 1st July, 2020, he submitted to GCLA-Arusha, 66 samples for laboratory analysis. He stated the samples contained dry leaves suspected to be bhangji and were labelled Lab. No. NZ 500/2000. After analysis, PW5 opined that the samples were found to be *bhangji*. He prepared a Government Chemist analysis report which was admitted in evidence as Exhibit P7.

In his defence, the accused person denied trafficking in narcotic drugs namely, *bhangji*. He claimed that he was arrested when he was drunk and that he found himself at the police station. Further, the accused stated that he was not at his house when the search was conducted by the police officer. He admitted that he was present at the time of disposing of the narcotic drugs. However, he denied knowing what was disposed on the fateful day. In conclusion, the accused prayed the Court to acquit him.

He called two witnesses namely, Francis Merio Mollel (DW2) and Paulo Ngoyeyoo (DW2). According to them, the accused person was a boozier. Both witnesses testified that, on the material date around 0800 hours, the accused was

at the house of Mr. Kaputi Sanjanga where there was a clan ceremony. It was their evidence that, around 1030 hours, the accused person was drunk and that he was chased from the ceremony for annoying other people. DW2 and DW3 further stated that it was on the next day when they learnt that the accused person had been arrested for the offence at hand. It was their evidence that the appellant was a pastoralist.

Having considered the evidence on record, the main issue for determination by this Court is whether the prosecution has proved the case against the accused persons beyond reasonable doubt.

Pursuant to section 15 (1) (a) and 3(iii) of the DCEA, the offence of trafficking in narcotic drugs preferred against the accused is proved by establishing the following: *First*, the accused person trafficked narcotic drugs namely, cannabis sativa, commonly known as *bhangji*. *Two*, the cannabis sativa (*bhangji*) trafficked by the accused person weighed more than fifty kilograms.

In determining whether the said ingredients were proved, first for consideration is the issue whether the accused person was found with 33 sulphates bags containing dry leaves suspected to be narcotic drugs. According to the arresting officer (PW1) and independent witness PW2, a total of 33 sulphate bags containing dry leaves suspected to be *bhangji* were seized from the accused person's house on 30th June, 2020. Their evidence is buttressed by the certificate

of seizure (Exhibit P1). The accused person did not object admission of the said exhibit (certificate of seizure). Further to this, he did not discredit evidence of PW1 and PW2 who testified that 33 sulphate bags were found in his house. For instance, he did not state anything about his thumb print appearing on Exhibit P1. That being the case, his defence that he was drunk and that he found himself at the police station did not raise doubt in respect of the sulphate bags which were claimed to have been retrieved from his house. Further, the fact that PW2 was not known to the appellant does not imply that he was not an independent witness. Considering further that, neither PW1 nor PW2 was cross-examined on issue of clan ceremony and whether the accused person was drunk, the accused person's defence that he was at ceremony from 8000 hours to 1030 hours does not hold water. That said, I hold that 33 sulphates bags containing dry leaves suspected to be *bhangi* were seized from the accused person's house.

The crux of the matter is whether the sulphate bags found in the accused person's house were containing narcotic drugs, commonly known as *bhangi* weighing 725.6 kilograms. It is position of law that, the GCLA has an exclusive mandate of weighing and analysis of substances suspected to be narcotic drugs. This stance was taken in the case of **Omary Said @Athumani vs R**, Criminal Appeal No. 58 of 2022, CAT at Tanga (unreported). The Court of Appeal held that:

*"...it is the law that, the weighing and analysis of substances suspected to be narcotic drugs is within the domain of the CGC. See for instance, in **Charo Said Kimilu v. R**, Criminal Appeal No. I II of 2015 (unreported), where it was stated:*

"Narcotic drugs or psychotropic substances should be submitted to the Government Chemist laboratory Agency for weighing and analysis before tendering it as evidence in court".

It is further set out under section 48A of the DCEA that, after making test and analysis of a sample of any narcotic drugs, the Government analyst should record finding in a signed report which is then issued to the person who submitted the sample.

Reverting to this case, PW5 is the Government chemist analyst from the GCLA - Arusha Zone. As stated earlier, he testified to have received 66 samples from PW1. It was his further evidence that his analysis confirmed that the samples brought were narcotic drugs, namely as bhangi weighing 725.6 kilograms and his finding was recorded in the Government analyst report (Exhibit P7). Now, the question that arises is whether the analysis was based on the sample drawn from 33 sulphate bags seized from the appellant?

