IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 7 OF 2023

CASE REFERENCE NO. 20230223000481548

THE REPUBLIC

VERSUS

ABUU SALEHE KIMBOKO

JUDGMENT

30th April & 25th June, 2024

KISANYA, J.:

The accused person, Abuu Salehe Kimboko, was arraigned before this Court for an offence of trafficking in narcotic drugs, contrary to section 15 (1) (a) of the Drug Control and Enforcement Act [Cap. 95, R.E. 2019] (henceforth "the DCE Act"), 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] (henceforth "the EOCCA").

It is alleged in the information that, on the 29th day of December, 2019 at Mbagala Zackhem area with Temeke District in Dar es Salaam, Region, the

accused person trafficked in narcotic drugs namely, Heroine Hydrochloride weighing 273.45 grams.

The accused person denied the charge, and a plea of not guilty was entered. Subsequently, a preliminary hearing was conducted, during which the accused person admitted his name and residence, Mbagala Zackhem within Temeke District.

Following the accused person's plea of not guilty, a trial commenced, with Mr. Mafuru Moses, Ms. Nitike Mwaisaka and Mr. Bryson Ngido, learned State Attorneys, representing the Republic *cum* prosecution. On his part, the accused person enlisted the legal services of Messrs. Ludovic Nickson, Nehemia Nkoko and Josephat Mabula, all learned Advocates

Seeking to substantiate its case, the prosecution summoned seven (7) witnesses and tendered six exhibits namely, sample submission form-DCEA 001 (Exhibit P1), Government chemist Analyst Report Form No. DCEA 009 (Exhibit P2), One envelope containing a small nylon bag with powder substances said to be narcotic drugs and five papers containing flours which were not proved to be narcotic (Exhibit P3 collectively). For clarity, the envelope, small nylon bag with powder substances said to be narcotic drugs and five papers containing flours which were not proved to be narcotic were marked and referred to as Exhibit P3 (a), (b) and (c) respectively. Other exhibits were a Toyota Spacio vehicle with

registration number T568 DKC (Exhibit P4), Certificate of seizure (Exhibit P5) and a letter authored by the Tanzania Revenue Authority (TRA) on dated 30th January 2020 (Exhibit P6).

The inception of the prosecution's case, culminating in the arraignment of the accused person, can be distilled from the evidentiary trail as follows: On the fateful day of 29th December 2019, Insp. Hassan Msangi (PW4), a seasoned officer of the Drug Control and Enforcement Authority (henceforth "the Authority), led an operation team at the Mbagala area within Temeke District, Dar es Salaam Region. Amidst the operation, PW4 received a call from an informant reporting the presence of Abuu Salehe Kimboko at Gereji Bubu, Mbagala Zakhem area, allegedly involved in illicit narcotics trade from his Spacio vehicle bearing Registration No. T. 968 DKC (Exhibit P4).

Acting on this information, PW4 and his team promptly arrived at the scene. Upon arrival, PW4 identified a person matching the informant's description, standing near the vehicle (Exhibit P4). PW4 introduced himself to that person, who confirmed his identity as Abuu Salehe Kimboko. After confirming his identity, PW4 informed him of his arrest on suspicion of narcotics trafficking.

Subsequent to the suspect's apprehension, a thorough search of his body and vehicle was conducted in the presence of two independent witnesses, Asha Hassan (PW6) and Shehka Kimbe. Among the items found from his trouser's pockets were two Nokia mobile phones and a key for the Spacio vehicle. Inside the vehicle's dashboard drawer (Exhibit P4), various items were retrieved, including a green canvas bag containing a red and white nylon bag filled with cream flour, five papers containing flour of different colors, a Bareta shotgun with 15 bullets in the magazine, cash amounting to Tshs. 900,000/=, three bank cards, a residential sketch map, an insurance receipt, a registration card of Exhibit P4, two diaries, and two vehicle sale agreements for a Toyota Prado and a Mitsubishi. PW4 labelled all the items found. He then filled out and signed a certificate of seizure, which was also signed by the independent witnesses and Kimboko.

