IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT MOROGORO

ECONOMIC SESSION NO. 7 OF 2022

REPUBLIC

VERSUS

SILVANO MANENO MKASANGA @ KELVIN

ALI KHAMIS JUMA

JUDGMENT

21st March, & 28th April, 2023

ISMAIL, J.

Silvano Maneno Mkasanga @ Kelvin and Ali Khamis Juma are joint accused persons. They were arraigned in court facing the charges of trafficking in narcotic drugs, in contravention of the provisions of section 15 (1) (a) and (3) (i) 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.

Deducing from the facts contained in the statement filed prior to, and read at the preliminary hearing, the prosecution's allegation is that, the offence was committed on 29th April, 2021, at Sangasanga checkpoint in

Mvomero District, Morogoro Region, and Chalinze in Coast Region. It is informed that apprehension of the accused persons at Sangasanga and Chalinze for 1st and 2nd accused persons, respectively, followed a tip off that PW9, ASP Hassan Masanika, got through his commanding officer. The tipoff informed that the 1st accused person was travelling from Ruvuma Region, aboard a motor vehicle make Toyota Noah with Reg. No. T421 DEA, and that he was destined for Dar es Salaam, where a consignment of what was believed to be narcotic drugs was to meet the intended recipients.

As the vehicle was put under surveillance, PW9 mobilized his team and left for Morogoro, and possibly beyond, with a view to intercepting the said vehicle, along the way. On arrival in Morogoro, intelligence information filtered that the said vehicle was already within Mvomero District, moving towards Morogoro town. The police team moved to Sangasanga Checkpoint and, a short while after their arrival, at around 3.00 am, the suspected vehicle arrived. It was waved and stopped by the police and passengers in the vehicle were ordered to alight with their possessions. Subsequently, a search, witnessed by an independent witness (PW5), was carried out, resulting in the seizure of assorted items, including two sulphate bags that had 20 packets of a powdery substance that was suspected to be narcotic drugs.

After seizure of the said drugs along with other possessions, PW9 held an interrogation with the suspects. In the course of the conversation, the 1st accused person opened up and confessed that the suspected substance was his and that it was intended to be delivered to two persons, including the 2nd accused person, who was to receive 5 packets in Chalinze. PW9 called the Regional Crimes Officer for Morogoro, the latter of whom opened up a case file after which the suspects, that included PW4, PW7 and five others left for Dar es Salaam, along with other police officers, PW8 inclusive. Along the way, the 1st accused person was ordered to talk to his intended recipient of the consignment bound for Chalinze. In Chalinze, the 2nd accused person, who was the intended recipient met the 1st accused person at Total Petrol station where he was put under restraint.

PW9 left with the 2nd accused person for Tanga where his house was searched but nothing was found. The 2nd accused person recorded his statement in which he allegedly confessed his involvement in the offence he was charged with. After that, PW9, the 2nd accused person, and two other suspects left for Dar es Salaam. As this happened, PW8, along with other police officers, left for Dar es Salaam with the 1st accused person and other suspects. On arrival, they were incarcerated and interviewed. While the rest of the suspects denied any involvement, the 1st accused person allegedly

confessed to the allegation of trafficking in narcotic drugs, and that the 2nd accused person was one of his intended consumers. Statements recorded by the accused persons were admitted as Exhibits P6 and P7.

The suspected drugs were wrapped and sealed by PW2 and handed them in a box to PW3 for safe custody. These drugs were then sent to the Government Chemist Laboratory Agency for testing and analysis. PW1 who carried out the analysis returned a verdict that confirmed that the suspected drugs were narcotic drugs known as Heroin Hydrochloride that weighed 20.24 kilograms. The findings were recorded in Exhibit P2. It is on the basis of these findings that the accused persons were arraigned in court on a charge of trafficking in narcotic drugs the involvement of which the accused persons have vehemently denied.

The preliminary hearing and the trial proceedings pitted Messrs Mosses Mafuru and Nestory Mwenda, learned State Attorneys, who featured for the prosecution, against Messrs Mkilya Daud and Salim Gogo, learned counsel, whose able services were jointly enlisted by the accused persons.

The case for the prosecution was built on the testimony of nine witnesses and eight exhibits. Two of these were physical exhibits. These were: a box containing 20 packets of narcotic drugs (Exhibit P3); and a Motor Vehicle Toyota Noah with Registration No. T.412 DEA (Exhibit P5). The rest

of the exhibits were Forensic Laboratory Form No. DCEA 001 (Exhibit P1); Government Laboratory Analyst Report No. DCEA 009 (Exhibit P2); Certificate of Seizure No. DCEA 009 (Exhibit P4); 1st Accused's Cautioned Statement (Exhibit P6); 2nd Accused's Cautioned Statement (Exhibit P7); and inventory of Exhibit for Disposal (Exhibit P8).

In the case of prosecution witnesses, those who testified for the prosecution were: Joseph Jackson Ntiba (PW1); A/Inspector Philemon Mbinda (PW2); SSP Neema Mwakagenda (PW3); Mikidadi Ally Nyangali (PW4); Nicholas Joash Makamba (PW5); Mashaka Abdi Hamad (PW6); Godlisten Geofrey Mmamba (PW7); H 3545 D/C Geofrey (PW8); and ASP Hassan Masawika (PW9).

At the closure of the trial proceedings, the Court was convinced that a case against the accused persons had been made. This precipitated into calling the accused persons to make their defence. Both of the accused persons who denied any culpable role in the proceedings, were the only defence witnesses and they did not tender any exhibits.