In order to resolve the foregoing question, one has to consider whether the chain of custody of 33 sulphate bags seized from the accused person was maintained. This question is based on the settled law that, in cases of this nature, there must be proper account of who and how the property or item was handled

from the time of being found and seized, up to the point when it is tendered in court. See for instance, the case of **Jibril Okash Ahmed vs R**, Criminal Appeal No. 331 of 2017, CAT at Arusha (unreported) in which the Court of Appeal underlined as follows:

"As a starting point we wish to state that it is settled law that in cases involving arrest, seizure, custody and later production in court of the seized property as exhibit, there must be proper explanation of who and how the property was handled from where it was found and seized up to the point when it is tendered in court. That is intended to ensure authenticity of such evidence.

The Court of Appeal went on citing the case of **Chacha Jeremiah Murimi and 3 Others vs R**, Criminal Appeal No. 551 of 2015 (unreported) where the legal principles governing chain of custody were stated as follows:

*"In establishing chain of custody we are convinced that the most accurate method is on documentation as stated in **Paulo Maduka and Others vs. R.**, Criminal Appeal No. 110 of 2007 and followed in **Makoye Samwel @ Kashinje and Kashindye Bundala**, Criminal Appeal No. 32 of 2014 cases (both unreported). However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked at depending on the prevailing circumstances in every particular case. For instance, in cases relating to items which cannot change hands easily and therefore not easy to tamper with."*

As intimated herein, evidence of PW1, PW2 and Exhibit P1 shows that 33 sulphate bags were seized from the accused person. Thereafter, PW1 handed over the said exhibit to the exhibit keeper (PW3) who stored or kept the same in the exhibit room. That was after registering the said exhibit (33 sulphate bags) and motorcycle (Exhibit P6A) in the exhibits register book (Exhibit P5).

It is clear that the paper trail on how the 33 sulphate bags with dry leaves suspected to be *bhangji* moved from and/or to the exhibit room was recorded in Exhibit P5 and supported by the oral testimonies of PW1, PW3 and PW5 as follows. *First*, on 1st July, 2020 at 0830 hours, PW3 handed over the 33 sulphate bags with dry leaves to PW1, for sampling and inventory. *Second*, according to PW1, PW4 and PW5, the sulphate bags were weighed and two samples drawn from each sulphate bags. *Third*, on the same date (01/07/2020), PW1 submitted 66 samples drawn from 33 sulphate bags to the GCLA- Arusha. *Fourth*, in terms of the samples submission form (Exhibit P2) and receipt notification form (Exhibit P2), the said samples were received by PW5 who analysed them and his finding recorded in the report (Exhibit P7) which was handed over to PW1. *Fifth*, as for the dry leaves which remained in the sulphate bags after sampling, PW1 returned the same to the exhibit room. *Sixth*, on 2nd July, 2020, PW1 took the said exhibits for destruction and PW4 confirmed to have issued an order of disposing of the said exhibit. *Seventh*, it is on evidence that the dry leaves suspected to be *bhangji* were

destroyed by burning and that the empty sulphate bags were returned to the exhibit keeper (PW1) as per Exhibit P1).

In the light of the foregoing, one may be tempted to hold that the chain of custody of was maintained. In order to determine whether the chain of custody was duly maintained or otherwise, I find it appropriate to consider whether the sampling was conducted in accordance with the law. Section 36(1) of the DCEA requires the officer seizing the substances suspected to be drugs to prepare an inventory of the said narcotic drug. The said inventory is required to have details on; description, quantity, mode of packing, marks, numbers of narcotic drugs; particulars on identification of the narcotic drugs; packing in which narcotic drugs are packed; country of origin; and other particulars relevant to the identity of the narcotic drugs. After preparing the said inventory, the officer seized the narcotic drugs is duty bound to ensure that the correctness of the inventory that and samples are certified by the magistrate. Section 36(1) of the DCEA provides:

"An officer seizing such narcotic drug, psychotropic substance, precursor chemicals or other substances proved to have drug related effects shall make an application to any magistrate having jurisdiction under this Act, for the purpose of-

- (a) certifying the correctness of the inventory so prepared;*
- (b) taking, in the presence of such magistrate, photographs of such drugs or substances and certifying such photographs as true; or*

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of sample so drawn."