Following the seizure, PW4 and his team conducted searches of the suspect's houses at Mbagala Mianzini and Tuangoma, where no illegal item was found. The impounded exhibits were securely housed within PW4's office locker pending further action.

The next day, on 30th December 2019, PW4 handed over the seized items to Insp. Johari Msirikali (PW3), the exhibit keeper. PW3 recorded the exhibits in the Court Exhibit Register under Entry No. 30/2019, referencing case number

DCEA/IR/15/2019. The seized narcotics, firearm, cash, and mobile phones were stored within the exhibit room, while the vehicle was housed in a designated facility, commonly known as godown.

At the same time, PW3 was assigned the task of preparing the suspected narcotics for forensic examination. He conducted a precise packaging and sealing process in the presence of the accused, Jackson Shambwe (PW2), and an independent witness, Julius Peter Mazimu (PW5). According to PW3, the procedure involved reducing the green canvas bag for sampling purposes and enclosing the red and white nylon bag along with the five papers containing flour within a khaki envelope. The red and white nylon bag containing flour and the five papers containing flour were wrapped together and placed in a khaki envelope, which was sealed with a red seal labeled "Evidence" and labeled with case number DCEA/IR/15/2019 and as Exhibit A for the nylon bag containing suspected narcotic drugs, and Exhibits B1 to B5 for the papers containing flour suspected narcotic drugs. The accused person, the independent witness, Jackson Shangwe, and PW3 signed on the sealed envelope, concluding the packaging and sealing process.

A few hours later, around 11:00 am. PW3 entrusted PW2 with the sealed envelope containing the suspected narcotics for transmission to the Government Chemist Laboratory Authority (henceforth "the GCLA") for forensic analysis. Upon

receiving the exhibits, PW2 dispatched them to the GCLA, where they were received by a chemist named, Esther Ishenda (PW1). This transfer was documented in Form No. DCEA 001, bearing the signatures of both PW1 and PW2.

According to PW1, she began the analysis by weighing the powder/flour substance in exhibits labeled A, B1, B2, B3, B4, and B5. Her analysis revealed that the substance in Exhibit A was heroin hydrochloride weighing 273.45 grams, while the substances in Exhibits B1 to B5 were not narcotic drugs. These findings were recorded in the Government Chemist Analyst Report (Exhibit P2) dated 6th January 2020. After the preliminary test conducted on December 30, 2019, PW1 extracted samples for confirmatory testing. She then sealed the exhibits with the GCLA seal and stamp and handed them over to PW3 who subsequently returned the exhibits to the DCEA, where they were kept until needed for evidence production.

On 28th January 2020, Insp. Paschal Daudi (PW7), the case investigator, wrote a letter to the TRA requesting information about the vehicle's owner. In response, the TRA confirmed in a letter dated 30th January 30 2020 (Exhibit P6), that the owner of the vehicle with registration number T568 DKC was Abuu Salehe Kimboko, residing at Mbagala Zackiem, Dar es Salaam.

Based on the presented evidence, the Court ruled that the accused person had a case to answer and invited him to enter his defence.

In his defence testimony, the accused person, who featured as DW2, completely denied the accusations made against him by the prosecution. He recounted that on the material date, he was at the garage attending to his vehicle. He mentioned encountering garage mechanics and Felix John (DW1) while waiting for his mechanics. The accused person recalled being attacked by unknown people, unable to recall their exact number, who were armed with police equipment such as belts, guns, handcuffs, and batons. He described being assaulted, handcuffed, and thrown to the ground, with two people stepping on him. He stated that two police officers searched him, took a gun and keys from his pocket, and then proceeded to his vehicle (Exhibit P4). The accused claimed to have heard a voice stating "there is nothing in this car" but was uncertain of who said it due to being restrained.

DW2 went on to state that he was lifted after the arrival of the local leader *(mjumbe)*, whereupon the search continued, resulting in the discovery of items suspected to be drugs and a gun. He asserted that he had no knowledge of the items found and refused to sign papers presented to him but was coerced into signing under duress. He disavowed any involvement with the exhibited items, claiming his sole occupation was selling flour. Therefore, the accused person

requested acquittal from the court, as he maintained his innocence regarding the charges of trafficking in narcotic drugs.

