IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT MOROGORO

ECONOMIC CASE No. 3841 OF 2024

REPUBLIC

Versus

JOHN MWASEBA MWASIKILI

JUDGMENT

23rd February & 15th March, 2024

OTARU, J.:

John Mwaseba Mwasikili is facing a criminal indictment of an offence of trafficking in narcotic drugs in violation of section 15(1)(a), (2) & (3)(iii) of the **Drugs Control and Enforcement Act** [Cap. 95 R.E. 2019], read together with paragraph 23 of the First Schedule to and sections 57(1) and 60(2) of the **Economic and Organized Crime Control Act** [Cap. 200 R.E. 2019], as amended. The statement of offence alleges that on 26/02/2022, at Doma Area, in Mikumi National Park within Kilosa District in Morogoro Region, the accused was found with eight sacks of *cannabis sativa* weighing 107.29 kilograms aboard a motor vehicle make Toyota Kluger, with registration No. T895 CQR.

According to the prosecution, on 26/02/2022, a wildlife patrol team led by conservation ranger Allen Joseph Mushi (PW4) while patrolling in Doma area within Mikumi National Park, along Morogoro - Iringa road, at about

01.00hrs of 26/02/2022 saw a parked vehicle. As they approached it, they saw two people disappear into the darkness of the night. A third person was observed struggling with the car key at the ignition switch. He was directed by the PW4 to come out of the vehicle. At first he seemed to be obeying the directive but as he emerged from the vehicle, he wrestled with PW4 and escaped, leaving the vehicle behind. Having examined the inside of the vehicle, the team found some documentation and a suspicious load of 8 sulphate sacks of dry leaves in the boot. The load was later confirmed to be narcotic drugs, to wit *cannabis sativa* or *bhangi*.

In the course of investigation, on 11/03/2022 the accused was apprehended. His home was searched and was found in possession of insurance cover note, a copy of a sale agreement and CRDB Bank payment slips for the vehicle in question. Identification Parade was conducted on 05/04/2022 whereby he was positively identified as the person who was seen and briefly apprehended at the crime scene on 26/02/2022. He was accordingly charged. The accused denied being the alleged person, leading to commencement of the trial.

The prosecution was led by Ms. Tully Helela, learned Senior State Attorney. Her team members include Ms. Batilda Mushi also learned Senior State Attorney, as well as Mr. Fortunatus Maricha and Jumanne Milanzi learned State Attorneys. Their counterpart for the defense was Mr. Nickson Ludovick, learned Advocate. The prosecution enlisted the assistance of sixteen witnesses (16) who

testified in support of its case and tendered fifteen (15) exhibits which were admitted as prosecution's evidence. Just before the prosecution closed their case, the accused, through his learned Advocate filed '*notice of intention to rely on the defence of alibi*.

After the closure of the prosecution's case, the court was of a view that the prosecution had established a *prima facie* case against the accused, as a result, it held that the accused had a case to answer. He was subsequently invited to make his defense which he did as DW1. He testified under oath without calling any witnesses, neither did he tender any documentary nor physical exhibits. At the closure of the defense case, parties filed their final submissions as per the agreed schedule. I appreciate their effort and of all those who have assisted the court in determination of the case.

In criminal trials, it is an accustomed practice and norm that once evidence of the prosecution and that of the defense is heard and taken, the question that calls for the court's consideration and determination is *whether the prosecution's evidence has proved, beyond reasonable doubt, the charges against the accused person*. This question takes into account the fact that it is the prosecution that bears the legal and evidential burden of demonstrating the accused person's guilt in the offence with which he is charged. This legal reality has been judicially highlighted by courts across jurisdictions. The case of **Joseph John Makune v. Republic** [1986] TLR 44 is no exception. It serves to cement the prosecution's unenviable duty that: -

'The cardinal principle of our criminal law is that the burden is on the prosecution to prove it's case. The duty is not cast on the accused to prove his innocence.'

