

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**CORRUPTION AND ECONOMIC CRIMES DIVISION**

**AT MOROGORO SUB-REGISTRY**

**ECONOMIC CASE NO. 05 OF 2023**

**REPUBLIC**

**VERSUS**

**EZEKIEL CHRISTOPHER KUDULA**

**JUDGMENT**

22<sup>nd</sup> March, & 28<sup>th</sup> April, 2023

**ISMAIL, J.**

The accused person stands trial on a charge of trafficking in narcotic drugs. The offence is in contravention of section 15 (1) (a) and (3) (iii) of the Drugs Control and Enforcement Act, Cap 95 R.E. 2019 ("DCEA"), read together with paragraph 23 of the First Schedule to the Act, and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 200 ("EOCCA").

The information that instituted the proceedings and facts read out during the preliminary hearing reveal that the said offence was allegedly committed on 8<sup>th</sup> February, 2022, at Kitonga Village in Mvomero District, Morogoro Region, and it involved 10 'suphate' bags containing dry leaves

which were suspected to be narcotic drugs that weighed 198.41 kilograms. The allegation is that these substances were recovered from one of the rooms in the accused person's house.

When the information was read out to the accused person, he pleaded not guilty to it. Inevitably, the plea of not guilty pushed the proceedings a notch higher, to the level of conducting a trial. As a prelude to the trial proceedings, a preliminary hearing was held on 21<sup>st</sup> March, 2023, during which the accused person disputed all the facts, save for his name, place of domicile, and the fact that he was arrested and arraigned in court on allegations whose commission he denied.

The proceedings, in both plea taking and preliminary hearing, as well as the trial, saw Messrs Mafuru and Millanzi, both learned State Attorneys, feature for the prosecution, while Mr. Bahati Hacks, learned advocate, had his services enlisted by the accused person.

The prosecution's case was founded on the testimony adduced by five prosecution witnesses and six documentary and physical exhibits. In the case of prosecution witnesses, those who featured were: Fidelis Begumisa Chrizant (PW1); PF 21280 A/Inspector Ally Lipinda (PW2); Juma Adam Saleh (PW3); H. 6551 PC James (PW4); and G. 4086 D/CPL Lifa (PW5). With

regards to exhibits, the following documentary and physical exhibits were tendered. These are: Sample submission Form No. DCEA 001 for case No. MOR/IR/1100/2022 (**Exhibit P1**); Chain of Custody Report in respect of MOR/IR/1100/2022 (**Exhibit P2**); Report of Examination of the sample - Form No DCEA 009 (**Exhibit P3**); 10 bags containing substance believed to be cannabis sativa (**Exhibit P4**); Seizure Certificate – Form No. DCEA 003 (**Exhibit P5**); and 2 Exhibit Registers (PF 16) with entries 89 and 169 (**Exhibit P6**).

The background information that precipitated these proceedings is gathered from the prosecution's case, and it is to the effect that at around 4.00 am, Assistant Inspector Ally Lipinda (PW2) was about to retire after a long night of patrols. He received a call from an informer, telling him that a consignment of narcotic drugs known as "bhangi" was about to be trafficked from Kitonga village, Mvomero District. His prayer for intervention got a nod from the Regional Crimes Officer (RCO), and mobilized police officers who, together with him, visited the scene of the crime that happened to be the accused person's home. An emergency search into the house was conducted, witnessed by two independent witnesses, among them, Juma Adam Saleh (PW3). In one of the rooms, 10 green 'sulphate' bags full of dry leaves were found. It is alleged that the suspected drugs belonged to the

accused person. The said bags (Exhibit P4) were seized and labelled B1-B10. A certificate of seizure (Exhibit P5) was issued, signed by PW2, the accused person, and independent witnesses, one of whom was PW3.

The accused person who was put under restraint, together with the seized substance, were conveyed to Morogoro Central Police Station where he was incarcerated, while Exhibit P4 placed in the custody of H 6551 PC James the latter of whom registered it in the Exhibit Register (Exhibit P6). On 4<sup>th</sup> of March, 2022, PW5 handed Exhibit P4 to PW1 for analysis. Submission of this exhibit was accompanied by Exhibit P1 and the recipient was Fidelis Begumisa Chrizant, a Chemist working with the Chief Government Chemist, Central Zone in Dodoma. The bags were put on a scale and they weighed 198.41 kilograms. The findings of the analysis confirmed that the contents constituting Exhibit P4 were narcotic drugs commonly known as bhangi. These were conveyed in a report admitted in court as Exhibit P6. Exhibit P4 was sent back to PW5 and handed to PW4 for safe custody.

