IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM REGISTRY

ECONOMIC CASE NO.21 OF 2022

THE REPUBLIC

VERSUS

MARIA OSWARD MTUMBUKA

HAMIS SAID AWADH

JUDGMENT

Date of last order: 29/02/2024

Date of judgement: 28/03/2024

ISAYA, J.

The accused persons, Maria Osward Mtumbuka and Hamis Said Awadh being the first and the second accused persons respectively stand charged each with the offence of Trafficking in Narcotic contrary to section 15(1) (a) (3) (i) of the Drugs Control and Enforcement Act (Cap 95 R.E. 2019) read together with paragraph 23 of the First Schedule to and section 57(1) and 60(20 of the organized Crime Control Act (Cap R.E. 2019), the same in two counts.

It is alleged by the prosecution in the first count that, on the 2nd day of April 2021 at Julius Nyerere International Airport (JNIA) area within Ilala

District in Dar es Salaam the 1st accused person was found trafficking in narcotic drugs namely Heroin Hydrochloride weighing 6.65 Kilograms from the Republic of Zimbabwe to India via Tanzania.

In the second count, it is alleged by the prosecution that, on the 2nd day of April 2021 at Julius Nyerere International Airport (JNIA) area within Ilala District in Dar es Salaam the 2nd accused person was found trafficking in narcotic drugs namely Heroin Hydrochloride weighing 6.75 Kilograms from the Republic of Zimbabwe to India via Tanzania.

Both the accused persons pleaded not guilty to the information. In the bid to prove the case against the accused persons beyond a reasonable doubt, the prosecution paraded five (5) witnesses to testify, besides they produced fifteen exhibits that admitted into evidence. On the other hand, the accused persons testified themselves under oath as defence witnesses as DW1 and DW2 respectively, and tendered one exhibit.

At the trial, Ms. Edith Mauya, Ms. Nitiky Mwaisaka, Ms Tully Helela SA, and Blandina Mng'ongi, Learned State Attorneys, represented the Republic, while Marietha Mollel and Benjamin Mageni Learned Advocates, represented the first and second accused persons respectively. I extend my appreciation to the team of members of the bar for their commitment, hard work, and attentive cooperation.

The brief body of evidence by the prosecution side is a fairly captivating one. The two accused persons are both Tanzanian citizens who were en route to India on the 2nd day of April 2021 when they got arrested at Julius International Airport, Dar Es Salaam. The prosecution evidence which is in agreement with the defence evidence reveals the accused persons instead of pursuing the direct route to India, the plan of the course of their journey was made very long and could be likened to the Israelites' journey from Egypt to Canaan as they were fleeing Pharaoh and his army. The journey started from JNIA, Dar es Salaam to Nairobi Kenya on 26.03.2021. From Nairobi, the couple took a flight to Harare Zimbabwe. On 02.04.2021 the two were traveling from Harare to Bombay, India when they landed at the JNIA, Dar es Salaam again en route to Bombay, India [Exh.P11]. PW4 Joseph Enock Nyambalya works as a security officer under the Tanzania Airport Authority (TAA) at JNIA, terminal-III. On that day at 18.30 hours, he was at the Baggage Handling System (BHS) checking the offloaded transit baggage. Through the x-ray device in the BHS machine, he noted some strange stuff in the two bags. Having suspected, he put them aside from the belt and studied the names on the tags in each bag. One bag had the name, Maria Oswald Mtumbuka while the other tag had the name Hamis Said Awadhi. After that he reported the incident to his in charge, who reported to the

police. PW2 Inspector Furahini Michael Tarimo was a police officer Incharge at JNIA. At about 19:00 hours while at JNIA supervising other Police Officers, he was called to go at the Baggage Handling System at terminal III. He went to terminal III, where he found Sgt. Faraj, Sgt. Mwanaidi, CPL Swalehe and workers of TAA (Tanzania Airport Authority) who are Joseph Enock Nyambalya, Stanley Nzota, Frank Kimaryo, and Christopher Reuben, and two passengers (1st and 2nd accused persons) who were traveling from Zimbabwe to Bombay, India via Dar es Salaam. According to him they had two bags, one was a black bag, and the other had a fading blue color bag. PW2 and his fellows were informed by PW4 that the two bags were suspected to have contained suspicious substances.