Felex John (DW1) was called in to support the accused persons' defence. He testified that he was present at the garage when several people in civilian attire, armed with guns and batons, arrived and assaulted the accused person, who was with another person. He stated that he observed them restraining the accused person, searching his belongings, seizing his car key and gun, and then proceeding to search a vehicle (Exhibit P4). It was his evidence that some of them left the scene and upon returning, they searched the vehicle again. DW1 recalled witnessing the accused person's vehicle being searched twice while he was restrained on the ground. He also claimed that the accused person was coerced to write on papers during the second search. He mentioned one of the officers taking and leaving with the accused person's vehicle as they departed from the scene.

Following the conclusion of the defence case, both parties were granted leave to file their closing submission within the timeframe specified by the Court, which they duly complied with. I commend the counsel for both parties for their diligent efforts and the authorities they have cited to support their respective arguments. I shall evaluate their arguments in the course of dealing with the issues central to this case.

Before delving into the crux of this case, it is imperative to reiterate the foundational principles of criminal law. As astutely argued by Mr. Mabula, it is a well-established legal doctrine, enshrined in section 3(2)(a) of the Evidence Act [Cap. 6, R.E. 2022] that, in criminal cases, the prosecution bears the onus of proving its case beyond reasonable doubt, and this burden remains steadfastly with the prosecution throughout the trial; it cannot shift to the accused. This fundamental precept finds fortification in judicial precedents such as the cases of **Mohamed Said Matula vs R** [1995] TLR 3 and **Mosha & Rajabu vs R** [1967] HCD No. 384, both cited by the defence counsel and the case of **Mohamed Haruna Mtupeni Another vs R**, Criminal Appeal 259 of 2007 [2010] TZCA 141 (4 June 2010 TanzLII). Furthermore, it is firmly established, as held in the cases of **Fanuel Kiula vs R** [1967) HCD No. 369, that the primary obligation of the accused is to a reasonable doubt.

One of the issues raised by Mr. Mabula pertains to the jurisdiction of this Court to try this matter. It is trite law that the question of jurisdiction of the court is fundamental to any case. In the landmark case of **Desai v. Warsama** [1967] E.A. 351, it was underscored no court can grant itself jurisdiction and that if a court assumes jurisdiction and proceeds to hear and decide a matter beyond its jurisdiction, the proceedings and the resulting decision are null and void. Here at home, in another case of **Omary Athumani @Magari and others vs.**

Republic, Criminal Appeal No. 173 of 2016, (unreported), the Court of Appeal reiterated the importance of jurisdiction when it held that:

> *"Jurisdiction of courts is a creature of statute and not what the litigants like or dislike. It may vary due to the subject matter, level of the Court and geographical area where the offence was committed. Adjudicating a case which the Court has no jurisdiction renders its judgment a nullity."*

Given the above position, it is evident that the jurisdictional challenge raised by the defence must be addressed first before proceeding to the substantive issues of the case.

Notably, the offence of trafficking in narcotic drugs, with which the accused person stands charged, is classified under paragraph 23 of the First Schedule to the EOCCA as an economic offence. Pursuant to section 3(3) of the EOCCA, jurisdiction over economic offences is vested in this Court, the Corruption and Economic Crimes Division of the High Court. However, as stipulated in section 26(1) and (2) of the same Act, prior to the commencement of trial in this Court, consent from the Director of Public Prosecutions (DPP) or a designated subordinate is required.

It is further established as a principle that the Consent of the DPP or his subordinate must reference the provisions of law that establish the offence. The

omission to do so renders the proceedings a nullity for want of jurisdiction. Besides the case of **Peter Kongori Maliwa & Others vs R,** Criminal Appeal No.252 of 2020, [2023] TZCA 17350 (14 June 2023, TanzLII), this legal stance was affirmed in the cases of **Chacha Chiwa Marungu vs. R**, Criminal Appeal No. 364 of 2020 [2023] TZCA 17311 (5th June 2023, TanzLII) and **Dilipkumar Maganbai Patel vs. R.**, Criminal Appeal No. 270 of 2019, [2022] TZCA 477.