It is on the basis of these findings that the accused person was arraigned in court on charges that constituted the subject of these trial proceedings.

After a closure of the prosecution's case, the Court made a ruling that found the accused person with a case to answer. Accordingly, he was invited to field his defence against the accusations. He gave his testimony on oath and he neither called any additional witness nor did he tender any exhibit.

The accused person's defence was, by and large, a denial of any ownership of the bags said to contain narcotic drugs. He testified that when PW2 and his colleagues visited his home, they said that they were involved in the crackdown against growers and traffickers of bhanghi, and that one of the sought after suspects was a certain Mr. Simba who was unknown to him. He stated that the police officers insisted that the accused person was part of the same gang, hence the decision to put him under restraint. He contended that the consignment with which he is connected was found in the vehicle into which he was bundled. He vehemently denied that these bags were recovered from his house, adding that his arrest was not brought to the attention of the village leadership or any of his relatives. In his view, this was an abduction. He denied that a search warrant or order was shown to him to justify the search. On the independent witness, the view held by the accused person is that he may be part of the police as he saw him riding a motor cycle that rode the police officers.

The accused person alleged that torture and intimidation were applied throughout his arrest and conveyance to the police station. He even lost a tooth. Overall, he denied any involvement and prayed for his acquittal.

It is customary, in all criminal trials, that after adduction of evidence for the prosecution, and once the defence testimony is also heard and taken, the court's next task is to make a pronouncement on whether a case has been made out by the prosecution. This entails weighing the testimony adduced by the prosecution and making a finding if the same has proved the case against the accused person, at the required standard *i.e.* beyond reasonable doubt. This duty is informed by the fact that conviction of the accused person must only be premised on the strength of the evidence and not on the weakness of his defence (See: ***Christian Kale & Another v. Republic*** [1992] TLR 302. This is a household position, stated in a multitude of court decisions. One of the notable decisions is in the case of ***Joseph John Makune v. Republic*** [1986] TLR 44, wherein 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."*

Thus, as stated in ***Yusuph Abdallah Ally v. Republic*** CAT-Criminal Appeal No 300 of 2009 (unreported), proof of a case beyond reasonable

doubt requires that the prosecution evidence must be strong as to leave no doubt regarding criminal liability of an accused person. This does not depend on the number of the witnesses but their credibility.

In the instant case, an answer to this singular question is dependent on the resolution of the following critical issues:

- (i) *Whether search and seizure was lawfully conducted and that the drugs were recovered from the accused; and*
- (ii) *Whether the prosecution has proved the case against the accused person beyond reasonable doubt.*

With regards to the first issue, the contention by the defence is that the search conducted by the police officers, leading to the alleged recovery of the drugs, was shrouded in an illegality. This is because the same and the resultant seizure did not conform to the requirements of law. In law, and as a matter of general rule, search and seizure are governed by the provisions of section 38 (1) and (3) of Criminal Procedure Act, Cap 20 R.E. 2022, read together with paragraphs 1(a), (b), (c), 2(a) and (d) of the Police General Order (PGO) No. 226. Under the cited provisions, the carrying out of a search and eventual seizure of any items constituting the subject or instrumentality of a criminal act must be preceded by issuance of a search warrant, save

where the search is conducted on an emergency basis. In our jurisdiction, an emergency search may be carried out if circumstances of the search fall within the description stated in section 42 (1) (b) (ii) of Cap. 20, which states as hereunder:

*42.-(1) "A police officer may-*

*(a) N/A; or*

*(b) enter upon any land, or into any premises, vessel or vehicle, on or in which he believes on reasonable grounds that anything connected with an offence is situated, and may seize any such thing that he finds in the course of that search, or upon the land or in the premises, vessel or vehicle as the case may be—*

*(i) N/A; and*

*(ii) "the search or entry is made under circumstances of such seriousness and urgency as to require and justify immediate search or entry without the authority of an order of a court or of a warrant issued under this Part.*

[Emphasis added]

The legal position in the quoted provision has been widely emphasized in court decisions in this Court and in the Court of Appeal of Tanzania (See: ***Ayubu Mfaume Kiboko and another v. Republic***, CAT-Criminal Appeal