At this juncture, the court is in agreement with the defence Counsel who in his final submissions stated that weakness of the accused's defence does not make him guilty. I have kept this in mind when making this decision. Having gone through the evidence of the prosecution's side and that of the defense, in my view, the question *whether the prosecution's evidence has proved, beyond reasonable doubt, the charges against the accused person,* can be determined through the following four issues; *whether the 8 sacks of dry leaves (exhibit PE3) are narcotic drugs; whether the chain of custody of exhibits PE3 and PE12 was well maintained; whether the accused person was the one who was seen at the crime scene and properly identified,* and *whether the motor vehicle apprehended at Mikumi National Park (the crime scene) belongs to the accused person.*

Starting with whether the dry leaves in the sacks (exhibit PE3) are narcotic drugs, the answer can be extracted from the testimony of the chemist, one Mohammed Mohammed Said (PW1), who on 01/03/2022 received exhibit PE3 from D/Cpl Jackson Shambwe (PW2) with a request to analyze it. He did perform the analysis as requested and prepared a report (exhibit PE2) in which he explained how he weighed the exhibit, took samples from each sulphate sack and analyzed them in two steps. A preliminary test involved mixing of individual samples with specific reagents. The color of all samples turned blue-violet,

signifying it to be a narcotic drug *cannabis sativa,* commonly known as *bhangi.* He then did some confirmatory tests using a calibration machine.

All samples were confirmed to be *cannabis sativa* or *bhangi* plant due to presence of Tetrahydrocannabinol (THC) chemical found uniquely in that plant. In his report (exhibit PE1), PW1 indicated the total weight of the 8 sacks to be 107.29 Kgs of narcotic drug *cannabis sativa* or *bhangi,* the effect of which is dependency and brain damage to it's users. That evidence confirms that exhibit PE3 is indeed narcotic drugs, thereby answering the 1st issue positively.

On the 2nd issue of chain of custody; it is crucial that the chain of custody of an exhibit is well maintained, to ensure that there is no human intervention that could possibly tamper with the exhibit as well as elimination of any possibility of planting anything to the detriment of the accused. The consequence of breaking the chain of custody is rejection of the exhibit (please see relevant cases of **John Joseph @Pimbi v R,** Criminal Appeal No. 262 of 2009 (CAT Mwanza), **Majid John Vicent @Mlindangabo & Another v R,** Criminal Appeal No. 264 of 2006 (CAT Mwanza) and **Chacha Jeremiah Murimi and 3 Others v R,** Criminal Appeal No. 551 of 2015 (CAT Mwanza) all unreported, on the subject).

In the case at hand, Allen Joseph Mushi (PW4), the patrol team leader, testified that on 26/02/2022 at about 01.00hrs he and his team apprehended motor vehicle T895 CQR (exhibit PE12) which was within their area of jurisdiction, after witnessing it being abandoned by its driver. Being in charge

of the patrol, PW4 informed the court that he called his superiors and was directed to move the vehicle to a safer place and oversee its safety. In so doing, the incident was reported to the Drugs Control and Enforcement Authority (DCEA) in Dar es salaam, who dispatched their officers, A/Insp Innocent Masangula (PW3), Jackson Shambwe (PW2) and two others. Until arrival of the DCEA officers at around 22:30hrs of 26/02/2022, exhibit PE12 was under the care of PW4. The DCEA team led by PW3 were handed over the vehicle and its contents by PW4 via a hand over document prepared by PW4 and signed by both PW3 and PW4 (exhibit PE7).

Having satisfied himself of exhibit PE12 and it's contents, to wit eight (8) sulphate sacks of leaves suspected to be narcotic drugs, a copy of motor vehicle T895 CQR registration card, a receipt for plate number and two receipts for fuel, PW3 who is also exhibit keeper, explained how he labelled all exhibits and prepared a certificate of seizure, Form No. DCEA 003 (exhibit PE5) which he signed in the presence of PW4, PW2 and Greyson J. Maro. He then together with his team took the exhibits to DCEA offices in Dar es Salaam where he kept them under his custody and care through entry No. 60 in the Court Exhibit Register (exhibit PE10).