Mr. Mabula contended that the consent provided by the Regional Prosecutions Officer did not cite the provision of section 15(3)(i) of the DCE Act, which, according to him, establishes the offence of trafficking in narcotic drugs. Therefore, invoking the legal position set forth in the case of **Peter Kongori Maliwa** (supra), he argued that the Court lacked jurisdiction to hear the matter and implored it to dismiss the case and acquit the accused person.

In reply, the prosecution contended that trafficking in narcotic drugs is created by section 15(1)(a) of the DCE Act, a provision duly cited in the information. It was further asserted that paragraph 23 of the First Schedule to EOCCA, which designates trafficking in narcotic drugs under section 15 of the DCE Act as an economic offence, was also cited. Arguing that section 15(3)(i) of the DCE Act merely clarifies the modus operandi of the offence, and asserting that the authorities cited by the defence counsel were incongruent with the

circumstances of this case, the prosecution urged the Court to dismiss the claim that it lacked jurisdiction over the matter as misconceived and misplaced.

Having considered the divergent arguments by learned counsel for both parties, it is undisputed that the consent required to institute an economic case before this Court was endorsed by the Regional Prosecutions Officer (hereafter "the RPO") in accordance with the power conferred upon him by section 26(2) of the EOCCA, alongside the Economic Offences (Specification of Offences for Consent) Notice, 2021, Government Notice No. 496H of 2021. It was categorically stated in the said Consent that the accused was charged with trafficking in narcotic drugs contrary to section 15(1)(a) of the DCE Act, read together with paragraph 23 of the First Schedule, as well as sections 57 and 60(2) of the EOCCA. Significantly, the provisions cited in the RPO's Consent were also enumerated in the information laid against accused person. This prompts the question of whether the referenced provisions in the RPO's consent establish the offence of trafficking in narcotic drugs.

It is widely understood that a provision which establishes an offence must explicitly defines certain conduct as criminal. In that respect, the provision creating the offence should unambiguously declare a conduct or omission that constitutes an offence, or employ language conveying a similar meaning.

Section 15(1) (a) of the DCE Act cited in the Consent and information provides as follows:

> *"15.-(1) Any person who-*
>
> *(a) trafficks in narcotic drug or psychotropic substance;*
>
> *(b) N/A; and*
>
> *(c) NA*
>
> *commits an offence and upon conviction shall be sentenced to life imprisonment."*

Upon a cursory review of the above provision, I am of the view that it explicitly creates the offence of trafficking in narcotic drugs by stating that a person who trafficks in narcotic drugs commits that offence. Moreover, paragraph 23 of the First Schedule to the EOCCA, which was also referred to in the Consent, classifies this offence as an economic offence. Conversely, the provision of section 15(3)(i) of the DCE Act, upon which the defence counsel relied, does not in itself establish the offence. Instead, it simply outlines the quantity of narcotic drugs relevant to offences committed under subsection (1) thereof. It is crucial to note that the absence of citation of applicable provisions in the statement of the offence can be remedied under section 388(1) of the CPA [See the case of **Jamali Ally Salum vs Republic**, Criminal Appeal No. 52 of 2017) 2019 TZCA 32 (28 February 2019)]. Similarly, I hold the view that the failure to cite subsection (3)(i) of the DCEA did not invalidate the Consent of the

RPO. Moreover, in the case of **Peter Kongori Maliwa** (supra) cited by the defence, the Consent did not mention the provision of the Wildlife Conservation Act which creates the offence laid against the appellant therein. In this respect, I concur with the prosecution that the circumstances of that case are different from those of the present matter, in which section 15(1)(a) of the DCE Act was cited in the information. Therefore, the argument that the Consent of the RPO failed to cite the provision creating the offence is without merit. In consequence, I hereby reject the contention that this court lacks jurisdiction to adjudicate the matter.

Returning to the crux of the matter regarding the prosecution's burden of proof, this court must ascertain whether the prosecution has established beyond all reasonable doubt two pivotal points: *firstly*, whether the accused engaged in the trafficking of 273.45 grams of Heroin Hydrochloride, and *secondly*, whether the accused has cast doubt on the prosecution's case. I will address the second point while resolving the sub-issues related to the first point.

