IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT MOROGORO

ECONOMIC SESSION NO. 4 OF 2023

REPUBLIC

VERSUS

1. RABAN MWAMSAKU

2. DAMAS THOBIAS @ RAMADHANI

3. ABDALLAH KHAMIS @ MIKELA

4. HAMAD MWICHANDE @ MACHECHE

5. SADIKI MOHAMED SHABANI

6. ABDALLAH MUUNGANO CHAMGOSI

7. JUMA MADEKE RAJABU

JUDGMENT

31st March, & 7th June, 2023

ISMAIL, J.

The accused persons face a joint charge of trafficking in narcotic drugs. Vide the information, filed in this Court on 17th March, 2023, a couple of counts have been preferred against them. The first count involves Rabani Mwamsaku, Damas Thobias @ Ramadhani, Abdallah Khamis @ Mikela and

Hamad Mwichande @ Macheche (the 1st, 2nd, 3rd and 4th accused persons, respectively), and the allegation is that on the 14th day of September, 2020, at Lugono area, Melela Ward, Mlali Division within Mvomero District, Morogoro Regions, the quartet was found trafficking narcotic drugs known as cannabis sativa, commonly known as bhangi. The drugs weighed 189.38 kilograms.

The second count contains an allegation levelled against the Sadiki Mohamed Shabani, Abdallah Muungano Chamgosi and Juma Madeke Rajabu all of whom are alleged to have been found trafficking narcotic drugs known as cannabis sativa, commonly known as bhangi, which weighed 157.98 kilograms. The offence is alleged to have been committed at Melela Mlandizi area, Melela Ward, within Mvomero District, Morogoro Region, on 14th September, 2020.

Both of the alleged counts were in contravention 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 sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2019.

The facts constituting the background to this matter are pretty straight forward. They are deducible from the prosecution's side of the story and the

defence put forward by the accused persons. It dates back to 14th September, 2020, when D.5266 D/SGT Mkaze (PW5), acting on an informer's tip off, reached out to his boss and informed him of news that plans were under way to traffic narcotic drugs from Melela Morogoro. The drugs were allegedly bound for Dar es Salaam. SP Edward, Officer In charge of Criminal Investigation in the District (OC-CID), who featured as PW2, acted on the information and assembled a team of his lieutenants, including PW5. They then started off to Melela where a trap was laid, culminating in the arrest of Sadiki Mohamedi, the 5th accused person. A while later, two other persons, namely; Abdallah Muungano, 6th Accused person, riding a motor cycle MC759, make Haujoue; and Juma Madeke, 7th Accused person, aboard motor cycle MC 956 CPU, make Haujoue, arrived. They each carried five bags containing a substance of that was suspected to be narcotic drugs on the instruction of the 5th accused person. These consignments were received by PW2 and his subordinate officers all of whom posed as "turn-boys" and loaded them into a Fuso truck. Both of the accused persons were put under police restraint.

The consignment was seized, vide a certificate of seizure, tendered in court as Exhibit P4. The seized consignment was tendered in two tranches

and admitted as Exhibit P3. The search was witnessed by Juma Hamisi, an independent witness, who featured as PW4.

As they were about to leave, news filtered from an anonymous informer that a similar consignment, bound for Dar es Salaam, awaited at Lugono Njia Tatu- Mvomero. This necessitated the splitting of the police officers into two groups. One of the two rushed to Lugono, following the signs and marks which were set by the caller. The informer required the police to be guided by a tree branch that was dropped on the road. On arrival, Raban Mwamsaku, the 1st accused, emerged from the bush and went to driver. He then went back to the bush and came back in the company of Damas Thobias, 2nd accused person, both of whom carried bags containing substances believed to be narcotic drugs. Once again, PW2 and his lieutenants masqueraded as "turn-boys" and helped the 1st and 2nd accused to load the said bags into the vehicle. They were put under restraint when they brought the last bag. The seizure of the said bags, which were tendered in court and admitted as Exhibit P7, was witnessed by PW7.

Interrogations with the 1st accused person revealed that the seized narcotics were meant for delivery to a Mr. Hamad Mwinchande, the 4th accused person, then based in Dar es Salaam. The same applied to the 5th accused person who stated that his principal was also in Dar es Salaam.

PW2 and his team were granted permission to travel to Dar es Salaam. They stopped at Kibo-Ubungo area. After a while a black Ractics vehicle, allegedly belonging to the 4th accused who was on board. After a conversation with the 5th accused person (Sadick), work began to unload the consignment and load it into his vehicle with Reg No. T686 DSC (Exhibit P 10). He was arrested shortly after he was done with the loading. PW2 filled a certificate of seizure (Exhibit P8) for the seizure of the vehicle.

A short while thereafter, a vehicle, make Toyota Noah with Reg. No T402 CVW, arrived. Two persons alighted and went to speak with Raban Mwamsaku, the 1st accused person. These were later identified as Hamad Mwichande, 4th accused person, and Abdallah Mikela, 3rd Accused person. After a brief conversation, the duo began to unload the sacks from the truck and loaded them into the Noah. When they were done, PW2 and his team stepped up and arrested them, simultaneous with seizure of the vehicle, tendered and admitted in Court as Exhibit P9. The seized exhibits were handed to Dakawa Police Station's CRO officer which was under the service a certain of CPL Mjarubi at the time. The latter passed it on to A/Insp Greyson, the exhibits keeper, for his custody.