PW2 searched the accused person's bags (Exhibit P10 collectively) where he found three plastic packets of Khaki in the said black bag and found 3 Khaki plastic pockets one of them was sealed by sole tape (khaki color) in a bag with a fading blue colour. All six packets from both bags contained cream powder substance which later were confirmed to be narcotic drugs. Thereafter he put the accused persons under arrest, seized items possessed by the accused persons and filed in the seizure certificates (Exhibit P7 and P8) for the 1st and 2nd accused respectively. Each accused person signed in her or his respective certificate of seizure which were also signed by PW2

and witnesses. Thereafter, the exhibits were marked "01" and "02" and then put in the envelope "A" and "B" respectively. Names of the accused persons were written on the respective envelopes, they signed and names and signatures of witnesses were added on the said envelopes. He then handed over the Exhibits to PW5 (E.7025 D/Sgt IVO) for safe custody at the JNIA Police station where the accused persons were also kept in custody and cases No. JNIA/IR/19/2021 and JNIA/IR/20/2021 were filed.

It was alleged further that on 06/04/2021 at 08:00 AM, **PW3 Jesias Aloyce Kihombo,** (E. 370 D/Sgt Jesias) was assigned to investigate a police case file Number JNIA/IR/19/2021 for investigation, while PW5 investigated police case file Number JNIA/IR/20/2021, on the same day both PW3 and PW5 took powder substances in envelopes A and B to the Government Chemist Laboratory Authority (GCLA) where they were received by PW1 Boniface Emmanuel Majinyale who weighed and conducted laboratory tests to both Exhibit P5 (substances in Envelope labeled A and IR No. JNIA/IR/19/2021) which is found to be Heroine Hydrochloride weighed 6.5 Kilogram and Exhibit P6 (substances in Envelope B and IR No. JNIA/IR/20/2021) Heroine Hydrochloride weighed 6.65 kilograms. It is the testimony of PW3 accused charged together in the case at hand since the

investigation revealed that both were arrested together and were on the same journey.

At the closure of the prosecution case, the court found that the accused persons had a case to answer in respect of the offence charged with. The accused persons (DW1 and DW2) firmly denied being involved in the offence alleged and charged with it. Both DW1 and DW2 under their respective sworn evidence testified that they were arrested at JNIA on a material date and time when they were on a journey from Harare to India. Their evidence was to the effect that; the fact that led to their arrest was when DW2 was suspected by one of the Immigration officers to be not a Tanzania citizen. Thus it is when the quarrel between the second accused person and immigration officers arose that caused their arrest. Thereafter, they were kept at the JNIA police post. DW1 and DW2 stated in their evidence to have been traveling to India for treatment purposes. It is the evidence of DW1 that DW2 is her brother-in-law and she was accompanying him for medical treatment in India. She firmly denied having been found in trafficking Exhibit P7 and that Exhibit P10 belongs to them. The same evidence featured in the evidence of DW2 who denied having trafficked Exhibit P8 and that Exhibit P10 belongs to them. DW2 stated that they decided to travel to Nairobi via Harare via Tanzania to India since there were some transport hardships

herein Tanzania, when they reached Harare Zimbabwe they were dropped from Kenya Airways as he fell sick and it was suspected that he was suffering from Covid 19, so he was kept in a Lockdown for five days while accompanied by DW1. DW2 produced a copy of a letter dated 06/04/2021 with IR No. JNIA/IR/20/2021 Exhibit D1 to cement his evidence.