In the case of the 1st accused person, the contention was that he was travelling from Njombe to Morogoro and was aboard Toyota Noah for which he paid TZS. 30,000/- as fare. At around 3.00 am of the fateful day, they were stopped at Sangasanga check point where police officers, led by PW9,

ordered them to disembark from the vehicle. They did and they were then told to lie on the ground. While still on the ground, he heard one of the police officers enquiring about Haruna who the 1st accused realized was one of passengers he was travelling with. From there, he and other passengers were conveyed to Kurasini Police station where they were kept in confinement. He denied that the alleged drugs were seized from him or that he had any role in their procurement. On the confessional statement, the contention was that he was ordered to sign it involuntarily.

The 2nd accused was also in total denial. He stated that he was travelling from Tanga to Dar es Salaam, along with his two children. At a petrol station in Chalinze, he was put under restraint as he prepared to refuel his vehicle. He was taken to a nearby police station where he was searched and found with nothing. They then went to search his Tanga house where nothing was found. He testified further that PW9 and his colleagues forced him to confess to the suspicion of drug trafficking but he refused. He yielded to the pressure after he and his children were seriously beaten. He denied knowing or meeting the 1st accused person prior to the day of their arrest.

At the conclusion of the trial proceedings and, at the instance of the parties, the Court ordered that counsel for the parties prefer closing

submissions. This was done by way of written representations the filing of which complied with the filing schedule set on the parties' consensual basis.

The prosecution's submission, preferred by Mr. Mosses Mafuru, learned State Attorney, began by giving a factual background of the matter which came by way of a summary of evidence adduced by the witnesses. Addressing the Court on the prosecution's burden of proof, learned attorney argued that this is enshrined in section 3 of the Evidence Act, Cap. 6 R.E. 2019, and exemplified in numerous court decisions one of which is the case of ***Mohamed Haruna @ Mtupeni & Another v. Republic***, CAT-Criminal Appeal No. 25 of 2007 (unreported). Mr. Mafuru further argued that the testimony that the prosecution relies on in this case is direct and confessional. While profiling the testimony of PW1, PW4, PW5, PW8 and PW9 as falling in the category of direct evidence, learned counsel contended that, in law, direct evidence is enough to prove the commission of the charged offence, provided that the witnesses who testified in that respect tell nothing but the truth. On this, learned counsel quoted the excerpt from the Court of Appeal's decision in ***Vujo Jack v. DPP***, CAT-Criminal Appeal No. 334 of 2016 (unreported), which quoted the reasoning in the case of ***Commonwealth v. Webster*** 1850 vol 50 MAS 225. In the latter, it was held:

"The advantage of positive evidence is that it is direct testimony of witness of a fact to be proved who if speaks the truth so it is done, the only question is whether he is entitled to belief?"

The prosecution side maintained that, while matters relating to credibility of a witness are a monopoly of this Court, their take is that the testimony adduced by PW5, PW7, PW8 and PW9 provided a coherent account which left no doubt that 20 packets of the narcotic drugs were retrieved from sulphate bags that were identified to belong to the 1st accused person. He urged the Court to believe them and give them their credence, consistent with the principle enunciated in the case of ***Goodluck Kyando v. Republic*** [2006] TLR 363.

Regarding the confessional testimony, the view by Mr. Mafuru is that the 1st accused person made an oral confession to PW5, PW7, PW8 and PW9, that the sulphate bags seized from the vehicle were his. Learned attorney took the view that the trite position is that an oral confession made to reliable witnesses can sufficiently be used to ground a conviction. On this, he relied on the cases of ***Posolo Wilson @ Mwalyengo v. Republic***, CAT-Criminal Appeal No. 613 of 2015; and ***Peter Didia Rumala v. Republic***, CAT-Criminal Appeal No. 421 of 2019 (both unreported).

Regarding the search and seizure of the substance that turned out to be narcotic drugs, the contention by the prosecution is that the testimony of PW9 was clear that, while search order is ordinarily a requirement prior to any search and seizure, circumstances of this case demanded that the search and seizure be conducted on an emergency basis. The reason for this is twofold. ***One***, that any delays that would come from the protracted process of securing an order would result in the failure to locate and apprehend the suspects. Learned counsel argued that circumstances of this case were excepted in the same way it was done in the cases of ***Wallenstein Alvares Santillan v. Republic***, CAT-Criminal Appeal No. 68 of 2019; and ***Maluqus Chiboni @ Silvester Chiboni & Another v. Republic***, CAT-Criminal Case No. 8 of 2011 (both unreported). ***Two***, that PW9 and his entourage were not certain if the accused persons would be met in Morogoro as the tip off received only stated that the suspects were travelling from Songea to Dar es Salaam. It could not be ascertained or stated, with precision, that an arrest would be effected in which region.

Mr. Mafuru submitted, in the alternative, that even assuming that the search and seizure were in contravention of requirements of the law, the position, as it currently obtains, is to the effect that, since the said search and seizure were conducted in the presence of the 1st accused person and

an independent witness then the same was perfectly in order. The same cannot vitiate the whole process of seizure. The prosecution fortified its view by citing the case of ***Jamali Msombe & Another v. Republic***, CAT-Criminal Appeal No. 28 of 2020 (unreported). In this case, a search that was shrouded in procedural flaws was vindicated when the Court held that the violation of the procedural rituals was not fatal since it was done in the presence of the 1st appellant.

Turning on to the confessional testimony, Mr. Mafuru's contention is that the practice of the Court is that evidence that comes by way of cautioned statement should be corroborated before it is relied upon in convicting an accused person. He was quick to submit, however, that the Court can still convict an accused person if it believes that the confession is nothing but the truth and that it was obtained voluntarily. He invited the Court to be inspired by the decisions in ***Dickson Elia Nsamba Shapwata & Another v. Republic***, CAT-Criminal Appeal No. 92 of 2007; and ***Umalo Mussa v. Republic***, CAT-Criminal Appeal No. 150 of 2005 (both unreported).