On 28th September, 2020, the seized drugs were collected by D/Ssgt Mkaze and took them to the Government Chemist Laboratory Agency for

analysis. Noel Kaaya (PW1) carried out the analysis and came with a confirmation that the substance in the bags was indeed narcotic drugs by the name cannabis sativa, commonly known as bhangi, and they weighed 157.98 kg.

Subsequent investigation put the accused persons in a blemished position, calling for their arraignment in court on a charge of trafficking in narcotic drugs. They all pleaded not guilty to the charges, necessitating carrying out of a trial in which the parties presented their testimonies in support of and in opposition of the allegations. Trial proceedings were preceded by the preliminary hearing during which facts of the case were read. The accused persons disputed every fact, save for their personal particulars and places of residence.

The trial proceedings saw the prosecution represented by Messrs Mosses Mafuru and Emmanuel Kahigi, both learned State of Attorneys. The defence team was composed of a battery of learned legal practitioners by the names of Marwa Masanda, Susan Mafwele, Hassan Nchimbi, Bahati Hacks, Aziz Mahenge and Alpha Sikalumba, learned advocates for the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th accused persons, respectively.

The prosecution's bid to prove its case rested on the oral testimony and adduction of documentary and physical testimony. In the case of oral testimony, five witnesses testified in court, while 14 exhibits were tendered in court. With regards to oral testimony, those who testified were: Noel Isack Kaaya (PW1); SP Edward (PW2); A/Inspector Greyson Yohana Lemanya; (PW3); Juma Hamisi (PW4); and D. 5266 D/Ssgt Mkaze (PW5).

With respect to documentary and physical evidence, the Court admitted the following documents: Taarifa ya Uchunguzi wa Maabara ya Serikali in respect of DAW/IR/967/2020 (Exhibit P1); Taarifa ya Uchunguzi wa Maabara ya Serikali in respect of DAW/IR/968/2020 (Exhibit P2); 20.5 sulphate bags full of narcotic drugs confirmed to be cannabis sativa (Exhibit P3); Certificate of Seizure (Form No. DCEA 003) for seizure of 10 sulphate bags of narcotic drugs (Exhibit P4); Certificate of Seizure (Form No. DCEA 003) for seizure of Motor Cycle with Reg. No. MC 956 MCL (Exhibit P5); Certificate of Seizure (Form No. DCEA 003) for seizure of Motor Cycle with Reg. No. MC 579 MCL (Exhibit P6); Certificate of Seizure (Form No. DCEA 003) for seizure of 10.5 sulphate bags of narcotic drugs (Exhibit P7); Certificate of Seizure (Form No. DCEA 003) for seizure of motor vehicle with Reg. No. T 686 DSC Ractis (Exhibit P8); Certificate of Seizure (Form No. DCEA 003) for seizure of motor vehicle with Reg. No. T 402 CVW Noah

(Exhibit P9); Motor vehicle with Reg. No. T 686 DSC Ractis (Exhibit P10); Motor vehicle with Reg. No. T 402 CVW Noah (Exhibit P11); Motor Cycle allegedly seized from 6th accused person with Reg. No. T 579 CML (Exhibit P12); Motor Cycle allegedly seized from 7th accused person with Reg. No. T 956 CPU (Exhibit P13); and Exhibit Register (PF 16) (Exhibit P14). Summary of the prosecutions testimony, as alluded to earlier on, will feature in details during the analysis of the case.

When the prosecution case's curtain closed, the Court retired and made a finding on whether the accused persons had a case to answer. The answer to this question was in the affirmative against all the accused persons. They were thus invited to put up their defence. All of the accused persons maintained their innocence. Their testimony was solely oral, made on oath or affirmation, and they neither called other witnesses nor did they tender any exhibit. They testified as DW1, DW2, DW3, DW4, DW5, DW6 and DW7.

As stated earlier on, all of the accused persons have denied any involvement in the alleged wrong doing. They also denied having been found with narcotic drugs.

Raising the defence curtain was the first accused person who featured as DW1. He told the Court that he is a farmer at Maganza village in Morogoro.

He testified that, on the fateful day he went to downtown Morogoro to buy fish for his retail business, but he did not find any. He chose to spend a night awaiting a fish consignment from Kigoma. At around 3.00 pm, he strolled to a local liquor shop at Chamwino in Morogoro, where he went on a drinking spree that lasted until 9.00 pm, when he decided to leave. Along the way, he met a land cruiser vehicle which he later recognized as a police vehicle. The vehicle stopped beside him and enquired about his movements. He told them that he was heading to his place of aboard but they were unfazed. He heard them saying *"Hawa ndiyo vibaka, kama vipi Afande na huyu tumchukue"*, literally meaning that I was a petty thief who should be arrested. He was then put under a restraint, searched and bundled into the vehicle in which he met three people. He was then taken to the Central Police Station in Morogoro where he spent a night. The following day, he was taken to Mvomero Police Station, where he remained in incarceration until 09th October, 2020, when he was arraigned in Court alongside other people he did not know. They all faced economic crime charges. He denied being in police custody prior to 1st October, 2020. On his whereabouts on 14th September, 2020, DW1's testimony is that he was doing his fish business on the day, and that at 11.00 pm, he was home, asleep with his family. On his movements on 15th September, 2020, the contention by DW1 is that he went

about his normal business routine and nothing else. He denied the allegations and prayed for his acquittal.