On 28/02/2022, PW3 together with PW2 opened exhibit PE3 and sealed them with *evidence seal* in the presence of an independent witness one Julius Peter Mazimu (PW6). Both PW2 and PW6 confirmed that occurrence. On 01/03/2022, PW2 took exhibit PE3 to the Chief Government Chemist for analysis

via Form No. DCEA 001 (exhibit PE1). PW1 then sealed the sacks and handed over exhibit PE3 to PW2 who conveyed it back to PW3 on the same day. PW3 continued to keep the exhibits in his care until they were submitted in court at the trial.

Having considered this unchallenged evidence, it is my considered opinion that the chain of custody of the motor vehicle T895 CQR (exhibit PE12) and the 8 sacks of dry leaves found therein (exhibit PE3) was well maintained. Such that this issue of chain of custody is answered in the positive.

The answer to the 3rd issue, *whether the accused person was the one who was seen at the crime scene*, is extracted from the evidence of conservation rangers Allen Joseph Mushi (PW4) and Zephania Wandiba Mwai (PW5) on conditions for identification at the crime scene. However, the process and procedure of identifying the accused at the Identification Parade is gathered from F.9150 D/Cpl Dotto (PW12), Insp. Michael Ikusua (PW13), Jimmy Ludovick Tarimo (PW14), Renga James (PW15), as well as the accused himself.

PW5 testified that at the scene of crime, he saw two people run from the left rear side of exhibit PE12. He tried following them, while his colleague PW4 went to the right side of the vehicle in the driver's direction, but he did not know what transpired there. According to PW4, he saw the accused struggle with the keys at ignition while seated at the driver's seat. Both witnesses informed the court that their car, which was parked behind exhibit PE12 had its full lights on and they each had a powerful torch as well. The learned Advocate for the

accused questioned their testimonies and urged the court to disbelieve them on the basis that they were at the same place but gave different narrations. I have considered their testimonial differences yet I do not find the difference to amount to contradictions. This is because from their own evidence, PW4 and PW5 run in different directions. PW4 run in the direction of the driver while PW5 run in the direction of the two running men. According to PW4, the incident took a few minutes, such that it should not be surprising that within those few minutes each witness encountered a different scenario.

According to PW4, he commanded the accused who was at the driver's seat to come out, he did. Then he attacked PW4 and they wrested briefly before the accused escaped into the darkness of the night. In his testimony, PW4 stated that he was able to clearly see the face of the accused due to the full light eliminating from the patrol car and the powerful torch he held. Again the learned Advocate for the accused urged the court to disbelieve the issue of light claiming that the person who had capacity to testify concerning the car lights was the driver who was not called. This too I have considered, yet again I am not convinced by that contention because each witness testified as to what he witnessed on the side he was. To me, the question to be posed is on credibility of PW4. As per the case of **Shabani Daudi v R**, Criminal Appeal No. 28 of 2000 (CAT) (unreported) it was held that: -

> '*The credibility of a witness can 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.'

As stated above, evidence indicate that PW4 and PW5 each run in different directions, thus should not be expected to give the same narration of events. Further, the testimonies of PW4 and PW5 were coherent as to what each had witnessed. Such that in my view, both PW4 and PW5 are credible witnesses.

From the facts, it is clear that the prosecution case against the accused is hinged on recognition evidence both at the place of incidence and at the Identification Parade conducted on 05/04/2022. The law on visual identification is settled. Courts should only act on visual identification after all possibilities of mistaken identity have been eliminated due to the fact that evidence of visual identification is of the weakest kind and most unreliable and thus before it is acted upon as a basis of conviction, it must be watertight. This position was pronounced by the Court of Appeal of Tanzania in the landmark case of **Waziri Amani v. R** [1980] TLR 250, where it was held in exact words that:-

'No court should act on evidence of visual identification unless, all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is watertight. The following factors have to be taken into consideration, ***the time the witness had the accused under observation,*** *the* ***distance at which he observed him,*** *the* ***condition in which such observation occurred,*** *for instance whether it was day or night*