Mr. Mafuru was adamant that, having passed the test of voluntariness, through trials within a trial, the accused persons' confessions were voluntarily procured. He held the view, further, that looking at the cautioned statements of both of the accused persons and the details that are in them,

there can be no doubt that the same were plausible and nothing but a true account of what transpired. He argued that these statements fall in the description of a true account because they have met the criteria set out in ***Michael Mgowole & Another v. Republic***, CAT-Criminal Appeal No. 205 of 2017 (unreported), wherein it was held:

> *"There are several ways in which the court can determine whether or not what is contained in a statement is true. FIRST, if the confession leads to discovery of some incriminating evidence, SECOND, if the confession contains a detailed elaborative relevant and thorough account of a crime in question that no other person would have known such detail but the maker, THIRD, it must be coherent and consistent with testimony and LASTLY the facts narrated in the confession must be plausible."*

The prosecution counsel was of the view that the details contained in the two confessional statements could only be given by none other than the confessors themselves. This, in his contention, was a true account of what happened. He argued that the 1st accused person's revelation is what triggered arrest, search and confession of the 2nd accused person in relation to his involvement in the trafficking of the drugs, and that he was aware that the said drugs were being transmitted to Chalinze and then to Dar es Salaam.

This, he contended, revealed the communication between the accused persons. It is this alleged communication that Mr. Mafuru imputed what he called constructive possession of the drugs, consistent with what was held in the case of ***Simon Ndikulyaka v. Republic***, CAT-Criminal Appeal No. 231 of 2014 (unreported), which cited its earlier decision in ***Moses Charles Deo v. Republic*** [1987] TLR 134, wherein 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."*

The prosecution dwelt on the question of chain of custody of the exhibit, and the contention is that the same was established and that no possibility of tempering existed. Learned counsel argued that the testimony of PW1, PW2, PW3, PW8 and PW9 gave a detail of how the said exhibit was handled from its seizure to the date of tendering it in court. This, he argued, constituted a direct oral account of how the chain of custody was unbroken. On this he cited the decisions in ***Wallenstein Alvares Santillan v. Republic***, CAT-Criminal Appeal No. 68 of 2019; and ***Abas Kondo Gede v. Republic***, CAT-Criminal Appeal No. 472 of 2017 (both unreported).

Regarding variances in narrations of the witnesses, the contention by Mr. Mafuru is that the discrepancies are inconsequential as they do not go

to the root of the matter. He urged the Court to be inspired by the decisions in ***EX. G. 2434 George v. Republic***, CAT-Criminal Appeal No. 8 of 2018; ***Chukwudi Denis Okechuku & 3 Others v. Republic***, CAT-Criminal Appeal No.507 of 2015; and ***Said Ally v. Republic***, CAT-Criminal Appeal No. 249 of 2008 (all unreported).

The prosecution urged the Court to find the accused persons guilty of trafficking in narcotic drugs.

The accused persons' representations were preferred by Mr. Salim Gogo, learned counsel. His starting point was to devise a question which was intended to query if the prosecution proved the case beyond reasonable doubt. Learned counsel argued that the prosecution failed to prove that on 29th April, 2021, the 1st and 2nd accused persons were at Sangasanga check point at which the narcotic drugs were impounded. Mr. Gogo submitted that the testimony of PW4, PW5 and PW7 was unanimous on one fact; that is that the 2nd accused was not at the Sangasanga check point. He argued that Exhibit P4 is quite explicit on the fact.

Mr. Gogo further contended that, having failed to prove the 2nd accused person's presence at the scene of the crime, the second issue for determination is whether the 1st and 2nd accused persons were jointly and together found trafficking in narcotic drugs. In his view, based on the first

issue, this issue is also resolved in the negative. Mr. Gogo argued further that no printout of the communication between the accused persons was tendered in court to prove common intention or any semblance of communication between the two.

The defence advocate raised issues with regards to the certificate of seizure which contained details relating to Motor Vehicle make Toyota Mark II with registration No. T 654 DJK which was seized in Chalinze and it belonged to the 2nd accused person. In his contention, such inclusion raised serious doubts on the authenticity of the said document (Exhibit P4).

Mr. Gogo has also taken an exception to the prosecution's failure to bring evidence that would prove that Babu Ali, who was allegedly mentioned by the 1st accused person, was actually the 2nd accused person. He argued that neither PW7 nor PW8 and PW9 were certain that Babu Ali has any relationship whatsoever with the 2nd accused person. He was of the firm view that no evidence was tendered in court to link the 2nd accused to the name of Babu Ali, and that none of the items seized from him revealed that he was actually the much talked about Babu Ali.

On the prosecution's reliance on the 1st accused person's confessional statement, the view held by Mr. Gogo is that there is a testimony of PW8 and PW9 which confirms that the duo did not have their note books during

the arrest and seizure of the accused persons. He contended that such failure was a violation of Order 282 (3) and (4) of the Police General Orders, 2021 (PGO) which demand that police officers carry their note books while on duty, and enter sufficient information in the occurrence book which is likely to be part of the evidence. In the absence of all this, he argued, no proof had been adduced to substantiate the contention that the 1st accused person confessed.

Turning on to the confessional statements, the defence's contention is that, since the said testimony was not corroborated by another testimony, then its weight is suspect and cannot support the charges. Regarding the chain of custody, Mr. Gogo was heard saying that the prosecution had not proved that chain of custody of the seized narcotic drugs was not broken from the time they were seized to the time the same were tendered in court.