The case for the 2nd accused person was also characterized by denial of what he was accused of. Testifying as DW2, he argued that on the fateful day he was at a place known as Kibaoni, at the junction to Kilosa Township within Morogoro Region, where he had gone to drink local brew called "Komoni". At around 8.00 pm, he left the place for his home. Along the way, he saw a motor cycle that carried police officers who suspected him of being a lifter of luggage from vehicles, commonly known as "Shusha shusha". They took him to Morogoro Central police station where he spent a night before he was transferred to Dakawa Police Station. He stayed in confinement until 09th October, 2020, the date on which he was arraigned in court on allegations of trafficking in narcotic drugs whose involvement he denied. He urged the Court to acquit him. On cross examination, he said he was arrested at Shamba Pesa and not at Lugona Njia Tatu. He claimed PW2 said he arrested Damas Thomas and not him. He denied knowing PW4.

3rd accused person's defence did not deviate so much from what other accused persons testified on. He introduced himself as a driver of a truck that plies between Iringa and Dar es Salaam. He testified that on 12th

September, 2020, he arrived at Msamvu, Morogoro from Iringa, enrooted to Dar es Salaam. He decided to retire in Morogoro for the night. He handed the truck to his co-driver and went for supper in one of the restaurants within the bus terminus. After he was done, he went to look for a place to sleep. It was at that point in time, that he met police car with police officers who stopped and enquired about his presence there. He explained he was a stranger but this explanation did not get him off the hook. He was arrested and bundled into their vehicle, joining other suspects all of whom were conveyed to central Police Station. On 15th September, 2020, he was taken to Dakawa Police Station. On 9th October, 2020, he was taken to Morogoro Central Police before his arraignment in the RM's Court Morogoro on allegations of committing economic crimes. He denied the allegations and prayed that the Court should set him free as he was not involved.

The 4th accused testified as DW4. He contended that he was a seller of second hand clothes at Msamvu Morogoro but a resident of Dar es Salaam. He alleged that he was arrested on 17th September, 2020, as he was waiting to catch a bus to Dar es Salaam. The alleged wrong doing was that he was a vagabond. After spending three days in confinement at Central Police Station, he was moved to Dakawa Police Station until 9th October, 2020, when he saw his day in court. He was not allowed to plead. He denied being

arrested at Ubungo, Dar es Salaam or that he was found with narcotic drugs. He maintained that nothing was recovered from him, and that he did not append his signature on any certificate of seizure. He prayed that the Court acquits him.

The 5th accused person's story was linked with what allegedly occurred at a football field at Melela Kololo, where a match was played between two local rivals from Majengo and Kidai. A scuffle ensued, pitting fans of one team against the other, who complained of poor refereeing. Luck eluded him as in the course of scampering for safety, he fell in the hands of the police officers who took him to Mzumbe Police Station. He was later transferred to Morogoro Central Police where was locked up for two days. On 16th September, 2020, he was shifted to Mikese Police Station. At around 3.00 am on 17th September, 2020, he was transferred to Dakawa Police Station where he was told he was accused of causing a brawl in a football match.

On 09th October, 2020, he was arraigned in the RM's Court Morogoro, together with other suspects, for the offence of trafficking in narcotic drugs. He denied being involved as well as denying that he was at the scene of crime.

The 6th and 7th accused persons, have a shared story of having

attended to a traditional initiation ceremony of their brother's daughter at Mikoroshini hamlet. The duo went to the ceremony and stayed until 10:00 pm and left. On their way home, they saw a police vehicle full of police men. Unbeknown of what would befall them, they ran away. The police got the best of them and managed to contain them. They were taken to Dakawa Police Station, before they stood a trial on 9th October, 2020, on allegations of trafficking in narcotic drugs known as bhangi. They both denied the allegations and prayed the court to acquit them.

On the closure of the cases for the sides, counsel for the parties urged the Court to allow them to file closing submissions. This prayer was acceded to and the parties complied with the order.

The prosecution's representations were preferred by Mr. Mosses Mafuru, learned state attorney, who clustered his submission into several heads. They touched on seizure, credibility of witnesses, chain of custody, contradiction and defence of alibi raised by the accused persons.

With regards to seizure, the prosecution's contention is that PW2 has testified on how the arrest and seizure of the substances was done, and that the said substance was later confirmed by PW1 as narcotic drugs known as cannabis sativa or bhangi. Regarding the propriety or otherwise of the seizure, the argument is the requirements of section 38 (1) of the Criminal

Procedure Act, Cap 20 R.E. 2022 were complied with. This argument is predicated on the testimony of PW2, who was heard as stating that, being a Superintendent of Police at the time, he was a rank higher than that of the Officer Commanding the Station (OCS), then an Assistant Superintendent. It would not be appropriate to procure an order that would command a superior officer to conduct a search. Learned attorney reproduced the content of section 2 of Cap. 20 which defines an officer incharge of a police station. Mr. Mafuru concluded that the search and seizure was in conformity with the law.

