IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT ARUSHA SUB-REGISTY

ECONOMIC CASE NO. 5 OF 2023

THE REPUBLIC

VERSUS

PAUL MARMO BAHH

JUDGMENT

21st December 2023 & 5th February, 2024

KISANYA, J.:

This case involves Paul Marmo Bhahh (the accused) who is charged with trafficking of narcotic drugs, contrary to section 15 (1) (a) and 3(iii) of the Drug Control and Enforcement Act, Cap. 95, R.E. 2019 (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 (the EOCCA). It is alleged that, on 22.08.2021 at Sekela Village within Monduli District in Arusha Region, the accused was found trafficking in narcotic drugs, known as Catha Edulis, commonly known as "mirungi," with a weight of 55.2 kilograms. In response to the information, the accused person proclaimed his innocence.

At the trial, Mses. Naomi Mollel, Eunice Makala and Neema Mbwana, all learned State Attorneys, represented the Republic, while Messrs. Mahfudhu Mbagwa, Fridolin Bwemelo and Samwel Wellwel, all learned advocates, represented the accused person.

In a bid to prove its case, the prosecution paraded five witnesses namely, H201 CPL Enock Mwambola (PW1), F5838 D/SGT Ramadhan (PW2), Raphael Mollel (PW3), Queen Fanuel Maro (PW4) and Michael Saimon Benarnard (PW5). Additionally, the prosecution tendered a total of eleven (11) exhibits, all of which were admitted into evidence. These exhibits include, Court Exhibit Register Book-PF16 (Exh. P1), a motorcycle with registration No. MC 548 CVF (Exh. P2), Search Order and Certificate of Seizure - PF91 (Exh. P3), Sampling Inventory Form (Exh. P4), Sample Receipt Notification Form (Exh. P5), Certificate of destruction (Exh. P6), Certificate of photograph (Exh. P7), One (1) empty sulphate bag (Exh. P8), four (4) still pictures dated 28.08.2021 (Exh. P9 collectively), five (5) still pictures dated 02/09/2021(Exh. P10 collectively), and Government Chemist Analyst Report (Exh. P11).

In a nutshell, the prosecution's evidence shows that, PW2 is a police officer stationed at Ngorongoro Police Station. On 22.08.2021 at 0700 hours, PW2, along with Abdul Jummane and Yesse Kowelo, officers from Ngorongoro

National Park, were on patrol in Sekela Village. During their duty, PW2 stopped a motorcycle with registration No. MC 549 CVF, suspecting it of carrying illegal substances. PW3 happened to pass by the scene and was approached by PW2 to witness the search of the motorcycle.

According to PW2 and PW3, the person riding the motorcycle introduced himself as Paul Marmo Bahh and claimed that the sulphate bag with him contained narcotic drugs (mirungi). Upon inspecting the sulphate bag, fresh leaves suspected to be mirungi were found concealed by pieces of gazette and banana leaves. In consequence, PW2 seized one sulphate bag containing substances suspected to be mirungi, one motorcycle bearing registration no. MC 549 CVF, and one Techno mobile phone from the accused person. The seizure was documented in the certificate of seizure (part of Exh. P3), signed by the seizing officer (PW2), PW3, Yesse Rabson Kowero, and the accused person.

Subsequent to that, the accused person, together with the seized items, was taken to Ngorongoro Police Station. Upon arrival, PW2 weighed the substances in the sulphate bag seized from the accused person, and the gross weight amounted to 55.2 kilograms was obtained. PW2 proceeded to open a case file No. NGOR/IR/90/2021. Additionally, he handed over all exhibits to

the exhibit keeper (PW1) for safe custody. The handover was documented through the Court Exhibit Register PF16 (Exh. P1), and it was signed by PW1 and PW2.

Following these events, one sulphate bag, suspected to contain mirungi, along with a motorcycle bearing registration number MC 549 CVF, and a Techno mobile phone which were seized from the accused person, remained under the custody of PW1 who testified to storing them in the exhibit room. He produced the motorcycle with registration number MC549 CVF before this Court and it was admitted in evidence as Exh. P2.

Three days later, on 25.08.2021, PW3 collected a sulphate bag containing substances suspected to be mirungi from PW2 for further legal procedures. Upon receiving this exhibit. PW2, along with the accused person, proceeded to the court at Sekei area in Arusha for sampling. In the presence of the magistrate (Hon. Nguvava), the accused person, and other stakeholders, including PW4, a police officer who took the photographs during weighing of exhibit, PW2 extracted two samples from the substances in the sulphate bag. Each sample was packed in its respective envelope, labelled as A and A1, and signed by both the accused person and the magistrate. Furthermore, PW2 filled out a Sampling Inventory Form (Exh. P4), which was

signed, among others, by the magistrate and the accused person. Additionally, PW2 applied before the Resident Magistrate (Hon. Nguvava) for the destruction of the seized exhibit. His application was granted and an order for the destruction of the said exhibit issued.