(whether it was dark, if so was there moonlight or hurricane lamp etc) ***whether the witness knew or has seen the accused before or not.'***

I am also alive to the observation made by the Court in the case of **Njamba Kulamiwa v. R**, Criminal Appeal No. 460 of 2007 (CAT)(unreported), that:-

*'**Waziri Amani's** case just gave broad guidelines and it is for the trial court, in each case to assess and apply those guidelines, in the light of the circumstances of each case.'*

In applying the guidelines enunciated in the case of **Waziri Amani** (supra), it is crucial that evidence of visual identification must be subjected to careful scrutiny, paying due regard to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled (please see the case of **Philip Rukaza v. Republic**, Criminal Appeal No. 215 of 1994 (CAT Mwanza) (unreported)).

Coming to the case at hand, even though the accused was not known to PW4 before the incident, PW4 had explained how he managed to see and remember the accused from the time he saw him inside the vehicle; to the time when he came out and wrested with him (at a close range) for a few minutes.

Guided by the legal position on visual identification, the evidence presented in this case shows that conditions for visual identification were

favourable for proper identification thereby eliminating the possibility of mistaken identity of the accused. I say so because, although the incident occurred at night, there is evidence of ample light from the patrol car as well as from the torch PW4 had, with sufficient time for PW4 to observe the accused at a close range and remember him.

The Identification Parade of 05/04/2022 was organized by Insp. Michael Ikusua (PW13). He narrated how he dealt with the accused ahead of the parade. He explained to him his rights and choices. He then paraded nine people including the accused, who resembled in terms of age, body size, clothing and hair style. He also explained how PW4 identified the accused by touching him on the shoulder. His evidence is corroborated by PW4 as well as PW14 and PW15 between whom the accused stood. The record of the parade and the order in which the accused stood in relation to other participants has been admitted in court as exhibit PE15.

The accused claimed that the evidence of PW14 and PW15 should not be believed and relied upon on account that it was loaded with contradictions and their registered phone numbers bore different names, other than theirs. I have taken note of the contradictions that the defence is referring to. PW15 did not seem to remember well the type of clothes worn by the paraded persons. However, PW12, PW13 and PW14 are consistent on their account that all participants in the parade were wearing t-shirts and shorts. In my view, that state of forgetfulness has caused a contradiction of a minor nature. On the

question of their registered numbers being in the names other than theirs, I have not been able to grasp the connection between their telephone numbers with the evidence they gave. All in all, I am of a considered view that the accused was correctly identified both at the scene of crime as well as at the Identification Parade. Such that this issue is also answered in the positive.

The 3rd issue as to *whether the car found at the crime scene belongs to the accused person* is answered by the following witnesses; PW2, PW3, PW4, PW7, PW8, PW9, PW10, PW11 and PW12.

It has been stated by PW4 and corroborated by PW2 and PW3 that, apart from exhibits PE3 and PE12, there were also a motor vehicle T985 CQR registration card, two fuel refilling receipts and two receipts for a new plate number (collective exhibit PE6). The registered owner of exhibit PE12 who appears on the registration card, is Linus Linus Ngonyani (PW8). PW8 testified to the effect that he sold exhibit PE12 to Rashid Suleiman (PW9) on 26/01/2022 for a consideration of T. Shs. 10,000,000/-. To substantiate the sale, PW8 produced a sale agreement between himself and PW9 (exhibit PE13). It was understood between PW8 and PW9 that PW9 was to transfer ownership to himself the soonest. Apparently, this did not happen. Instead, PW9 made some repairs and re-sold the vehicle to the accused for T. Shs 12,500,000/=. His testimony is also supported by *madalali* (middlemen) Makumbi Ramadhani (PW10) and Nicodemus Jeremiah Sanga (PW11) who were adamant that the accused was the person who purchased exhibit PE12. They all insisted that the

accused had sent one *Dani* to seal the deal on his behalf. The accused on his part has firmly denied his involvement in the purchase of the vehicle and put all the blame on *Dani* whom he said he did not know.