To reinforce the above provisions, regulation 16 of the Drugs Control Enforcement (General) Regulations, 2016 provides for procedure for management and drawing of samples as follows:

"16. Immediately following the seizure of narcotic drugs or psychotropic substance, the authorized officer in-charge of the seized substance shall take all reasonable steps to ensure that:

- (a) all the package or containers seized are serially numbered for purposes of identification and the date of seizure is indicated;*
- (b) ..*
- (c) Where it is physically possible to count and weigh the seized drug, the officer in charge shall measure and record the gross or net weight.*
- (d) the gross weight, particulars of drugs and the date of seizure is indicate on each package.*
- (e) the seized substance is displayed and photographed, videotaped or otherwise recorded to depict it as originally packed.*
- (f) samples from the seized substance are drawn in duplicate in the presence of the witness and where necessary the person from whom possession it has been recovered or the owner, occupier or representative of the owner of the premises; and*

(g) all items of evidential value that relates to the seized substance are stored in secure and appropriate condition for the prevention from loss, theft or any other form of misappropriation, accident or accelerated deterioration."

In his testimony, PW1 stated to have applied before the magistrate (PW4) for sampling of substances in 33 sulphate bags found in possession of the accused person. PW4 and PW5 were at one that, PW1 weighed the said sulphate bags and that two samples were drawn from each sulphate bag. PW1 and PW5 went on to state that the said samples were labelled as A1 (1) (2) to A33 (1) (2). However, the sampling inventory showing the details of samples and weight of the narcotic was not tendered in evidence. The said sampling inventory is prepared under section 36(2) of the DCEA read together with regulation 22(1) of the Regulations. It is in a prescribed form found in the Third Schedule to the DCEA and Regulations. Some of the details in the inventory form found in the third schedule to the Regulations is the gross weight of the substance, net weight of the substance and weight of the sample.

As shown herein, PW1 and PW4 told the Court that the net weight of the narcotic drug was 725.6 kilograms. It was further stated by PW4 that the weight was recorded by PW1 and PW4. Yet, neither PW1 nor PW4 tendered the sampling inventory containing the weight of the substances in 33 sulphate bags. I have noted that the Government chemist analyst report (Exhibit P7) shows that the narcotic

drugs weighed 725.6 kilograms. However, the weight of the substances and samples does not feature in the sampling submission form (Exhibit P2) submitted to the GCLA. Further to this, the sample receipt notification (Exhibit P3) suggests that the weight of the dry leaves in the sulphate bags was 728.9 kilograms. In the circumstance, the weight of narcotic drugs trafficked by the accused was not proved beyond reasonable doubt.

Apart from showing the weight, the sampling inventory form would have informed us how the package (sulphate bags) and samples drawn thereto were marked or labelled before being submitted to the Government Chemist. In the absence of the sampling inventory form, nothing to show that the samples submitted to PW5 were marked A1 (1), A (2) to A33 (1), A33 (2). As if that was not enough, there is no record showing whether the magistrate (PW4) certified on the correctness of the inventory and list of samples as mandatorily required by the law. Furthermore, neither PW1 nor PW5 told the court whether the photographs were taken in the presence of PW4 as required under the provisions afore. I have also considered that the sampling inventory form and certificate of photographs were read over to the accused person during committal proceedings and that, during the preliminary hearing, the prosecution indicated they would rely on the said exhibits. This Court was not told as to why the said documents were not tendered in evidence.

On the foresaid reasons, I am of the view that the chain of custody of exhibits was not maintained as the sampling inventory form and certificate of photographs alleged to have been taken were not tendered in evidence. Considering further that the weight of narcotic drugs subject to this case was not duly proved, it is my humble opinion that the prosecution case was not proved beyond reasonable doubt.

Ultimately, the accused person is found not guilty and is acquitted of the offence of trafficking in narcotic drugs levelled against him. In consequence, I order that the accused person be set free from custody unless he is held for other lawful cause.

Dated this 6th day of April, 2023.



S.E. KISANYA
JUDGE
06/04/2023