Basically, that was the evidence of both the prosecution and the defence sides. Counsels for prosecution and the accused persons filed their final submissions as it was ordered by this court. In their submission Learned Counsels for the defence suggested that the court to hold the case against both accused persons was not proved beyond a reasonable doubt. His first attack was that PW5 was summoned as witness by the prosecution contrary to the procedural law for failure to mention him during the committal to enable the accused person to prepare his defence. To him, the witness was incompetent. He reinforced his point by citing section 246(2) and 247 of the Criminal Procedure Act, Cap 20. RE 2022, the case of **DIRECTOR OF PUBLIC PROSECUTION V SHARIFF MOHAMED@ATHUMANI AND6 OTHERS, CRIMINAL APPEAL NO.74 OF 2016 CAT ARUSHA (UNREPORTED)**. Another attack on the prosecution case was that the amount of 0.1 grams of sample collected from Exh.P5 & P6 was insufficient

and contrary to Regulation 17 of the Drug Control and Enforcement (General) Regulations of 2016. He also cited the case of **BASHIRU RASHID OMAR V. DPP, CRIMINAL APPEAL NO.309 OF 2017, CAT AT ZANZIBAR.** Another attack in his submission was on the requirement of an independent witness. On this, he came armed with the case of **THE DPP V. MUSA HATIBU SEMBE, CRIMINAL APPEAL NO. 130 OF 2021 CAT at TANGA.** He challenged too that the chain of custody was broken and cited the cases of **CHACHA JEREMIAH MURIMI AND 3 OTHERS V. REPUBLIC, CRIMINAL APPEAL NO. 551 OF 2015**. The last aspect of his submission was an allegation that Exhibit DE1, a letter to the government chemist showed that the black bag was seized from DW2 but during the hearing of the prosecution case the prosecution produced a blue bag concerning DW2. On the said discrepancy he cited the cases of **DICKSON ELIAS NSAMBA SHAPWATA & ANOTHER VS. REPUBLIC, CRIMINAL APPEAL NO. 92 OF 2007** and **JEREMIA SHEMWETA V REPUBLIC (1986) TLR 226 at page 229.**

On the other hand, the prosecution Counsel submitted that their evidence manages to prove the case against accused persons in a required

standard thus he referred this court in several cases including; **GOODLUCK KYANDO V. R. [2006] TLR, MASHAKA JUMA@ NTATULA VS. REPUBLIC, CRIMINAL APPEAL NO. 140 OF 2022, CAT AT SHINYANGA,** at page 13, **JIBRIL OKASH AHMED VS. REPUBLIC, CRIMINAL APPEAL NO. 331/2017 CAT** at pages 40-41, **SANO SADIKI AND TUKULE ALLY VS. REPUBLIC, CRIMINAL APPEAL NO. 623OF 2021 CAT MTWARA,** and **FELIX LUCAS KISINYILA V. REPUBLIC; CRIMINAL APPEAL NO. 129 OF 2002, CAT DSM**

Having carefully considered the evidence on record of both sides, the main issues for determination are **first,** whether Exhibits P5 and P6 are narcotic drugs, **Secondly,** whether the search was legally conducted and Exhibits P5 and P6 were retrieved from the 1st and 2nd accused persons while trafficked and **Thirdly,** whether the chain of custody of exhibit in question was maintained, and **Fourthly,** weather defence raised reasonable doubt against the prosecution case. The issues will be determined in series as follows;

Starting with the 1st issue, it is the evidence of (PW1) that, he is the Chemist at GCLA who became a laboratory analyst via GN No. 826 of 02/10/2020. On 06/04/2021 at the GCLA, Dar es Salaam he received the

police officers, PW3 and PW5. They submitted to him exhibits with references No. JNIA/IR/19/2021 (Exhibit P5) for PW3 and JNIA/IR/20/2021 (Exhibit P6) from PW5. Also, they submitted exhibits P5 and P6. PW3 and PW5 each submitted form NO. DCEA 001 (Exhibits P1 and P2 respectively). PW1 inspected the documents and exhibits and registered the exhibits with the lab. No. 926/2021 and 927/2021 respectively. Thereafter he took PW3 and PW5 with the exhibits to the laboratory for the preliminary test. In the laboratory, PW1 weighed three packets in exhibit P5 containing substances alleged to be narcotic drugs, in which he got a total weight of 6.65 kg. He took samples from each packet. After that, he conducted a MECKEL test where the color changed to bluish-green, a sign of the presence of heroin in the exhibit. After the preliminary test, he took a small sample for further test thereafter packed the exhibit using the GCLA seal, signed Exhibit P1, and handed back Exhibit P5 to PW3.