The first sub-issue arising from the first issue point is whether Exhibit P3(b) constitutes 273.45 grams of Heroin Hydrochloride. This matter should not unduly delay the Court. The settled law in this jurisdiction dictates that the weighing and analysis of substances suspected to be narcotic drugs fall within the mandate of the Chief Government Chemist (CGC). Apart from section 48A of

the DCE Act, this legal interpretation is bolstered by cases such as **Marceline Koivogui vs R**, Criminal Appeal No. 469 of 2017 (unreported), where the Court of Appeal explicitly stated:

> *"We wish to point out that the examination and packaging of narcotic drugs is an expertise which is the domain of the Chief Government Chemist."*

In this instance, PW1, a chemist within the GCLA, highlighted that his duties include receiving, weighing, and analyzing exhibits, as well as preparing analyst reports. Furthermore, PW1 tendered a government analyst report (Exhibit P2) where his designation was recorded as Government Analyst. Consequently, in accordance with section 48A(1) of the DCE Act, PW1 was duly authorized to handle the weighing and analysis of the suspected narcotic drugs. In the case of **Republic vs. Kerstin Cameron** [2003] T. L. R. 85, the court held that an expert's responsibility is to supply the court with the essential scientific benchmarks needed to verify the accuracy of their findings. His role allows the court to independently apply these benchmarks to the established facts and reach its own judgment. Thus, the expert aids the court by providing the means to assess the reliability of their conclusions through scientific criteria.

In his testimony, supported by the sample submission form, PW1 stated that she received Exhibit P3 from PW3 for analysis. He accounted that upon

weighing Exhibit P3 (b), the total weight was recorded as 273.45 grams. PW1 also stated under oath that he extracted two samples, one for a preliminary test and the other for a confirmatory test. It was his assertion that the findings from both tests confirmed that Exhibit P3(b) contained narcotic drugs, namely Heroin Hydrochloride, while other exhibits (P3(c)) brought along with it were not narcotic drugs. Consistent with the law, PW1 signed a Government Chemist Analyst Report (Exhibit P2) stating that Exhibit P3(b) comprised narcotic drugs, namely Heroin Hydrochloride, weighing 273.45 grams.

In accordance with section 49A(2) of the DCE Act, the evidence of facts presented in Exhibit P2 is deemed conclusive unless successfully rebutted. I see no grounds for doubt, particularly since the scientific methodology used to obtain the analysis findings was not discredited under cross-examination. Therefore, I am satisfied that the prosecution has proven that Exhibit P3(b) consists of 273.45 grams of Heroin Hydrochloride, a narcotic drug.

The core issue revolving around the second sub-issue of the first point is whether the accused was found in possession of the narcotic drugs (Exhibit P3(b)) in question. This issue is anchored in section 15(1)(a) of the DCE Act, which stipulates that the offence of trafficking in narcotic drugs is committed when a person trafficks in narcotic drugs, with possession being one of the forms of trafficking outlined under section 2 of the same Act .

Evidence from the prosecution witnesses (PW4) and certificate of seizure (Exhibit P5) indicates that Exhibit P3(b) was seized during a search and seizure conducted inside the accused person's vehicle (Exhibit P4). In his defence, the accused seems not to dispute this fact, but rather contests his possession of the item, claiming further that the search and seizure were unlawful. In such a situation, the crucial question is whether the search and seizure leading to seizure of Exhibit P3(b) complied with the law. This question is vital because Exhibit P3(b) is central to this case, and according to established legal principles, evidence obtained through unlawful means is inadmissible against the accused.

My starting point is to revisit the legal framework governing search and seizure. Section 48(2) of the DCE Act empowers the authorized officers of the Authority and other enforcement organs to conduct searches and seizures. This provision grants the said officers the power to stop, search, and detain any conveyance or person reasonably suspected of possessing substances with drug effects. It also allows them to seize from the arrested person or any other person anything connected to the offence for which the person is arrested or related to any narcotic drugs. It is important to note that under section 32(2) of the DCE Act, any search and seizure conducted under this Act must also adhere to the legal provisions governing the general powers and duties of investigation, arrest, search, and seizure. Consequently, it is established that searches and seizures

carried out under the DCE Act must comply with the Criminal Procedure Act (CPA), which delineates the general powers regarding arrest, search, and seizure.