The defence advocate was of the view that PGO 229 (17), which requires filling of PF 145 was flouted as none was filled and that, though PW3 testified that she received the said drugs from PW8 and filled some entries in Form PF 16, that document was not tendered in court to prove that the said Exhibit P3 was actually entered into the said book. Mr. Gogo singled out part of PW8's testimony which stated that on 3rd May, 2021, the said exhibit was handed to PW8 but did not convey it to the Government

Chemist on the day, and that he had to take custody of the same for the whole day. He took the view that a possibility existed that the same was prone to tempering. He persuaded the Court to be inspired by the decision of the Court of Appeal of Tanzania in ***Shiraz Moh'd Shariff v. Mkurugenzi wa Mashtaka (D.P.P)*** [2005] TLR 387; and that of the Court in ***Republic v. Juma Andrew Wilson @ Kipara & Another***, HC-Economic Case No. 28 of 2021 (unreported). In both of the decisions, need to adduce evidence of the chain of custody was underscored.

In yet another effort to punch holes in the prosecution testimony, Mr. Gogo took an issue with what he considered to be an uncertainty on whether what was seized from the vehicle is what was tendered in court. This is in view of the fact that the witnesses who testified were unanimous that they were all ordered to alight from the vehicle and taken to the front side of the vehicle. This means, in his contention, they would not know what was happening on the rear side of the vehicle. This explained why PW4, PW5 and PW7 failed to identify Exhibit P3. This, he argued, was a result of the failure to involve them in the seizure, pointing to a possibility that what was seized was not what they saw in court.

Finally, the defence was of the view that the sudden change from pursuing Haruna who was named in the intelligence information to picking

the 1st accused person is devoid of any explanation. The view held by the defence is that this was unjustified. Learned counsel also wondered why a witness was not procured to prove that the 1st accused person was also known as Kelvin.

It was his conclusion that a case had not been made out. He implored the Court to acquit the accused persons of their offence and set them free.

From these rival but impressive submissions and the totality of the trial proceedings, the question is whether the prosecution has proved its case against the accused persons.

This broad question is posed in the knowledge that the cardinal principle in criminal justice is that conviction of an accused person can only be grounded if the prosecution proves the guilt of the accused person beyond the evidential and legal threshold. The standard of proof set is beyond reasonable doubt. This enduring principle has been restated time and again, and the emphasis is that no conviction should be solely based on the weakness of the defence. In the case of ***Republic v. ACP Abdallah Zombe & 12 Others***, HC-Criminal Sessions Case No. 26 of 2006 (DSM-unreported), this Court restated the said principle in the following words:

> *(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)."*

The small follow-up question is whether there is any credible testimony sufficient to establish the accused persons' culpable role. My unfleeting review of the trial proceedings brings me to the conclusion that the testimony that the prosecution relies on is, by and large, direct evidence, complimented

by the accused persons' confessional statements. The latter are in the form of cautioned statements (Exhibits P6 and P7).

Direct evidence is composed of the testimony adduced by prosecution witnesses, particularly, that of PW1, Joseph Jackson Ntiba. This witness carried out an analysis that concluded that the substance allegedly seized from the 1st accused person was narcotic drugs. This witness went further and listed the damaging effect that would come with the consumption of the drugs. There is also an account of PW2, PW3, PW6 and PW8, all of whom handled the seized substance and the manner in which they handled it from the time it was seized, analyzed by PW1, and eventual custody thereof, before it was tendered in court during trial. Then there is evidence adduced by PW4, PW5, PW7, PW8 and PW9, who were present when the said substance was seized from the vehicle the 1st accused person was travelling in.

Besides this oral testimony, there is also a bunch of documentary and physical evidence, in the form of Exhibits P1, P2, P3, P4, and P5. They include the certificate of seizure; submission form for analysis of the drugs; report of the analysis of the drugs; the vehicle from which the drugs were seized; and 20 packets of the drugs which were confirmed to be narcotic drugs, allegedly recovered from the 1st accused person. The combination of these

sets of testimony brings out a chain of what is considered to be the evidence that links the 1st accused person with the seized narcotic drugs (Exhibit P3), and constitute the subject matter of these trail proceedings. The testimony has partly brought the 2nd accused person on board as one of the accomplices and co-perpetrators of the offence of trafficking in narcotic drugs.

A question that may be posed at this juncture is whether this testimony can constitute the basis for conviction against any or both of the accused persons. As Mr. Mafuru contended, the legal position, as it currently obtains, is to the effect that direct evidence can sufficiently constitute the basis for conviction if, as accentuated in ***Vujo Jack v. DPP*** (supra), the same is true and the person who adduced it is to be believed. Is this testimony worth of such belief? The contention by Mr. Gogo is that this testimony is substantially hearsay and one that is lacking in credibility, adding that the manner in which the seizure was done left a lot to be desired. I will address matters relating to seizure of Exhibit P3 in a moment. Suffice to state, at this point, that my conclusion in that respect is that there was nothing untoward in the entire process that led to the recovery of the said drugs.

With respect to the contention that the testimony is hearsay and, therefore, incredible, my unflustered view is that none of this testimony can

be said to be hearsay or anything close to such contention. This is direct evidence, an eyewitness testimony, regarding something that the witnesses actually observed. The testimony is composed of oral account of persons who travelled with the 1st accused person, put him under restraint, searched and seized items from him and interviewed and recorded his statement. It constitutes evidence that directly links him to the offence he is charged with. Since the witnesses who testified in this respect, and the physical and documentary testimonies, were nothing short of credible, I take the view that their direct account did quite superbly in proving the case against the accused persons.