Thereafter he took Exhibit P6 which was in the Khaki envelope with three packets in it, each containing flour substance alleged to be narcotic drugs, he weighed and got a total of 6.75 kg. After that, he collected little samples from each packet and conducted a preliminary test using a reagent called Meckel. The substance changed to dark bluish-greenish which is a sign

of the presence of heroin in the substance. Thereafter he signed Exhibit PW2 sealed Exhibit P6 with a GCLA seal and handed it over to PW5. PW1 kept a small remaining amount of sample collected from Exhibits P5 and P6 for confirmatory tests.

Later on the same day, he proceeds to conduct confirmatory tests using the solid phase extraction (SPE) procedure. He processed both samples from Exhibits P5 and P6, each in its tubes, six tubes together with a blank tube and a positive control tube. The blank tube is to show that there was no contamination. The positive tube control is for reference standard. After the SPE process, he went for a nitrogen gas evaporation system, as he took them to a liquid chromatography-mass spectrometer (LCMS) machine. The results showed that both Exhibits P5 and P5 were narcotic drugs called heroin. Thereafter he prepared analyst reports (Exhibits P3 and P4) of Exhibits P5 and P6 separately which were endorsed by the director.

On the other hand, in their respective defences, DW1 denied being involved in trafficking narcotic drugs, and Exhibit P5 which was narcotic drugs was not retrieved from her bag. DW2 in his evidence stated that the exhibit which was brought before the court was not the one that was taken to GCLA. The narcotic drugs are not connected with him.

The evidence of PW1 went unchallenged with any rival evidence to shake its weight or credibility of PW1 in respect to the first issue. PW1 being an expert, his opinion is important for the court to form its independent judgment on the matter at issue, See the case of **Sylvester Stephano v. Republic,** Criminal Appeal No. 527 of 2016 CAT at Arusha; and **Fauzia Jamal Mohamed versus Oceanic Bay Hotel Limited**, Civil Appeal No. 162 of 2018, CAT at Dar es Salaam (Both unreported). The credibility of an expert witness as PW1 in our case depends on the reasons stated in support of his conclusion and the tools, techniques, and materials that form the basis of such a conclusion. PW1 stated on both tools, techniques, and materials he used to find out that Exhibit P5 and P6 are narcotic drugs. In the event this Court believes that the evidence of PW1 in support of the report stated under section 48A (2) of the Drugs Control and Enforcement Act, [Cap 95 R.E 2019] i.e. Exhibits P3 and P4 are full proof that Exhibit P5 and P6 are narcotic drugs to wit heroine Hydrochloride that weighed 6.65 kilograms and 6.75 kilograms respectively. I find the first issue answered positively.

Reverting to the second issue, it is crystal clear that search and seizure by a police officer is governed by the provisions of section 38 (1) (2) and (3) of the Criminal Procedure Act, [Cap 20 RE. 2022] "the CPA" as well

as the Police General Order paragraph 226, as well as section 48 (2) of the Drugs Control and Enforcement Act as far as the drugs-related cases are concerned.

It is the evidence of PW2 that on the material date while he was in normal duties of supervising other Police officers he was called to go to terminal III at JNIA and when he reached the place he found the accused persons herein and the need to search them arose there. Being in charge of police at JNIA, he resorted to conduct a search on them in the presence of witnesses including PW4 who witnessed the search and signed certificates of seizure (Exhibit P7 and P8) under which various items were seized including Exhibits P5 and P6. PW4 evidenced that the search and seizure of accused persons' bags were conducted in his presence and Exhibits P5 and P6 were retrieved thereon also Exhibits P7 and P8 filed by PW2 and signed by both PW4 and PW2, together with PW2 and PW4 Exhibit P7 signed by 1st accused person while Exhibit P8 was signed also by the 2nd accused person.