According to the established position, one of the conditions for a valid search and seizure is the presence of an independent witness. This requirement is further reinforced by section 48(2)(d) of the DCE Act, which mandates that the authorized officer conducting the seizure to ensure the presence of, and obtain statements from, persons who can testify about the seized article. In the case of **Mwanahamis Makenzi Said vs. The Director of Public Prosecutions**, Criminal Appeal No 687 of 2023 [2024] TZCA 330 (8 May 2024, TanzLII), the Court of Appeal underscored that the significance of having an independent witness during search to provide independent or impartial evidence. In that respect, the presence of an independent witness during a search and seizure serves to protect the rights of the person being searched, ensures compliance with the law, and enhances the credibility of the search and seizure process.

In the case at hand, the searching and seizing officer (PW4) testified that the search and seizure were witnessed by two independent witnesses, Asha Haruna Hassan (PW6) and Shekha Kimbe, both of whom are local leaders (*wajumbe*) from the location of the incident. PW6 confirmed that she indeed arrived at the scene with Shekha Kimbe.

As Mr. Mabula rightly observed, it is evident that both independent witnesses arrived at the scene when the accused person had already been apprehended. This fact is clearly explained by PW4 who confirmed that after arriving at the scene, the accused was apprehended first, and then ACP Shelimoh went to procure independent witnesses. Moreover, during cross-examination, both PW4 and PW6 acknowledged that there were car mechanics at the garage.

I concur with the defence that the mechanics should ideally be independent witnesses. However, PW4 explained they decided to involve the local government leaders from that area. According to paragraph 17(b) of the PGO No. 226, services of a local leader or two independent witnesses is required throughout the search and seizure. Considering further the precedent set in **Maliki Hassan Suleiman vs S.M.Z** [2005] T.L.R 236, which stipulates that a witness to a search must be a respectable person from the locality, I find no fault in the prosecution's decision to employ service of the local leaders instead of garage mechanics.

Both DW1 and DW2 claimed that there was a search conducted before the independent witnesses were present. Such claim suggests the garage mechanics were made independent witnesses or brought to court to testify, as they could

have described the events before PW6 and her *co-mjumbe* arrived. This argument lacks merit because PW4 was firm that nothing was done to the vehicle until the independent witnesses were brought by ACP Shelimoh. PW4 also testified that the car key was taken from the accused's pockets upon arrival of the independent witnesses and before the search began. This testimony was not contradicted during cross-examination. Moreover, PW4 was not questioned about any search or inspection alleged to have been conducted before the independent witnesses arrived. The only question posed to PW4 was regarding the accused being handcuffed and lying down before the independent witnesses arrived. In such a scenario, it is clear that the garage mechanics would have testified about the arrest of the accused, not about how the search was conducted. Therefore, the omission to call them did not affect the prosecution case.

This give rise to the issue of credibility of the independent witness (PW6) called before this Court becomes crucial in this case. This approach was also taken in **Shabani Said Kindamba vs R.**, Criminal Appeal No. 390 of 2019, [2021] TZCA 221 (2 June 2021 TanzLII). It is a well-established legal principle stated in the case of **Goodluck Kyando vs R** [2006] TLR 363 referred to this Court by the prosecution that, witnesses are entitled to credence, and their

testimonies must be believed unless there are compelling reasons not to do so. As also argued by the prosecution and held in **Raphael Ideje @ Mwanahapa vs The Director of Public Prosecutions,** Criminal Appeal No. 230 of 2019, [2022] TZCA 71 (25 February 2022), the credibility of witnesses may be ascertained through their demeanor or coherence of testimony of one witness or when such testimony is not consistent with the testimonies of other witnesses.