While still on the direct evidence, the defence has pointed out a couple of what it considers to be irregularities in the conduct of the search. Most notably, the contention that the said search was carried out without due regard to Order 282 (2) and (3) of the PGO which requires that police officers conducting arrest, search and seizure to carry note books. In this case, no evidence was tendered to prove that such requirement was followed. The other relates to failure to particularize items in the certificate of seizure, and that it included a vehicle which was not seized during the Sangasanga operation.

There is no denying that search and seizure that culminated in the recovery of the narcotic drugs (Exhibit P3) was conducted without there being a search order or warrant. This is a unanimous view that has been expressed by both sets of the witnesses. Needless to say, therefore, that such act was not in conformity with the provisions of section 38 (1) and (3) of Criminal Procedure Act, Cap 20 R.E. 2022 (CPA), read together with paragraphs 1(a), (b), (c), 2(a) and (d) of PGO No. 226. These are the general provisions that govern search and seizure. The contention that arises from the testimony of PW8 and PW9 is that circumstances of the arrest and seizure presented a unique case that classified the search and seizure as emergency and, therefore, excepted by the imperative requirements of the cited provisions. I am in agreement that the prosecution witnesses operated in peculiar circumstances that depicted urgency which would only be addressed through invocation of section 42 (1) (b) (ii) of the CPA. It states as follows:

> *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]

PW8 and PW9 testified that their source of intelligence information pointed out that any delays in intercepting the suspected vehicle had the potential of having the suspects elude the trap and get away with the drugs in a manner that would render the entire exercise futile. In my considered view, this set of facts presented a push which called for seriousness and urgency that justified immediate search and entry without authority of an order or of a warrant issued.

My contention is in sync with numerous court decisions which include ***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). The most captivating position was set in the case of ***Marceline Koivogui v. Republic***, CAT-Criminal Appeal No. 469 of 2017 (at page 29), in which the upper Bench held as follows:

> *"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."*

See: ***Maluqus Chiboni @ Silvester Chiboni and Simon v. Republic***, (supra)

PW9 has also testified to a plausible fact that his team was uncertain of the territorial location at which they would meet the suspects and put them under restraint and search them. Noting that search orders or warrants have their validity in a specific territorial area, it would not be established, with any precision, which of the police stations would enjoy the powers of issuing the search order required for the search. In my considered view, this was a reason sufficient enough to dispense with the requirement of issuing a search order.

I draw an inspiration from the superior Bench's decision in ***Jamali Msombe & Another v. Republic*** (supra) and hold that, since the search was witnessed by the 1st accused person, the anomaly is tolerable and of little or no consequence. This applies to the accused persons' disgruntlement on the shortfalls in the manner in which Exhibit P4 was filled. I take the view that the pointed anomalies, though justified, are of trifling effect and they did not cause any deflection of justice.

As stated earlier on, there is yet another set of evidence on which the prosecution's case is premised. This is the confessional evidence allegedly extracted from both of the accused persons. It is in the form of cautioned statements which were tendered and admitted in Court as Exhibits P6 and P7, for the 1st and 2nd accused persons, respectively. These statements had their admissibility subjected to serious challenges, arising from the defence's contention that the same were not voluntarily extracted. After a couple of trials within a trial, these statements were given a 'clean bill of health' and admitted. The Court was not convinced that the same were extracted through inducement or any form of threats and intimidation.

In terms of section 27 (1) of the Evidence Act, Cap. 6 R.E. 2019, a confession that is voluntarily made to a police officer by a person accused of an offence may be proved as against that person. For it to serve the purpose

enshrined in the foregoing provision, the same must meet the requirements of a confession, spelt out in section 3 (1) (c) of Cap. 6 i.e. it must be a statement that contains an admission of all the ingredients of the offence with which its maker is charged. Where the charged offence is trafficking in narcotic drugs, as is the case here, the confessional statement should be able to explicitly and unequivocally quote the accused as admitting that he was involved in the trafficking - within the meaning ascribed to in section 3 of Cap. 95 - of the substances which are confirmed to be narcotic drugs, and that he did so with his knowledge. In other words, a confession must amount to an admission of the issues in contention.

In ascertaining if confessional statements amounted to admission, the Court of Appeal of Tanzania did, in ***Juma Magori @ Patrick & 4 Others v. R***, CAT-Criminal Appeal No. 328 of 2014 (unreported), make reference to the decision of the Supreme Court of Nigeria in ***Ikechukwu Okoh v. The State*** (2014) LPER-22589 (SC). The latter quoted, with approval, a UK decision in ***R v. Sykes*** (1913) 1 Cr. App. Report 233, wherein key principles that should be applied in determining probity and weight to be accorded to confessional statements were propounded. The upper Bench quoted the following excerpt:

"The questions the court must be able to answer it can rely on a confessional statement to convict an accused person were set out in the case of R v. Sykes (1913) 1 Cr. App. Report 233 are as follows: (a) Is there anything outside it to show that it is true? (b) Is it corroborated? (c) Are the factors stated in it true as can be tested? (d) Was the accused the man who had the opportunity of committing the offence? Is the confession possible? (f) Is it consistent with other facts which have been ascertained and proved? (at 22) ..."

Emmanuel Lohay and Udagene Yalooha v. Republic, CAT-Criminal Appeal No. 278 of 2010 (unreported).

The emphasis in all of these decisions is that confessions must contain such details as to assume that the maker of the statement must have played some culpable role in the offence with which he is charged.