On their part, DW1 and DW2 denied having been found in the trafficking of Exhibits P5 and P6 and stated further that they had been arrested at terminal III in JNIA after the immigration officer suspected DW2 to be not a Tanzanian, consequently after an exchange of bitter words

between DW2 and officers, PW2 was called to the area after reaching there he took accused persons (DW1 and DW2) to the Police Station at the terminal I. DW1 stated that at the Police Station, she was taken to the cell where her belongings were seized, at night she signed on the envelope that her properties were put for storage, and in Exhibit P7 there is her signature and thumbprint, and that black bag in Exhibit P10 is not hers. While DW2 stated that after he was taken to the Police Station he was tortured and put in a cell for a long, he stated in Exhibit P8 that there are two names, his name and that of another person, he also produced a copy of a letter dated 06/04/2021 with IR No. JNIA/IR/20/2021 (Exhibit D1), which shows the drugs were retrieved from the black bag. That the blue bag was not his while his bag was red one.

According to the circumstances leading to the search conducted on the accused persons and subsequent seizure of items, I agree with the PW2 that the search was emergence conducted under section 42 (1) (a) (i) and (ii) and (2) of the CPA. As provided;

"(1) A police officer may-

(a) ***search a person suspected by him to be carrying anything concerned with an offence;*** *or*

(b) NA,

(i) if the police officer believes on reasonable grounds that it is necessary to do so in order to prevent the loss or destruction of anything connected with an offence; 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.***

(2) A police officer who believes on reasonable grounds that, that person is carrying an offensive weapon or anything connected with an offence may stop that person and seize any such weapon or thing that is found on the person.

Thus from the wording of section 42 above and in consideration of the circumstances of the case, the search in question would not invite a need for a warrant of search. The accused persons did not dispute that the search was to be conducted in their presence, and the presence of PW4 as an independent witness, also they did not raise any doubt in their evidence showing that they were not signed in a certificate of seizure. See also the case of **Moses Mwakasindile v. Republic**, Criminal Appeal No. 15 of 2017(unreported).

Also, it is a cardinal principle that the certificate of seizure ought to have been signed at the place where the search was conducted and in the

presence of an independent witness. See the case of **David Athanas@ Makasi and Joseph Masima@ Shandoo Vs the Republic**, Criminal Appeal No. 168 of 2017, CAT at Dodoma (unreported), the Court of Appeal. In the case at hand, the certificates of seizure were signed by the accused persons, PW2 and PW4 (independent witness) at the place where the search and seizure were executed.

Again, despite that the accused persons denied owning the bags, they however did not dispute the tags with their names attached to the said bags as stated above. To deny to have been searched is an afterthought because the same was not raised anywhere during the testimony of PW2.

Because the accused persons' undisputed signatures have appeared in their respective certificate of seizure Exhibits P7 and P8, the same bare signature of the witness and officer executing the search, it is my opinion that the certificates are valid and connote that the accused persons acknowledged that Exhibit P5 and P6 were retrieved from them. See the case **Song Lei v. The Director of Public Prosecution and Others** Consolidated Criminal Appeals No. 16 A of 2016 & 16 of 2017) TZCA at Mbeya (Unreported). Having found that it is my firm view that the issue is answered in the affirmative.

Reverting to the third issue, it is the evidence of PW2 that after seizing Exhibit P5 and P6 on the 2nd April 2021 he handed over the same to PW5 who stored the same. It is the evidence of PW3 and PW5 that on 6th April 2021, PW5 handed Exhibit P5 to PW3. Both PW3 and PW5, together went to the GCLA for laboratory tests. At the GCLA, the Exhibits were received, registered, weighed, tested, and sealed by PW1 who after doing all that handed over the same to PW3 and PW5 respectively, thereafter they went back to JNIA Police Station where PW3 handed over Exhibit P5 to PW5 who kept the same until the same was taken to the court. The evidence shows that all handing over was done by using handing over certificates in Exhibits P9, P14, and P15 as well as Exhibits P1 and P2.