Regarding credibility of the witnesses, the view held by the prosecution is that the testimony of all prosecution witnesses was positive, meaning that it was direct from the witnesses who participated and saw what transpired at the scenes of the crime. In the counsel's view, this testimony was sufficient to base a conviction on, if witnesses are credible and tell the truth. Underlining the significance of the positive evidence, Mr. Mafuru cited the case of ***Vuyo Jack v. DPP***, CAT-Criminal Appeal No. 334 of 2016 (unreported), which quoted an excerpt from the decision in ***Commonwealth v. Webster*** 1850 vol 50 MAS 225.

He argued that, since the settled position is that credibility of a witness is determined through coherence of his testimony, when considered in

relation to evidence of other witnesses, and that the witnesses for the prosecution presented nothing that would cause a disbelief, the Court should apply the principle in ***Goodluck Kyando v. Republic*** [2006] TLR 363. In the latter, it was held:

> *"it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

Describing PW2's testimony as credible, Mr. Mafuru held the view that, the fact that the defence did not cross examine on the amount of items seized means that the prosecutions his account of facts is nothing but the truth.

Regarding the impact that PW4's statement (Exhibit D1) has on the case, Mr. Mafuru was of the view that this was an act of corroboration of the prosecution's testimony, since Exhibit D1 provides details with respect to arrest of the 5th, 6th and 7th accused persons, and seizure of the items, especially Exhibit P3. While admitting that lies of the accused cannot serve as the basis for conviction, it was his view that such lies may have the effect of corroborating the prosecution's case. On this, he referred me to the decision of the Court of Appeal of Tanzania in the case of ***Twaha Elias Mwandugu v. Republic*** [2000] TLR 277. Still on the statement (Exhibit

D1), Mr. Mafuru was quick to dispel the effect of having the statement skip some of the narrations made by PW4 when he testified. He argued that, though alien, it is common practice in India where facts not factored in a statement may be considered to be relevant. On this, he prayed that the Court be persuaded by the holding in ***Bhaghandra v. State of Madhya Pradesh***, Criminal Appeal Nos. 255-256 of 2018, Supreme Court of India, Criminal Appellate Jurisdiction.

Submitting on the chain of custody, Mr. Mafuru's argument is that the whole essence of keeping trail of the chain of custody is to ensure that the subject matter, the potential evidence, is not destroyed, polluted or tampered with. With regards to Exhibit P3, the contention by the prosecution is that the testimony tendered has given a chronological oral account of how the said exhibit changed hands until it found its way to the Court. He denied that the chain of custody was broken at any point in time as to suggest that the said exhibit was tampered with. Mr. Mafuru argued that Exhibit P3 is not one of the items that could change hands easily. In his view, PW1, PW2, PW3 and PW5 had sufficiently established the unbroken chain of custody. On the oral account in proof of chain of custody, the prosecution relied on the decisions in ***Abas Kondo Gede v. Republic***, CAT-Criminal Appeal No.

472 of 2017; and ***Wallestein Alvares Santillan v. Republic***, CAT-Criminal Appeal No. 68 of 2019 (both unreported).

Turning on to the contention that the driver of the truck was not called to testify, Mr. Mafuru argued that the duty of proving the case beyond reasonable doubt had been accomplished without enlisting the testimony of the said driver. In any case, he argued, the driver was a whistle-blower who enjoys protection against disclosure of his identity. This is done by not calling him to testify in court. The prosecution's view is premised on the decision in ***Khamis Said Bakari v. Republic***, CAT-Criminal Appeal No. 359 of 2017 (unreported).

There is also a contention with respect to the defence of alibi. Mr Mafuru has taken the view that no notice or sufficient particulars were given by any of the accused persons to that effect that they were not at the scenes of the crime on the dates stated. He further contended that none of the accused persons contradicted the testimony of PW2 on the accused's whereabouts on the fateful days. This suggested that they had no qualms with the testimony of PW2.

Addressing the Court on misjoinder of counts, the prosecution rallied behind the testimony of PW2 and held that these arrests were part of the same transaction. Learned counsel argued that charging two counts in one

charge is an allowable practice under section 133 of Cap. 20, provided that the offences are founded on the same facts or if they form or are a part of series of offences of the same or similar character.

In a bid to establish culpability of all of the accused persons, the prosecution argued that 3rd and 4th accused persons had knowledge of the consignment that was to be trafficked to Dar es Salaam and were prepared to receive it. It was the prosecution's contention that this amounted to constructive possession, in the same mould as explained in the case of ***Simon Ndikulyaka v. Republic***, CAT-Criminal Appeal No. 231 of 2014 (unreported). It was held:

> *"For a person to have possession, actual or constructive of goods, it must be proved either that he was aware of their presence or that he exercised control over them."*

On the possible contradictions, the view by the prosecution is that such contradictions (if any) are minor and a healthy indication that the witness did not have a rehearsed script. Learned counsel backed up his arguments by citing and quoting reasoning in a couple of the decisions. These are: ***EX. G. 2434 George v. Republic***, CAT-Criminal Appeal No. 8 of 2018; and ***Chukwudi Denis Okechukwu & 3 Others v. Republic***, CAT-Criminal Appeal No. 507 of 2015 (both unreported).

It was the prosecution's view that a case had been made out against the accused persons.

The defence's final submission was jointly preferred by the learned counsel for the 2nd, 5th and 7th accused persons, while none was preferred for the rest of the accused persons. This submission dwelt, to a large extent, on two key aspects. These are: issues relating to chain of custody; and the question of identification of the 6th and 7th accused persons.