A scrupulous review of Exhibits P6 and P7 brings out what the accused persons are said to have stated in relation to the charged offence:

Exhibit P6:

"*.... Nikiwa Songea niliweza kumpigia simu rafiki yangu wa karibu anayeitwa HARUNA OMARY SALUM ambaye ni mkazi wa KIMARA na ana mashamba huko SONGEA na mara kwa mara huwa anakwenda kutazama mashamba yake. Hivyo nilimpigia simu kwa lengo la kujua alipo na baada ya kujua kuwa yupo Songea na mimi nipo Songea*

na alikuwa na rafiki yake anayeitwa GODLISTEN MAMBA wote wakiwa Songea kwa shughuli za mashamba hivyo mimi nilimweleza rafiki yangu huyo kuwa nina safari ya kuja Dar es Salaam na ndipo rafiki yangu huyo akasema kuwa yuko na rafiki yake na wao pia wana safari ya kurejea Dar es Salaam baada ya kumaliza shughuli za mashamba. Hivyo mimi nilimuomba lift katika gari lake na ndipo wakakubali baada ya hapo siku ya tarehe 28-04-2021 majira ya saa sita mchana safari ya kuondoka Songea iliweza kuanza safari huku mizigo yangu nikiwa nimepakia katika gari ya rafiki yangu huyo na wakati safari inaanza ndani ya gari hilo tulikuwa watu watatu tu ambao ni HARUNA OMARY SALUM, GODLISTEN GODFREY MAMBA pamoja na mimi mwenyewe. Gari likiendeshwa na GODLISTEN GODFREY MAMBA ikiwa ni gari yenye namba za usajili T .....DEA – NOAH ya Silver. ..... Safari iliweza kuendelea na tulipofika maeneo ya check point ya Sanagasanga – MOROGORO majira ya saa 03: HRS usiku tuliweza kusimamishwa na polisi kisha polisi hao kulititilia mashaka gari tulilokuwa tumepanda na ndipo maofisa hao wa polisi wakiongozwa na INSP. HASSAN akiwa na askari wengine walitua muru kushuka kwenye gari hilo na kisha zilifanyika taratibu zote za kisheria na hatimaye gari hilo lilifanyiwa upekuzi huo ulisimamiwa na INSP.HASSAN ukishuhudiwa na wote waliokuwemo ndani ya gari hilo. Upekuzi huo ulifanyika kwa kila aliyekuwa ndani ya gari hilo pamoja na mzigo

wake na ndipo ilipofika zamu ya kupekua mizigo yangu na begi langu ziliweza kupatikana pakiti tano za nailoni angavu zilizokuwa zimechangamana na vitunguu. Pia zilipatikana pakiti kumi na tano zikiwa ndani ya mfuko wa sulfate rangi ya njano zikiwa zimechangamana na vitunguu maji. Paketi hizo zote kwa mujibu wa maofisa wa polisi walizitilia mashaka kuwa ni zidhaniwazo kuwa ni za kulevya. Hivyo ilijazwa hati ya ukamataji ukiainisha vitu vilivyopatikana katika zoezi hilo la upekuzi na ambavyo vimechukuliwa kwa ajili ya uchunguzi ambapo kwa upande wangu simu mbili zilichukuliwa .... pamoja na mifuko hiyo ya salfate ambayo ilikuwa na pakiti jumla zipatazo ishirini zenye unga udhaniwao kuwa dawa za kulevya. Baada ya hapo maofisa wa polisi waliweza kutuchukua na kufika Chalinze na kuweza kumkamata mtu mmoja anayeitwa BABU ALLY aliyekuwa akisubiri kupokea paketi tano kutoka kwangu zilizokuwa kwenye mfuko wa Salfate rangi ya kijani na baada ya hapo BABU ALLY alibaki Chalinze kwa taratibu zingine na kisha sisi tukaletwa huku Dar es Salaam kwa taratibu zingine. Nakiri wazi kwamba paketi hizi za dawa za kulevya zilizokutwa ndani ya mifuko miwili ya Salfate zikiwa zimechangamana na vitunguu ni zangu mimi mwenyewe na nilizipokea kutoka NYASA mpakani mwa TANZANIA na MSUMBIJI ili niweze kuzisafirisha kuzileta kwa BABU ALLY na zingine kuja huku Dar es Salaam...."

Exhibit P7:

> *"…. tukiwa tunatumia gari TOYOTA MARK II GX 100 no T654 DJK rangi ya SILVER; pia nilichukua pesa za kitanzania TSH 1,000,000/= kwa ajili ya kumpa KEVI mtu ambae anakuja na mzigo wa dawa za kulevya kg tano 5. Tulifika Chalinze majira ya usiku; tulipofika hapo CHALINZE tukapaki gari yetu pembeni tukalala ndani ya gari ilipofika muda wa saa za alfajiri KEVI alinipigia akaniambia ndo amefika Morogoro, hiyo ilikuwa tarehe 29/4/2021; na akaniambia gari yake inatembea taratibu taratibu kwani iliharibika; na ilipofika majira ya saa 07.10 asubuhi ya tarehe 29/4/2021 KEVI (aliniaa) alinipigia simu kwa namba siikumbuki na akaniambia kuwa ameshafika CHALINZE na yupo Sheli, kituo cha mafuta cha TOTAL; Baada ya kunieleza hivyo mimi (nikashuka) nikaenda hadi hapo kituo cha mafuta, akanielekeza gari yake, na mimi nikaiona, baada ya kuiona nikashuka kwenye gari wakati naelekea kuchukua mzigo wangu wa dawa za kulevya ndipo nikakamatwa na askari na kuwa chini ya ulinzi ….."*