The defence raised a question about a need for Exhibit labels and Exhibit register (PF16) to establish a chain of custody. It is from the prosecution evidence that, the packets from a black bag labeled "01" and those from faint blue labeled "02", also the envelopes contain names of the accused persons and IR numbers. The PGO 229 Paragraph 8 provides that;

"*The investigating officer shall attach an Exhibit Label (P.F. 145) to each exhibit when it comes into his possession.* ***The method of attaching labels differs with each type of exhibit. In general, the label shall***

be attached so that there is no interference with any portion of the exhibit which requires examination." [Emphasis is mine]

From the bolded lines above, it is amply that, the essence of labeling exhibits is to avoid interference of one exhibit with another and the mode of labeling differs according to the nature of the exhibit. Together with the evidence of PW5 the Exhibits label and register were complied with. In the case of **Abdallah Rajabu Mwalimu vs. Republic**, Criminal Appeal No. 367 of 2017(Unreported), Court of Appeal at Dar es Salaam. The Court of Appeal stated that;

> *".....as rightly submitted by Ms. Mkunde, even in the absence of paper documentation on how the pellets were handled from the time of the arrest until when they were tendered in court, the oral evidence of witnesses who described how the pellets were handled from arrest to the time the same was tendered in court was sufficient proof. We reiterate the position we stated in our decision in* ***Kadiria Kimaro*** *(supra) concerning the importance of oral evidence in explaining the chain of custody depending on the circumstances like the one obtaining in this case"*

Also, in the case of **Abas Kondo Gede Vs Republic,** Criminal Appeal No. 472 of 2017 (Unreported) Court of Appeal at Dar es Salaam. The Court of Appeal stated that;

"It is also noted that the desirable method of establishing the chain of custody is documentation of the chronology of events in the handling of the exhibit from seizure, control, transfer until tendering in court at the trial as stated in ***Paulo Maduka and 4 Others*** *(supra) which was followed in other decisions..."*

The court of Appeal went on;

"However.....documentation will not always be the only requirement in dealing with exhibits. Thus, the authenticity of the exhibit and its handling will not fail the test merely because there was no documentation."

Guided by the above principle it is crystal clear that in the instant case prosecution paraded four witnesses PW1, PW2, PW3, PW4, and PW5, and seven documentary exhibits are Exhibits P1, P2, P7, P8, P9, P14, and P15 to establishing the integrity of the chain of custody of exhibit P5 and P6, the said witnesses are credible witnesses, there is no any reason can be raised

by this court to doubt on their credibility in consideration of their demeanor, coherent and consistency of their evidence. Therefore, this court is of the view there is no possibility that the integrity of the chain of custody of Exhibit P5 and P6 has been tampered with. It is my considered view that the prosecution through both oral and documentary evidence manages to prove that the chain of custody of Exhibit P3 is not broken. I find that the integrity of the chain of custody in this case was intact and well complied.

Coming to the last issue, in determining the issue in question it is important to note that it is well settled that in criminal trials, the duty of the accused is to raise doubt on the prosecution case and not to prove his innocence.

The learned counsel for the defence side had also submitted Exhibit DE1, a letter to the government chemist showed that the black bag was seized from DW2 but during the hearing of the prosecution case the prosecution produced a blue bag in relation to DW2. Since it is now common knowledge in our legal practice that where there is a contradiction, the court should resolve the same first. In the case of **Bahati Makeja v. Republic,** Criminal Appeal No. 118 of 2006 (unreported), the Court of Appeal stated that;

"Another observation worth making here is that while normal discrepancies do not corrode the credibility of the witness, material discrepancies do. Normal discrepancies are those which are due to normal errors of observations, memory errors due to lapse of time, or due to mental disposition such as shock and horror at the time of occurrence of the event Material ones are those going to the root of the matter or not expected of a normal person."

Again, in another case of **Mohamed Matula v. Republic,** (1995) T.L.R.3, the Court of Appeal considered among other issues, contradictions, and inconsistencies in the prosecution evidence and the duty of the trial court to address the same. It was held that;

"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."

In the matter at hand, having carefully considered the evidence as a whole and general circumstance in this case, and since DW2 did not dispute the tag with his name attached to the said bag I am of the firm view that the contradiction pointed out in Exhibit DE1 is a minor and an immaterial contradiction. In any way, the same does not go to the root of the case.