With regards to chain of custody, the contention by the defence is that chain of custody of exhibits P1 and P2 was not established in the manner spelt out in the famous case of ***Paulo Maduka & 4 Others v. Republic***, CAT-Criminal Appeal No. 110 of 2007; and restated in ***Alberto Mendes v. Republic***, CAT-Criminal Appeal No. 473 of 2017 (both unreported); and in terms of the Police General Orders PGO 229. In both of the said decisions, the Court of Appeal of Tanzania held that, where chain of custody cannot be established through a paper trail then there must be sufficient evidence to prove or establish it. The defence contended that, in the instant case, a lot of gaps were exhibited, meaning that the chain of custody of Exhibits P1 and P2 was broken, and as such, exhibits passed through several handlers without any proper documentation of the sequence of events. Learned

counsel singled out PGO 229 paragraphs 17 and 29, the former of which states as follows:

> *"Whenever an exhibit is passed from the custody of one officer to that of another, the officer who hands over the exhibit shall record in the presence of the latter officer the name, rank and number of the officer to whom he hands over the exhibit and the date and time of handing over on the back of Exhibit label (P.F. 145)."*

In the defence's view, PW2's failure to tender any proof of how Exhibits P1 and P2 were handed to CPL Mjarubi, and the fact that CPL Mjarubi did not appear and testify in the proceedings means that there was no proof of the chain of custody of the said exhibits. The same contention was made with respect to the handling of the said exhibits by PW5 who took the exhibits to the Government Chemist, but without any proof on how the said exhibits were retrieved from PW3, the custodian, and back to the PW3. Learned defence counsel further argued that there is no evidential trace on how PW1 got hold of Exhibits P1 and P2 from PW5. They argued that serious doubts exist on whether what was tendered in Court by PW1 is the same as what was seized at the scenes of the crime. They revisited PW1's testimony which was to the effect that there was no way analysis would be carried out without

Form DCEA 001, yet none was tendered in court in the entirety of the trial proceedings.

The defence further contended that, failure to give reasons for the prosecution's failure to comply with mandatory guidelines for tendering a paper trail on the chain of custody of the exhibits left a lot to be desired. It is contrary to the holding in ***Zainabu Nassoro @ Zena v. Republic***, CAT-Criminal Appeal No. 348 of 2015 (unreported), in which it was held:

> *"... the chronological documentation and/or paper trail showing seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind the recording the chain of custody .... is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having planted frequently to make someone guilty, the chain of custody requires that from the moment the evidence is collected, its very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it..."*

The defence introduced yet another issue with respect to the role played by PW4, an independent witness. The contention is that the said witness was among the persons who were searched. Learned counsel referred to Exhibit P5 which was tendered by PW2. They argued that, the

fact that an independent person was also searched means that PW4 ceased to be independent and impartial, lowering his credibility, as well.

With regards to identification, the defence's take is that the 6th and 7th accused persons were not properly identified by PW5. They contended that PW5 mixed up the two with the 7th accused referred as 6th accused, and vice versa. The defence also contended that PW4 failed to identify them during cross examination, the reason being that the said accused persons were arrested at a scene of crime which was covered by darkness.

Overall, the defence urged the Court to hold the accused persons not culpable of the offences they are charged with. They prayed that they be acquitted.

From the parties' contending submissions and the factual settings as gathered during trial, the grand question that awaits resolution is whether the case against the accused persons has been established.

Framing of this question has taken into consideration the established canon, a certainty in criminal justice, which is to the effect that an accused's conviction can only be grounded if, and only if, the prosecution is able to make out a case that leads to an irresistible conclusion of his guilt. In so doing, the prosecution has to conform to the evidential and legal standard of proof, and the standard is beyond reasonable doubt. Under this, the

weakness or strength of the defence testimony is of no decisive importance as far as his culpability is concerned.

This position, a household principle in criminal jurisprudence, has been underscored in a multitude of decisions across jurisdictions. This Court has pronounced itself on many a time as well. The most emphatic of the subscriptions by the Court came in the famous case of ***Republic v. ACP Abdallah Zombe & 12 Others***, HC-Criminal Sessions Case No. 26 of 2006 (DSM-unreported). It was held as follows:

> *(i) The burden of proof in criminal cases generally is always on the prosecution and the standard is beyond reasonable doubt. When the said burden shifts to the accused, the standard is on, a balance of probabilities (See **OKARE v R** (1955) EA 555, **SAID HEMED v R** [1987] TLR 117, **MOHAMED SAID MATULA v R** [1995] TLR. 3; and **(MSWAHILI v R** [1997] LRT. 25).*
>
> *(ii) A mere aggregation of separate facts all of which are inconclusive in that they are as consistent with innocence as with guilt, has no probative value (**CHHABILDAS D. SUMAIYA v. REGINA**(1953) 20 EACA 14.*
>
> *(iii) That a conviction should always be based on the weight of the prosecution case and not the weakness of the defence case.*

(iv) *It is not the quantity but the quality of the evidence which matters in deciding on the guilt or innocence of an accused person.*

(v) *Suspicion, alone, however strong cannot be the basis of a conviction (**SHABANI MPUNZU @ ELISHA MPUNZU v. R** (Criminal Appeal No.12 of 2002 (Mwanza) unreported)."*