No. 694 of 2020; ***Director of Public Prosecution v. Doreen John Mlemba***; CAT-Criminal Appeal No. 359 of 2019; ***Joseph Charles Bundala v. Republic***, CAT-Criminal Appeal No. 15 of 2020; and ***Damian Jankowski Krzysztof & Another v. Republic***, HC-Criminal Appeal No. 47 of 2021 (all unreported). In ***Marceline Koivogui v. Republic***, CAT-Criminal Appeal No. 469 of 2017 (at page 29), the Court of Appeal of Tanzania held:

*"In addition, in the present case, the circumstances in which the search and seizure were effected, in our considered view, befit emergency situation as envisaged by provisions of section 42 (1) of the CPA."*

This reasoning was echoed in the subsequent decision of the upper Bench in ***Maluqus Chiboni @ Silvester Chiboni and Simon v. Republic***, CAT-Criminal Appeal No. 8 of 2021 (unreported), wherein it was guided as follows:

*"We are aware of the law governing search warrant and seizure (Part II A (d) of the Criminal Procedure Act, Cap 20 R.E. 2002, particularly section 38 to 42). Section 38 and 40 require, generally, that a warrant be issued to a police officer or other person authorized before such officer or person executes the search. However, under exceptional circumstances, a police officer may conduct a search and seizure without warrant. Such*

*circumstances are listed under section 41 and 42 of Cap 20. Relevant to this case are the provisions of sections 42(1) (b) of Cap 20."*

Glancing through the testimony of PW2, the arresting officer, it comes out clearly that information on the accused's involvement in the alleged trafficking in narcotic drugs was relayed very early in the morning, and that such information required that action be taken without any undue delay lest they miss out on the suspects. It is why he mobilized his 'troops' and drove to Vitonga village where they finally seized the alleged narcotic drugs. Circumstances of this case revealed urgency and seriousness that left no room for formalities spelt out in sections 38 and 40 of Cap. 20, or any of the provisions of the PGO.

I am fortified in my view that circumstances of this case are akin to those that obtained in the case of ***Wallenstein Alvares Santillan v. Republic***, CAT-Criminal Appeal No. 68 of 2019 (unreported). In the cited case, the Court of Appeal of Tanzania (at Dar es Salaam) held at pg. 21, as hereunder:

*"Having reviewed the entire evidence on record, we hold that in the circumstance of the case at hand search was conducted in an emergence situation and therefore the*

*provision of section 38(1) of CPA and 32 (4) of Act No. 5 of 2015 the DCEA would not apply.”*

In view of the foregoing, the answer to the first segment of the first issue is in the affirmative.

The answer to the first segment takes me to next segment that requires the Court to pronounce itself on whether the substance which was subsequently confirmed as cannabis sativa was seized from the accused person. The answer to this question couldn't get more easier, thanks to the resolution of the first part of the issue in the affirmative. The testimony of PW2 and that of PW3 left no doubt that the search into the accused person's house led to seizure of 10 'sulphate bags' of dry leaves which were subsequently confirmed by PW1 as cannabis sativa. In terms of the adduced testimony, these bags were recovered from one of the rooms in the accused person's house, and that these were labelled B1-B10. This was also confirmed by Exhibit P5, Seizure Certificate – Form No. DCEA 003.

The accused person has valiantly denied that the drugs were recovered from his house. His contention is that these drugs were recovered from an unknown source and that he found them in the police vehicle that he was

bundled into. I am not convinced that Exhibit P4 was planted onto the accused person and I see no reason for that. The accused person has stated, quite categorically, that he did not know any of the police officers, including PW2, or an independent witness (PW3), prior to the incident. I see no reason why the police officers would travel all the way to Kitonga village to fix a person that they did not know before. I am overly convinced by the potency of the testimony of PW2 and PW3, and hold the view that the drugs were recovered from the accused person.

Turning on to the next issue, the task is to determine if the prosecution has proved its case beyond reasonable doubt. As stated earlier on, reasonable doubt is the standard of proof used to determine the accused person's guilt. In the instant case, the testimony that should be used to determine guilt or innocence of the accused person is that which was adduced by PW1, PW2, PW3 and PW4. This is the testimony that attempts to complete the chain of what would constitute the accused person's involvement in the offence with which he is charged. In its cumulative sense, the said testimony gives a blow by blow account of how the substance, believed to be narcotic drugs, was seized, stored and analyzed, resulting in

a confirmation that the same were indeed narcotic drugs known as cannabis sativa.