Having revised the evidence over and over in my mind as well as on the record, it is clear that PW9, PW10, PW11 and PW12 are certain about the accused purchasing exhibit PE12. Throughout their testimonies they were firm that it was the accused himself who had enquired about the vehicle, negotiated the price and sent his relative '*Dani* to finalize the deal. Further, according to PW10, the accused paid a total of T. Shs 10,000,000/- in about three installments through CRDB bank *wakala* (agent). Finally, a sale agreement was prepared and signed between PW10 and *Dani* (on behalf of the accused). The same was witnessed by PW11 and PW12. The sale agreement was admitted in as exhibit PE14.

According to PW3 and Grace William Mlawa (PW7), a local leader at Kimara Saranga where the accused resided, the accused's residence was searched on 11/03/2022, and various items relating to exhibit PE12 were retrieved and seized. These include a copy of the sell agreement between PW9 and the accused (signed on his behalf by one *Dani*), CRDB *wakala* payment slips to PW9 in instalments and an insurance cover note (collective exhibit PE8). The receipts bear the first name of the accused *John* and others his last *Mwasikili*. When cross examined, the accused admitted the documents were

retrieved from his home yet in his final submissions, he continued to insist that he had no involvement in the purchase of exhibit PE12.

Having considered that exhibit PE8, which includes insurance cover note for exhibit PE12, CRDB payment slips and a copy of the sale agreement signed by *Dani,* was retrieved from the accused, one would expect the accused would have provided a reasonable explanation as to how these items came to his possession. Without any explanation, it is difficult to believe that the accused did not know *Dani* and that he had nothing to do with the purchase of exhibit PE12.

Why would the accused have the bank deposit slips if he did not do the deposits or did not send anyone to do it or did not know the person? Or why was the agreement in his possession if it did not concern him? The answer is not hard to guess because it proves the allegation by the accused that the accused was the person who purchased the vehicle (exhibit PE12) through *Dani.* Having purchased the vehicle he has the title thereto and therefore he is the owner thereof.

As stated earlier, the accused filed a notice of intention to rely on the defence of *alibi* towards the conclusion of the prosecution's case. Matters of *alibi* are regulated by section 42 of the **Economic and Organised Crime Control Act** (supra), which provides as follows: -

42.-(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.***

The accused filed a notice of intention to rely on the defence of *alibi* under section 194(4) and (5) of the **CPA**. The said provision provides that:-

*'194 (4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution **notice** of his intention to rely on such defence **before the hearing of the case;***

*(5) **Where** an accused person **does not give notice** of his intention to rely on the defence of alibi before the hearing of the case, **he shall furnish the prosecution with the particulars of the alibi** at any time before the case for the prosecution is closed;*

Because there is a specific law applicable to economic cases as the one at hand, the accused should have confined himself to the relevant law. Despite of that, the *notice* is filed not *before the hearing of the case,* as required by law, but when the prosecution were into their 13th of 16 witnesses. The *notice*

is filed under both provisions for *notice* and *the particulars*, that is S.194(4) and (5) of the **CPA.** The gist of the *alibi* as provided by the Counsel is that:-

> *'On 26/02/2022 the accused person was at Uyole in Mbeya Region attending a funeral of his uncle who died interstate at his home'.*

Even if it was filed under the applicable law, the said *notice* does not provide sufficient particulars to enable verification thereof. The name of the uncle is unknown. His home is unknown and the burial place is also unknown. At the dock, the accused claimed to have driven to Uyole on 24/02/2022 with his mother and uncle and stayed there until 28/02/2022. The prosecution objected acceptance of the notice by the court because time for giving notice has passed. The learned Advocate for the defence, urged the court to accept the notice as *particulars of the alibi* under S.194(5) of the **CPA** (supra).