Resolution of the foregoing question will be done by tackling the following issues. These are:

(i) *Whether search and seizure of Exhibit P3 and other items allegedly seized from the accused persons conformed to the law;*

(ii) *Whether the accused persons were found in possession of Exhibit P3; and*

(iii) *Whether the chain of custody of Exhibit P3 was maintained;*

The first two issues will be resolved in a combined fashion. As stated earlier on, propriety of the search and seizure of assorted items, allegedly recovered from the accused persons, is on the line. This includes Exhibit P3, a consignment of what was later confirmed as cannabis sativa. While the defence is adamant that none of the listed items was seized from any of them, the prosecution has pinned its hope on the testimony of PW2, PW4 and PW5 who were present in the entirety of the process of arrest, alleged

search and seizure of the items. Their testimony is that 10 bags of cannabis sativa were seized at Melela and the persons from whom they were seized were 5th, 6th and 7th accused, and allegedly appended their signatures on Exhibit P4. PW2 testified, at length, how he got to Melela, got the 5th accused person under restraint, and how he helped load the bags into a waiting truck before he arrested the 6th and 7th accused persons. He also testified that he did the same with respect to 10½ bags, allegedly recovered at Njia Tatu area, involving the 1st and 2nd accused persons.

With regards to search and seizure, the applicable law is the provisions of Cap. 20. Its application in the cases of narcotic drugs is mandated by section 32 (5) of Cap. 95. The relevant provision in this case is section 38 (1) which provides as hereunder:

> *"Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place-*
>
> *(a) anything with respect to which an offence has been committed;*
>
> *(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;*
>
> *(c) anything in respect of which there are reasonable grounds to believe that it is intended to*

be used for the purpose of committing an offence, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be."

The contention by PW2 is that he could not obtain a search order from a police officer whose rank is lower than his, he being a superintendent of police. The prosecution has backed up this argument by citing section 2 of the Act that defines the term "officer in charge of station". My take on this is that the prosecution is quite in order in its position. The search and the resultant seizure would not be invalidated merely on account of lack of a search order which would not, in the circumstances of this case, be issued to the head of operations, a senior officer who cannot be ordered by an officer whose rank is inferior to his.

PW2 and PW4 were subjected to a number of questions on the manner in which the entire process was handled. None of the questions posed any serious concern on the powers that he had in searching and seizing the items, and the obvious conclusion is that there was nothing untoward on the legitimacy or propriety of the search. In law, and as the prosecution has

submitted, failure to cross examine on a fact draws a conclusion that the account of fact narrated in the testimony is nothing but the truth (See. ***Nyerere Nyegue v. Republic***, CAT-Criminal Case No. 67 of 2010 (unreported)).

On whether the accused persons were found with the said narcotic drugs, the answer is pretty straight forward. The cumulative effect of the testimony adduced by PW2, PW4 and PW5 presented a unanimous position that convinces me that the object of these proceedings, the narcotic drugs (Exhibit P3) were found or seized from the accused persons. This position is corroborated by Exhibits P4 and P5 among other documents. These certificates of seizure clearly indicate that Exhibit P3 is one of the items that were recovered from the 1st and 2nd accused, in the case of the first tranche, and 5th, 6th and 7th accused, with respect to the second tranche. Their names and signatures confirm the contention by the prosecution, and I see nothing to discount the veracity brought up by the prosecution.

The defence has valiantly denied the allegation that they were involved. They even resorted to pleading a defence of *alibi* whose discussion will unveil shortly. The contention is that no search or recovery was effected.

With respect to the defence of *alibi*, almost all of the accused persons have contended that they were in different locations far from the alleged

scenes of the crime. Invocation of this defence by the accused persons which has drawn a criticism partly intended to convince the Court that they were neither searched nor were they found with any of the seized items, including exhibit P3. In law, an accused person is allowed to introduce the defence of *alibi* and get away with the allegations if he successfully pleads to it and if the procedure for introducing the defence is followed. In our case, the governing law is Cap. 200 whose section 42 provides as hereunder:

> *"(1) Where a person charged with an economic offence intends to rely upon an alibi in his defence he shall first indicate to the Court the particulars of the alibi at the preliminary hearing.*
>
> *(2) Where an accused person does not raise the defence of alibi at the preliminary hearing, he shall furnish the prosecution with the particulars of the alibi he intends to rely upon as a defence at any time before the case for the prosecution is closed.*
>
> *(3) If the accused raises a defence of alibi without having first furnished the particulars of the alibi to the court or to the prosecution pursuant to this section, or after the case for the defence has opened, the Court may, in its discretion, accord no weight of any kind to the defence."*

From the evidence on record, there is nothing to suggest that any of the accused persons furnished the particulars of the *alibi,* either during the preliminary hearing, or during the trial proceedings and before closure of the prosecution's case. This means that the contention that the accused persons were not at the scenes of the crime cannot be vindicated by these pleas of *alibi* whose introduction was contrary to the cited provision of the law. The most plausible and legitimate course of action is, in this case, to exercise the Court's discretion under sub-section (3) and accord no weight of any kind to this defence.