Mr. Benjamin had challenged the search in his submission that the requirement of independent witness was not complied. I agree, PW3 was a police officer in charge of the shift who searched in the presence of PW4. PW4 was an employee of TAA (Tanzania Airport Authority). He is not a police officer, nor did he comprise a team that arrested the accused persons. He only suspected the presence of narcotic drugs and reported to his in charge. In my considered view, he was there to furnish his duties and had no interest in serving police officers. Under the circumstance, he was an independent witness at the place where the accused was arrested and searched and Exhibits P7 and P8 were filed and signed there, therefore the legal requirement under the principle above was met. This court finds that PW4 was an independent witness to the search, fit in both sections 48(2)(c)(vii) of the DCEA and 38(3) of the CPA since the case involves trafficking in narcotic drugs. See the case of **Jibril Okash Ahmed v. Republic**, Criminal Appeal No. 331 of 2017 CAT at Arusha (unreported) on page 38.

The accused persons in the case at hand in their evidence came up with a general denial that they were not arrested while trafficking drugs instead they found themselves under arrest after suspicious of citizenship raised toward the 2nd accused and police officers opted to punish them after

quarrel arose between the police and accused person. The accused persons denied ownership of bags which are Exhibits P5 and P6 in which the narcotic drugs were alleged to be found. The prosecution witnesses stated that the accused persons were arrested after being suspected of their bags to contain unusual kinds of stuff and that the said bags had tags with their respective names. Well, the accused persons made general denials. It should be earmarked that a general denial is the weakest evidence ever, and at any rate, cannot shake a case of the adverse party.

However, in their defence accused persons have not denied that they signed Exhibits P5 and P6. They never cross-examine the tags with their respective names in bags alleged to have carried Exhibits P5 and P6 inside. The prosecution witnesses alleged to have been involved in arresting the accused persons were not cross-examined on essential matters as the ones raised by the accused persons in their defence.

It is trite law in this jurisdiction founded upon prudence that failure to cross-examine on a vital point ordinarily implies the acceptance of the truth of the witness evidence, and any alarm to the contrary is taken as an afterthought if raised thereafter. See the case of **Martin Masara vs. The Republic,** Criminal Appeal No. 428 of 2016, CAT at Mbeya (unreported).

Considering the discussion on the issue at hand, the accused failed to cross-examine about tags on the bags claimed to be theirs, examine on ownership of the bags, being arrested for citizenship issues, and not trafficking drugs. I consider that this piece of evidence by accused persons is nothing but an afterthought. Thus this issue was answered negatively

The defence counsel also challenged that PW5 was summoned as witness by the prosecution contrary to the procedural law for failure to mention him during the committal to enable the accused person to prepare his defence. I tirelessly visited through the committal proceedings and proceedings in this court together with the documents supplied to the accused persons. It is true as submitted by Mr. Benjamin Mageni, that the list of prosecution witnesses in the committal proceedings in the lower court did not include the name of PW5. However, the letter from the National Prosecution Service, Dar es Salaam with Reference No. NPSC/DSM/DRG/16/2022/20 dated 09.11.2022 to the Deputy Registrar, High Court, Corruption and Economic Crimes Division on the filing of information and statements of witnesses included or listed the name of PW5. The bundle of documents filed in this court, supplied to the accused persons, and also sent to the lower court for committal proceedings includes the

statement of PW5. Since the accused persons were supplied with the statement of PW5 as included in the documents supplied, and since the NPS filed them in this court and the same documents were sent for committal proceedings in the lower court, but also the name and statement of PW5 was included in the preliminary hearing, I think it was only an omission to write the name of the witness rather than an omission to read his statement. This is because even the defence never raised an objection when PW5 testified in court. They had notice of the witness and his statement, consequently they were not taken by surprise on his appearance before the court. After all, the aim of committal proceeding is to prepare the accused for the defence. (See the case of **MUSSA RAMADHANI MAGAE VS. THE REPUBLIC, Criminal Appeal No. 545 of 2021 CAT DSM**). The very aim has not been defeated and no injustice caused.