It is clearly discernible that Exhibits P6 and P7 carry a combined set of facts that provide a fabulous story which presents a blow by blow account of how the accused persons were part of the wider network of narcotic drugs traffickers. They also tell of the culpable role that each of them played in the

offence with which they are charged. The level of precision and material particularity in each of the confessional statements is phenomenal, telling what each of them did before, during and after they were held in restraint. The coherence with which these confessional statements are characterized leave little or no flicker of doubt that the accused persons were the planners and executors of the criminal undertaking that they are now held responsible for. These fine details contained in the confessional statements would only come from the person who was privy to the goings on, and I see nobody in that position than the accused persons themselves. I am inclined to take the path taken by the Court of Appeal of Tanzania, when it held in ***Kashindye Meli v. Republic***, CAT- Criminal Appeal No. 12 of 1996 (unreported):

> *"…. Secondly, and more importantly in the statement the details pertaining to the sequence of events leading to the death of the deceased are such that no one else other than a participant to the murder could do so. In minute details the statement outlines what happened …. by the nature of the statement we are satisfied that the extra Judicial Statement was true and freely made by the appellant."*

In my considered view, the accused persons' confessional statements are in sync with the qualities of confessions stated in ***Michael Mgowole & Another v. Republic*** (supra), cited by counsel for the prosecution.

The defence has raised a contention regarding the culpable role played by the 2nd accused person. The argument by Mr. Gogo is that no evidence was adduced to link the 2nd accused to the 1st accused person. He singled out lack of any printouts of communication as one of the missing links. By this, he meant that there was no direct evidence to that effect. The prosecution attorney is not convinced. His take is that such link is clearly established by the accused persons' own admission.

I do not consider that the view held by Mr. Gogo and, by extension, the defence, represents the correct position in this matter. The testimony of PW 7, PW8 and PW9 provides a cumulative and consistent message that the 2nd accused person was one of the recipients of the consignment that the 1st accused person trafficked. The testimony has gone further to state how a trap was laid to have the 1st accused person lure the 2nd accused person into a plan that led to his arrest.

But even assuming, just for the sake of argument, that such direct evidence is missing, the Court would want to ask itself if the 1st accused person's own account of culpability may be the basis for bringing the 2nd accused person into any culpable role. In law, this is an allowable practice, and the relevant provision here is section 33 (1) of Cap. 6, which provides as hereunder:

"When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person."

While this is the general position with respect to an accused person's confessional effect on a co-accused, sub section (2) of the same provision provides a caveat. This is to the effect that the said confession should not be the sole basis for conviction of a co-accused, meaning that such confessional testimony must be corroborated. This Court laid an emphasis for corroboration in the case of ***Republic v. ACP Abdallah Zombe & 12 Others*** (supra). The Court held:

*"It is also a truism that whether in the form of a confession, or any other types of evidence of a co-accused, to ground a conviction, it must be corroborated as a matter of law (in case of confessions) (s 33 (2) of the Evidence Act) or of practice in any other types of evidence of a co-accused (see **Pascal Kitigwa v. R** (1994) TLR (CA)."*

The need for confessional account of an accused person to be corroborated, for it to have an adverse impact on a co-accused, is now less tight than it was previously. The current position is that an uncorroborated

testimony of a co-accused may be used to convict an accused person, but only if the court warns itself against the dangers of relying on such testimony. This position is distilled from the decision of the Court of Appeal of Tanzania in ***Pascal Kitigwa v. Republic*** [1994] TLR 65. The apex Court guided, as well, that where corroboration is required then such corroborating testimony need not be direct evidence. It may also be circumstantial or based on the accused's conduct or words. The superior Court held further:

> *"However, as correctly observed by the trial magistrate and the learned judge, even though the law is such that a conviction based on uncorroborated evidence of an accomplice is not illegal, still as a matter of practice, the then Court of Appeal for Eastern Africa and this Court have persistently held that it is unsafe to uphold a conviction based on uncorroborated evidence of a co-accused. In this case, the trial magistrate as well as the learned judge on first appeal apart from warning themselves of the danger of convicting on uncorroborated evidence of the second accused (DW2), went further to look for other evidence implicating the appellant. It is common ground that corroborative evidence may well be circumstantial or may be forthcoming from the conduct or words of the accused."*

It is my fortified view that the 1st accused person's confessional statement, contained in Exhibit P6 is corroborated in a couple of ways. One,

through the testimony of PW7, PW8 and PW9, all of whom quoted the 1st accused person as stating that part of the seized drugs were destined to the 2nd accused person and some other person. Two, the 2nd accused person's own cautioned statement in which he admitted that he was to meet the 1st accused at Chalinze from which he would receive five packets of the seized drugs. These are the words of the accused person which fortify what the 1st accused person stated regarding the 2nd accused person's culpable role in the charged offence. My conviction is that the corroborating testimony has sufficient probative value that fortifies the testimony adduced against the 2nd accused person. In my contention, such testimony has laid down circumstances capable enough of supporting the exclusive hypothesis that the 2nd accused person is guilty of the of the offence he is charged with. In its totality, the evidence has provided circumstances which are incompatible with the innocence of the 2nd accused person.

The defence has taken an issue with respect to the chain of custody of the subject matter of these trial proceedings. Of particular importance is the happenings on 3rd May, 2021, the date on which the said substance was taken from PW3 for onward submission to PW1 for testing and analysis. Mr. Gogo has taken the view that tampering might have taken place while the said substance was in the hands of PW8.