It should not be lost on anybody, that the purpose of raising the defence of *alibi* remains unchanged. It is simply to raise doubts to the defence case, and that the prosecution retains the responsibility of ensuring that the prosecution lays evidence that proves the alleged wrong doing by the accused person. This responsibility survives any decision to disregard or accord no weight to the defence of *alibi.* This position has been accentuated in numerous decisions. In ***Ali Amsi v. Republic*** CAT-Criminal Appeal No. 117 of 1999 (unreported), it was observed as follows:-

> *"It is of course not the law that once the* ***alibi*** *is proved to be false, or is not found to have raised doubts, the task of proving the accused person's guilt is accomplished.* ***There must be still credible and convincing prosecution***

evidence, on its own merit, to bring home the alleged offence". (Emphasis added)

The superior Court went ahead and guided:

"The appellant had only to raise doubts on his presence at the scene of crime and the prosecution had to prove its case beyond reasonable doubt. The appellant's story need not be believed. He had only to raise a reasonable doubt and not to prove anything (See the case of ***YUSUPH NCHIRA v. THE DPP, CRIMINAL APPEAL NO. 174 OF 2007)***

In the course of the defence hearing, the defence team tendered PW2's statement which was admitted as Exhibit D1. The intention was to contradict PW2's oral account with his written statement. This mission was, in my considered, less fruitful, as what happened fortified the prosecution's case than weakening it. It, in fact, cemented the fact that the accused persons were searched and that the outcome of the search was the seizure of the object of these proceedings, among others.

It is my conviction that the evidence adduced by the prosecution weighs heavily and has done enough to prove that a searches and seizures conducted found the accused persons with the items listed in Exhibits P4 and P5, and that such items include Exhibit P3. This finding disposes the two issues in the affirmative.

There is yet another emotive issue that relates to chain of custody. The contention by the defence is that the provisions of the PGO governing handling of the exhibits were not complied with. A particular attention was placed on the absence of any paper trail that would detail on how the exhibit changed hands and whether such process did not allow for human intervention and tampering. The prosecution's view is that Exhibit P3's handling was fully accounted for through the testimony of PW1, PW2, PW3 and PW5 which has sufficiently established the unbroken chain of custody until its tendering in court. This, in their view, has discounted the possibility of any tampering.

The significance of maintaining the chain of custody is a matter of common knowledge and it requires no further spending of gallons of ink on. It is simply to ensure that there is no human intervention that would cause the tampering of the exhibit and remove the possibility of planting an exhibit to the accused person's detriment. Where chain of custody is broken, the consequence is to have the exhibit rejected when tendered for admission (See: ***John Joseph @Pimbi v. Republic,*** CAT-Criminal Appeal No. 262 of 2009; ***Majid John Vicent @ Mlindangabo & Another v. Republic,*** CAT-Criminal Appeal No. 264 of 2006; and ***Chacha Jeremiah Murimi and 3 Others v. Republic,*** CAT-Criminal Appeal No. 551 of 2015 (all unreported).

The defence counsel have fervently taken the view that chain of custody must be established through a paper trail and in strict conformity with PGO 229. While I agree that the law must be conformed to in the handling of the chain of custody, I subscribe to the view propagated by the prosecution, that an oral account can sufficiently establish the chain of custody without necessarily resorting to an documentary account (See: ***Huang Qin & Another v. Republic***, CAT-Criminal Appeal No. 173 of 2018 (unreported). The view in the cited decision got a boost from a subsequent decision in the case of ***The Director of Public prosecutions v. Mussa Hatibu Sembe***, CAT-Criminal Appeal No. 130 of 2021 (unreported), in which it was held at p. 16, as follows:

> *"On our part, we agree that there was no proper documentation in respect of Exhibit P4 (a) and (b). We are also of the view that, chain of custody can be established by oral account of witnesses as we have held in our previous decisions, some of which have been cited to by the learned State Attorney. However, in the instant case, the chain of custody was broken from the very beginning when the respondent was searched and alleged items seized in the absence of an independent witness. It is this initial stage of the process which would set in motion the chain of custody if it was done to the dictates of the law. Therefore, even if the exhibit was*

properly handled when it left the hands of PW4, the exercise lacked credibility because it was doubtful that exhibits P4 (a) and (b) was searched and seized from the appellant."

A scrupulous review of the trial proceedings reveal that PW2 sufficiently demonstrated the nature, number and movement of the substances suspected to be narcotic drugs (exhibit P3). This testimony was corroborated by that of PW1, PW3, PW4 and PW5. In particular, the testimony makes it clear the certificates of seizure (Exhibits P4 and P5) were duly filled by PW2, before the accused persons appended their signatures, followed by PW4, the independent witness. These certificates of seizure were tendered by PW2 and admitted by the Court without the slightest of an uproar from the defence. Such testimony showed that the seized drugs were handed to CRO (in-charge) who, in the presence of PW2 passed them on to PW3 (the exhibits keeper). Soon thereafter, the exhibits changed hands to PW5 (the investigator) who also submitted it to PW1 for scaling and analysis of what it contained. The latter handed it back to PW5 who returned it to PW3 for safe custody. What comes out of this testimony is a chronological account of how the substance was seized, stored, transferred, analyzed and finally tendered in court, in the absence of documentation paper trail. Nothing suggests, even remotely, that a room existed for any tampering as

the defence would like us to believe.