This testimony, especially that of PW2 and PW4, pointed to their involvement in the search and seizure of the said drugs. Their testimony represented a clear picture that it is the accused person, and none else, who was found with the narcotic drugs. Though it is not evident that the drugs were about to find their way to Dar es Salaam, the fact that these drugs were found in the accused person's possession sufficiently qualifies the act as falling within the scope of definition of trafficking, as stated 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 ....."*

I take the view that the witnesses who testified for the prosecution presented a story that was coherent, consistent and their credence was impeccable. I have no reason to disbelieve it and, in this respect, I am

inspired by the decision of the Court of Appeal in ***Goodluck Kyando v. Republic*** [2006] TLR 363, in which 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"*

My position is bolstered by the fact that the accused person's defence has been nothing short of lackluster. It has done so little to dislodge what I consider to be a formidable testimony presented by the prosecution. No reasonable, sufficient and credible doubts have been raised through the defence testimony to move the Court to take the position that guilt of the accused person has not been established. My take is that what constituted the defence testimony was, by and large, a bunch of evasive denials that embodied some fits of blatant lies and hardly answered the key question which is, why the police would settle on him and not on any other person. Basic issues, touching on the legitimacy of the search and seizure of the narcotic drugs, as testified by PW2 and PW3, were left unscathed by the accused person's testimony, creating an incontrovertible conclusion that exhibit P4 was recovered from the accused person. I am mindful of the fact that the trite position is that positive evidence, such as that of PW2 and PW3,

enjoys the advantage of being a direct evidence which sufficiently proves the case, provided that the person testifying is telling the truth and is entitled to be believed (See: ***Vuyo Jack v. Director of Public Prosecutions***, CAT-Criminal Appeal No. 334 of 2016 (unreported)). I entertain no doubt that this testimony is believable, and has the impact of establishing the accused's culpable role.

A critical review of the prosecution's testimony brings a conclusion that both of the criteria for ascertaining credibility of witnesses *i.e.* coherence of their testimonies, and their demeanor were spot on, and I have nothing but glowing commendation for their impressive show up. I am convinced that this testimony, in its collective sense, presented a massive impact that outshone the defence testimony. Not even the cross examination by the defence was able to blur the potency of this testimony. The net effect of all this is to push the prosecution's case above the requisite threshold that can sufficiently hold the accused person culpable of what he is accused of.

The totality of evidence adduced in Court, during the trial, convinces me that the accused person committed the offence with which he is charged. I, therefore, convict him of the offence of trafficking in narcotic drugs in contravention of section 15 (1) (a) and (3) (iii) of the Drugs Control and Enforcement Act, Cap 95 R.E. 2019, read together with paragraph 23 of the

First Schedule to the Act; 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 28<sup>th</sup> day of April, 2023.



  
**M.K. ISMAIL**

**JUDGE**

**28.04.2023**



## SENTENCE

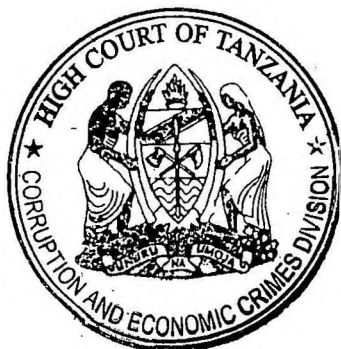
I have carefully taken on board the aggravating and mitigating factors as put up by learned counsel. I have taken note of the accused's previous record which is unblemished and the advanced age that he is docked. But as I consider all of that, I am mindful of the gravity of the offence he has been convicted of and the danger that comes with his indulgence in this unlawful act. Given its devastating impact to the society, the law has taken away any flexibility in the imposition of the sentence

Consequent to all that, I sentence the accused person to life imprisonment, consistent with section 15(3) of Cap. 95. This will serve to remind him that crime does not pay.

Simultaneous to imposition of the said sentence, I order that the narcotic drugs, Exhibits P4 be immediately destroyed and in the superintendence of the court.

Right of appeal is dully explained.

Order accordingly.



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**M.K. Ismail**  
**Judge**  
**28/04/2023**