The purpose of providing either a notice or particulars of the alibi is to enable the prosecution to verify it. At this point I wish to cite a passage from the case of **Uganda in Kibale v Uganda** [1999]1 EA 148, cited with approval in the case of **Mwiteka Godfrey Mwandemele v. R,** Criminal Appeal No. 388 of 2021, that:-

> *'A genuine alibi is, of course, expected to be revealed to the police investigating the case or to the prosecution before trial. Only when it is so done can the police or the prosecution have the opportunity to verify the alibi. An alibi set up for the first time at the trial of the accused is more likely to be an afterthought than genuine one.'*

It is therefore my considered view that the accused having failed to provide the notice or particulars as required by law, did not have a genuine *alibi* but a mere afterthought. In addition thereto, the accused did not cross examine the prosecution's witnesses along the lines of his defence. It is trite law that failure to cross-examine a witness on an important matter implies the acceptance of the truthfulness of the witness's evidence. Please see the case of **Damian Ruhele vs Republic,** Criminal Appeal No.501 of 2007, (CAT Mwanza) (unreported).

In the final note, I wish to state that the prosecution's witnesses were nothing short of credible, coherent and consistent such that they established the link between the accused person and exhibit PE12 and consequently exhibit PE3 because the level of credibility of witnesses met the criteria set in the case of **Shabani Daudi v R** (supra).

Since the evidence of the prosecution was not dismantled, and taking into account that defence of *alibi* presented by the accused person was an afterthought which carries no weight. As admitted by the learned Advocate for the defence, the defence was weak and has done little to create any doubt in the prosecution's case. As a result, I see no reason to discount the evidentiary position established by the prosecution.

In the final analysis, the learned Advocate for the accused is protesting against admission of witnesses who were not listed during PH proceedings but applied by the prosecution to be added in the course of proceedings. These are

PW7, PW8, PW9, PW10, PW11 and PW16. The learned advocate insisted that the court should reject their testimonies because their statements were not read during committal proceedings. It is misleading to say that their statements were not read during committal proceedings because the statements of all these witnesses were read in compliance with the law. It was only that their names were not listed at the PH. This was deliberated at the trial and a ruling to that effect was delivered.

In consequence of the foregoing, I am of the certain mind that the prosecution's evidence has proved, beyond reasonable doubt, the charges of trafficking in narcotic drugs, against the accused person. Accordingly, I find him guilty and convict him of the offence of trafficking in narcotic drugs contrary to the provisions 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 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.

DATED at **MOROGORO** this 15th day of March, 2024.

M.P. Otaru
JUDGE

SENTENCE

I have heard the submissions by both parties herein on the sentence. While I take note of the fact that the convict has no past criminal record, I also take cognizance of the fact that the law has provided stern sentence to be imposed upon conviction, the gravity of the offence, that the convict has been in remand for 2 years and other factors as submitted by the learned Advocate for the defence.

Consequently, I sentence the accused person, **John Mwaseba Mwasikili**, to twenty-five (25) years imprisonment.

M.P. Otaru
Judge
15/03/2024

ORDER

Simultaneous with imposition of the sentence of imprisonment, it is hereby ordered, as follows:-

1. That the eight sulphate sacks of narcotic drugs (exhibit PE3) be destroyed, without undue delay, with involvement of relevant law enforcement bodies.
2. That the motor vehicle with registration No. T895 CQR, make Toyota Kluger (exhibit PE12) be forfeited to the Government of the United Republic of Tanzania due to it's role in the commission of the offence by it's owner.
3. The two phones (1) Samsung sea blue smart phone and (2) Nokia

black buttoned phone; be returned to its owner.

It is so ordered.

M.P. Otaru
Judge
15/03/2024

COURT: Judgment is delivered virtually in the presence of the accused person and Mr. Shabani Kabelwa, learned State Attorney for the Republic, who were in Morogoro; and Mr. Nickson Ludovick, learned Advocate for the accused person in Dar es salaam. Also present were Ms. Sophia Minja (JLA) and Mr. Juma Maiga (RMA) in Dar es Salaam and Morogoro, respectively.

The right of appeal against the conviction, sentence and the consequential orders is duly explained to the parties.

M.P. Otaru
Judge
15/03/2024