But even if the Court were to be convinced by the defence counsel's contention that chain of custody was not established or it was broken as they tried to allude to, the current legal holdings are to the effect that mere breaking of the chain of custody would not result in the rejection of substances as evidence. The most relevant decision in this respect is that of the Court of Appeal of Tanzania in ***Joseph Leonard Manyota v. Republic***, CAT-Criminal Appeal No. 485 of 2015 (unreported). In this case, the Court of Tanzania guided as follows:

> *"It is not every time when chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, polluted and/or in any way tampered with. Where circumstances may reasonably show the absence of such dangers, the court cannot safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."*

Revisiting the trial proceedings, it is clearly shown that Exhibit P3,

whose chain of custody is the subject of the current consternation was tendered in Court on 29th March, 2023, in the unanimous approval by the defence counsel. The defence counsel's **"no objection"** to admissibility of the said exhibit was communicated to the Court by Mr. Mahenge, learned counsel who spoke on behalf of all the defence counsel. My conviction is that, having acceded to the prosecution's quest to tender the substance as an exhibit, there was nothing on which to move the defence to question its handling.

In sum, I hold that the chain of custody of Exhibit P3 was established, and that the answer to the raised issue is in the affirmative.

There is yet another contention, raised by the defence. This relates to the independence of PW4. The argument by the defence is that, if the independent witness was searched before he witnessed the search then he ceased to be independent, and that the search and the resultant seizure were carried out without the service of an independent witness, thereby rendering the entire exercise a travesty. I drift away from this postulation. In my considered view, search of an independent witness did not have any effect, least of all, that of relegating PW4 from being independent witness to what we do not know. But even assuming that that act had the effect of

stripping PW4 of his role as an independent witness, such act would not invalidate the search and seizure. This reality arises from the fact that presence and participation of an independent witness is not mandatory and that his signature can only be of significance if he is present. This is in terms of section 48 (2) (c) (vii) of Cap. 95 and section 38 (1) of Cap. 20.

The foregoing position is cemented by the decision in ***Jibril Okash Ahmed v. Republic***, CAT-Criminal Appeal No. 279 of 2016 (unreported), wherein the upper Bench 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 and indispensable, it should be backed by law. In the present case, the learned trial judge discussed sections 48 (2) (c) (vii) of the DCEA and 38 (3) of the CPA and found that the former does not imperatively provide for need of an independent witness while the latter requires an independent witness to sign the seizure certificate if present. That is the legal position."*

In view thereof, I find the view by the defence hollow and I choose to hold a divergent view on this and hold that the search and seizure was unblemished.

Regarding the question of identification, my settled view is that the alleged failure by one or two witnesses to identify some of the accused

persons is quite trifling and of no significance since the rest of the testimony has settled the matter.

Having disposed of the raised issues and nagging issues which were raised in the course of counsel's submissions, the final limb that awaits the disposal is whether, in the totality of all this, the prosecution has proved its case beyond reasonable doubt.

In my hastened view, the answer to this question is in the affirmative. My position is based on the fact that the testimony adduced in Court, particularly, that of PW1, PW2, PW4 and PW5 revealed the following:

(i) That the 1st, 2nd, 5th, 6th and 7th accused persons were searched and that in the course of the search, a consignment of substances was seized;

(ii) That the test and analysis conducted by PW1 confirmed that the seized substance, Exhibit P3, was narcotic drugs by the name of Cannabis Sativa, otherwise known in common usage as bhangi;

(iii) That the said narcotic drugs were destined to Dar es Salaam where the intended recipients were 3rd and 4th accused persons;

(iv) That the said Exhibit P3 was seized when it had been handed to the intended recipients, thereby completing the chain of trafficking in narcotic drugs;

That the prosecution's testimony was nothing short of credible, coherent and overwhelming that it established the link that existed amongst the accused persons and the culpable role that each of them played. The level of credibility of the testimony and that of the witnesses themselves was high and met the criteria set in the case of ***Shabani Daudi v. Republic***, CAT-Criminal Appeal No. 28 of 2000 (unreported), in which it was held as follows:

> *"The credibility of a witness can also be determined in two ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person".*

(v) That the overall effect of the testimony of the adduced in defence has done little or nothing to move the Court to have any feeling that guilt of any or all of the accused persons is in any serious doubt. On the contrary, and on account of the evasiveness and inclusion of some fits of blatant lies, the said

lies corroborated the prosecution's case in a profound way (See: ***Felix Lucas Kisinyila v. Republic***, CAT-Criminal Appeal No. 129 of 2002 (unreported)).

I, therefore, take a conviction that the prosecution has been able to rope all the accused persons onto the culpable role of trafficking in narcotic drugs, consistent with the definition enshrined in section 3 of Cap. 95, which defines trafficking to mean:

> *"... the importation, exportation, buying, sale, giving, supplying, storing, possession, production, manufacturing, conveyance, delivery or distribution, by any person of narcotic drug or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer ....."*

In consequence of the foregoing, I am of the considered view that the prosecution has made out a case against all the accused persons. Accordingly, I find them guilty, and convict each of them of the offence with which they are charged *i.e.* trafficking in narcotic drugs, contrary to 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 sections

57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2019.

Order accordingly.

Right of appeal duly explained to the parties.

DATED at **DAR ES SALAAM** this 7th day of June, 2023.

M.K. ISMAIL

JUDGE

07.06.2023