With that position of law in mind, I had ample opportunity to observe PW6's demeanor while giving her testimony. Initially, she appeared to recall the items allegedly found in the dashboard drawer well, including a pistol, TZS 90,000 in cash, two bank cards, a diary, and a green bag containing five pieces of papers. When asked about the contents of the pieces of paper, she appeared flustered and took some time before replying that she could not remember. The court was moved under section 168 of the Evidence Act and granted permission for PW6 to refresh her memory. This request came after the counsel for the prosecution argued that PW6 had difficulty recalling some of the items. Even after refreshing her memory, PW6 reiterated the previously mentioned items and added an agreement. Regarding the red and white nylon bag, PW6 stated that it contained five pieces of paper containing flour. She appeared hesitant to confirm the presence of flour suspected to be narcotic drugs.

It was only after the Court adjourned the hearing for a few minutes that PW6 stated that the white and red nylon bag contained flour suspected to be narcotic drugs and five pieces of papers also containing flour. Yet, such evidence contradicted that of PW4, who testified that the white and red nylon bag contained flour suspected to be narcotic drugs.

While I concur with the learned counsel for both parties that a witness may refresh his memory more than once, in this instance, the request to do so was made only once. After refreshing her memory, PW6 listed the seized items but did not indicate she had forgotten any, including the narcotic drugs (Exhibit P3(b)) subject this case. As stated earlier, it was only following the court's adjournment that she mentioned Exhibit P3(b). Notably, PW6 was not led to explain that she recalled this detail after re-reading her statement. That aside, she remained inconsistent or hesitant to state the contents of the nylon bags during cross-examination by the defence counsel. This is what happened:

> *"I remember that the nylon bag was opened at the scene. (PW6 has failed to state what he saw inside the bag). It was not necessary to state in my evidence in chief that the nylon bag was opened at the scene"*

As seen in the above excerpt, PW6 was unwilling or failed to describe to court what she saw inside the nylon bag, thereby preventing the defence from asking additional questions about that evidence. Considering that the case in

which PW6 was called to testify involves narcotic drugs, it is difficult to believe that she could recall other items including bank cards and diary but forget the nacrotic drugs (Exhibit P3(b)), which is crucial to this case.

Therefore, having considered PW6's demeanor before the court and the incoherency in her testimony, I find her neither reliable nor credible and henceforth disregard her testimony.

In the absence of PW6's testimony, there is no other independent witness who can provide impartial evidence regarding the search and seizure of Exhibit P3(b) as envisaged by section 48(2)(c) of the DCE Act. This is particularly significant because Shekha Kimbe, who was purportedly present during the search and seizure, was not called to testify, and this court was not informed of the reasons for her absence.

The learned counsel for the prosecution, citing section 143 of the Evidence Act, argued that there was no need to call Shekha Kimbe since PW6 had adequately covered the necessary testimony. It is my opinion that, due to concerns about PW6's credibility, the prosecution should have called in Shekha Kimbe to testify. Their failure to do so without a valid reason necessitates this court to draw an adverse inference against the prosecution.

At this point, and relying on the case of **Shabani Said Kindamba** (supra), which highlighted the importance of a credible independent witness to a search, I hold that the lack of such a witness in this case raises doubts about the validity of the search and seizure process. Since Exhibit P3(b) forms the cornerstone of the prosecution's case and its retrieval is questionable due to the absence of a credible independent witness to the search, there is no need to further consider the other issues raised by both sides. I find that the prosecution has not met the burden of proof beyond a reasonable doubt.

For the reasons I have outlined, I hereby find the accused not guilty and acquit him of the charge of trafficking in narcotic drugs. Consequently, I order his immediate release from custody unless he is being held for another lawful reason. I also order the return of the vehicle (Exhibit P4) to its rightful owner and the destruction of the narcotic drugs (Exhibit P3(b)) in accordance with the Drug Control and Enforcement Act [Cap. 95 R.E. 2019] and its Regulations.

DATED at DAR ES SALAAM this 25th h day of June, 2024.

S.E. KISANYA
JUDGE
25/06/2024

Judgment delivered in open court on this 25th day of June, 2024 in the presence of Ms Blandina Mnung'a, learned State Attorney for the Republic, the accused

and Mr. Josephat Mabula, learned advocate for the accused, Hon. Sophia Minja, JLA and Ms. Angel Abasy, Court Clerk.

Right of appeal to the Court of Appeal is explained to both parties.

S.E. KISANYA
JUDGE
25/06/2024