I agree with Mr. Gogo that chain of custody of the exhibit tendered in court must be established, and the trite position is that, where such chain is broken, then admissibility of the said exhibit faces some hurdles, and the stance taken by courts is that such exhibit cannot be admitted in evidence (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). In ***Majid John Vicent @ Mlindangabo*** (supra), it was held:

> *"...Indeed that would help in allaying any fears about the "chain of custody" in handling the exhibit before its production in evidence at the trial. We say so because presumably in the course of tendering the exhibit PW4 would have been in a better position to tell the court how it was handled from the date of the appellants arrest to the date of its production in evidence at the trial such evidence would have been important in ascertaining whether or not there was any possibility of tampering with the exhibit in the process..."*

From the foregoing excerpt, the obvious position taken by courts is that a witness intending to tender the exhibit must tell the court how the

particular exhibit was handled prior to submission to the Government Chemist and subsequent thereto, until the date it is tendered in court. Glancing through the proceedings, I gather that PW2, A/Inspector Philemon Mbinda; PW3, SSP Neema Mwakagenda and PW8, H3545 D/C Godfrey, have meticulously given an account of how Exhibit P3 was handled. This includes what happened on 3rd May, 2021, when the same was released out of custody but for some reason the same was not conveyed to the Government Chemist. This explanation removed the possibility of having the exhibit tampered, thereby allaying any fears the defence would have that the chain of custody of Exhibit P3 was broken.

Mr. Gogo has raised an issue with regards to failure to tender evidence which would substantiate the contention that the 1st accused person is also known as Kelvin. In do not think this contention is tacky enough to detain us. The confessional statements of both of the accused persons, and the testimony of PW7, PW8 and PW9 have done enough to bring certainty to the fact that the 1st accused person was also known as Kelvin.

On the alleged contradictions in the testimonies adduced by the witnesses, my position is in concurrence with the prosecution, that the said contradictions are trifling and they do not affect the central story (See: ***Dickson Elia Nsamba Shapwata & Another v. Republic*** (supra)). They

are differences that come with the lapse of time and those are tolerable. I choose to discount them.

The defence testimony by the accused persons constitutes their denials to any involvement in the offence they are charged with. In the case of the 1st accused person, the contention is that he found the sulphate bags, in which the drugs were allegedly stashed, at the police station. This contention varies in substantial terms with his own confessional statement and the testimony of prosecution all of whom posted a uniform and consistent message that the 1st accused person owned up to the fact that the bags and the substance in them were his. The obvious fact is that the 1st accused person's subsequent narrative was nothing short of blatant lies which can hardly find any purchase. These are lies which would have the same effect as that explained in ***Felix Lucas Kisinyila v. Republic***, CAT-Criminal Appeal No. 129 of 2009 (unreported), in which it was held as follows:

> *"Lies of the accused person may corroborate the prosecution's case."*

With respect to the 2nd accused person's testimony, the argument is that nothing was recovered from him as to infer any involvement in the offence of trafficking in narcotic drugs. While it is true that nothing was seized from him, I am convinced that the testimony adduced in court has

done enough to rope in the 2nd accused person and bring him to a culpable role. I take the view, further, that, since the confessional statements have revealed that the accused persons were in constant communication from the time the plan was hatched then, as the prosecution argued and, as held in ***Simon Ndikulyaka*** (supra), that is a proof of the fact that he was aware of the presence of the drugs in the hands of the person from whom he intended to receive. It means that he was in constructive possession of the said drugs.

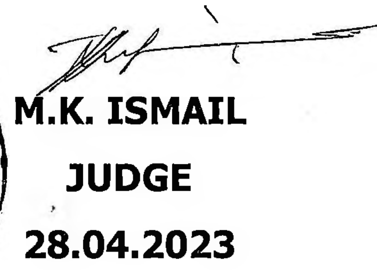
Overall, I am not convinced that the defence testimony created any crevices that would, in any way, shaken the prosecution's case which is built on a firm and solid foundation. I am persuaded to hold that the accused persons have committed the offence with which they are charged.

Consequently, I find them guilty and convict them of the offence of trafficking in narcotic drugs, contrary to the provisions of section 15 (1) (a) and (3) (i) 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.

It is so ordered.

Right of appeal duly explained to the parties.

DATED at **DAR ES SALAAM** this 28th day of April, 2023.



M.K. ISMAIL

JUDGE

28.04.2023

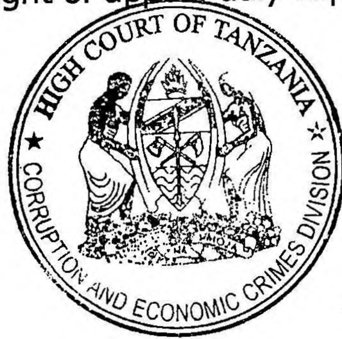
SENTENCE

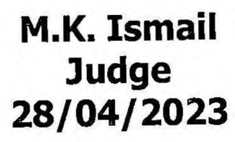
I have heard and considered the parties submissions on the sentence. While I take not of the fact that the accused are just offenders whose previous record is unblemished. I take cognizance of the fact that the law has provided no flexibility with respect to the sentence to be imposed on conviction. I take notice that the proviso to section 60(2) of Cap. 200 is to the effect that where the sentence in the charging provision is greater than that imposed under S.60 (2) then such sentence prevails. In this case, section 15(3) of Cap.95 provides for imposition of a maximum sentence of life imprisonment. In view thereof, I sentence the accused persons to life imprisonment. The sentence shall run from the date of this decision. Simultaneous with imposition of the said sentence, it is ordered as follows:-

(i) That the narcotic drugs (Exhibit P3) be destroyed without any undue delay and that such destruction should be done in the supervision of the Court. While awaiting destruction. Exhibit P3 shall be in the custody of ADU.

(ii) That motor vehicle with registration No. T412 DEA make Toyota Noah, be immediately released and handed to its registered or beneficial owner, as there is no evidence that links it with the charged offence. It is so ordered.

Right of appeal duly explained.





M.K. Ismail
Judge
28/04/2023