Another attack on the prosecution case was that the amount of 0.1 grams of sample collected from Exh.P5 & P6 was insufficient and contrary to Regulation 17 of the Drug Control and Enforcement (General) Regulations of 2016. I am well alive to the cardinal principle that the duty of an expert is to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the court to form its own

independent judgment by application of these criteria to the facts proven in evidence. See the case of **Sylvester Stephano v. Republic,** Criminal Appeal No. 527 of 2016 CAT at Arusha (unreported).

The provision of Regulation 17 of G.N. No 173 of 2016 provides that the quantity to be drawn for each sample for the chemical test shall not be less than 5g or 5ml with respect to all narcotic drugs and psychotropic substances, save for opium, where a quantity of 24 grams in each case is required for a chemical test. However, the said provision does not provide the effect of drawing samples for more or less than 5 grams whether fatal or will affect the result therein. Being that as it may be, from the evidence of PW1 there is no doubt that Exhibit P5 and P6 are narcotic drugs to wit heroine Hydrochloride that weighed 6.65 kilograms and 6.75 kilograms respectively. They are narcotic drugs within the ambit of section 2 and the First Schedule to the Drugs Act.

Now, what can be said in this case? First of all the route leaves much to be desired. In my opinion, it appears to be a cleverly devised scheme in their admitted long route of the journey to India. It is an illogical, yet artful plan of the journey. Again, how the narcotic drugs were hidden in the bags is nothing but a criminal mind at work. From the above findings, this Court is

satisfied that, the prosecution side has managed to prove the case against the first and second accused persons to a hilt. I therefore, find Maria Osward Mtumbuka and Hamis Said Awadh, being the first and second accused persons respectively guilty, and I hereby convict the first and second accused persons for the offence charged of trafficking in narcotic drugs contrary to section 15(1) (a) and 3 (i) of the Drug Control and Enforcement Act [Cap.95 R.E. 2019], read together with paragraph 23 of the First Schedule to and sections 57 (I) and 60 (2) of the Economic and Organised Crime Control Act [Cap.200 RE 2019].

G. N. Isaya

Judge

09/04/2024

SENTENCE

Whereas the first accused person convicted of the offence of trafficking in Narcotic Drugs contrary to section 15(1) (a) and 3(i) of the Drugs Control and Enforcement Act, [Cap 95 RE 2019] read together with paragraph 23 of the First Schedule to and section 57(1) and 60(2) of the Organized Crime Control Act [Cap 200 RE 2019] .

In sentencing the accused persons, I have considered reasons advanced by Ms. Tully, State Attorney, that narcotic drugs have adverse effects on all people in society, cause mental dependence, and hinder the social and economic development of the country. I consider mitigation of the accused person through Mr. Mageni, learned defence Counsel that the accused persons prayed for a lenient sentence since they are feeble due to sickness and the breadwinner of their family and his parents as well as being the first offenders.

I have considered the mitigation factors advanced and I am guided by the relevant legislations that is the Drugs Control and Enforcement Act, [Cap 95 RE 2019] and the Organized Crime Control Act [Cap 200 RE 2019]. The latter provided for a minimum sentence of 20 years towards 30 years which is the maximum penalty for a convict of offences laid in the First Schedule to the EOCCA Cap 200 including the one at hand. Since the convicts are the first offenders who are dependent on their families and parents, also keep in mind that narcotic drugs pose a great danger to society, people's health, and the country's development. I hereby sentence the convicts Maria Osward Mtumbuka and Hamis Said Awadh, each to serve thirty (30) years imprisonment.

So, ordered.

G. N. Isaya
Judge
09/04/2024

Right of Appeal explained.

G. N. Isaya
Judge
09/04/2024

Order:

1. Exhibits P5 & P6 be destroyed in accordance with the Drugs and Enforcement Act, [Cap. 95 R.E 2022] with its Regulations (GN. No 173 of 2016.

2. Let the personal properties of the accused persons be returned to them

G. N. Isaya
Judge
09/04/2024