After the sampling process, PW2 submitted the samples to the Government Chemist Laboratory Agency (GCLA) in Arusha. Upon arrival, the samples were handed over to Selina Maghembe, who registered them as Lab. No. NZL 643/2021. Selina Maghembe further acknowledged the receipt of the sample by filling and signing a sample receipt notification form (Exh. P7).

Upon submitting the samples to the GCLA, PW2 took the accused person and the remaining fresh leaves suspected to be narcotic drugs back to Ngorongoro Police Station. He handed over the said exhibit (fresh leaves suspected to be narcotic drugs) to PW1 for safe custody.

Six days later, on 31.08.2021, PW1 handed over to PW2, a sulphate bag containing fresh leaves suspected to be narcotic drugs for destruction. PW2 took the accused person and the said exhibit to Arusha for that purpose. Upon arrival, the substances suspected to be narcotic drugs were destroyed through burning in the presence of the magistrate (Hon. Mhenga), State Attorney, environmental officer, PW4, and the accused person, as shown in

the certificate of destruction (Exh. P6). PW4 documented the event of destruction by taking several photographs. The empty sulphate bag, part of the package, was not disposed of; it remained in the custody of PW2 until he tendered it as evidence (Exh. P8).

As stated earlier on, PW4 photographed the events of sampling and destruction of exhibits as per Exhibits P9 and P10 respectively and corroborated by the certificate of photographs (Exhibit P7).

Returning to the GCLA in Arusha, Selina Maghembe handed over the samples to the chemist analyst (PW5) for analysis. PW5 stored the samples until 01.09.2021 when he conducted both preliminary and confirmatory tests. The results from both tests confirmed that the samples were indeed narcotic drugs, namely, mirungi. This confirmation was based on the detection of cathinone and cathine chemicals, which are found in the mirungi plant only. Subsequently, PW5 prepared and signed a Government Chemist Analyst Report (Exh. P11) in which he opined that the samples received at the GCLA were narcotic drugs namely, mirungi.

Based on the aforementioned evidence, the Court found the accused with a case to answer. He chose to give his evidence without calling any witnesses to support him. Additionally, the accused relied on two

documentary pieces of evidence, namely, a medical document (Exhibit D1) and a certificate of attendance in basic motor vehicle mechanic grade II (Exhibit D2).

In his defence, the accused vehemently denied being found in possession of the sulphate bag containing narcotic drugs. He asserted that his occupation was that of a mechanic and that, before the incident, PW2 had demanded the return of his gear box, which the latter (PW2) had given him after fixing his vehicle. According to his testimony, on 21.08.2021, he was riding a motorcycle (Exh. P2) carrying a toolbox for the purpose of fixing a motor vehicle. He narrated that he was halted and apprehended by PW2 at the junction of Mangola and Ngorongoro, subsequently being taken to the Ngorongoro police post. Upon reaching the Ngorongoro police post, the accused alleged that a police officer asked him to resolve the matter with PW2. He further claimed that he was told to sign a certificate of seizure pertaining to the motorcycle and mobile phone only.

The accused maintained that on 23.08.2021, he was taken to the quarters of Ngorongoro National Park, where he purportedly endured torture at the hands of a game officer and was compelled to sign documents unknown to him. While acknowledging being taken to Arusha on 25.08.2021

and 31.08.2021, he insisted that he had no choice but to sign the documents and comply with directives issued on both occasions due to threats from PW2. He further attested to receiving medical treatment at the Prison Dispensary from 08.09.2021, supporting his testimony with a medical sheet (Exhibit D1).

The accused categorically denied having encountered PW3 on the fateful date and asserted that he was brought before the committal court on 08.09.2021. In conclusion, he steadfastly maintained his innocence, urging the Court to find him not guilty, acquit him, and order the return of the motorcycle to him

After the closure of the defence case, a schedule was provided to the learned counsel for both parties for the submission of their respective final submissions. The defence counsel adhered to the court's directive by filing the final submission, whereas the prosecution decided not to file a reply thereto. I will review and consider the points raised by the defence counsel while addressing the issues relevant to this case

From the outset, I agree with the defence counsel that the law imposes a crucial duty on the prosecution to establish its case beyond a reasonable doubt. This requirement, reinforced by section 3(2)(a) of the Evidence Act, Cap. 6, R.E. 2022, has been underscored in numerous decisions of this Court

and the Court of Appeal. A notable example is evident in the case of **Hemed vs R** [1987] TLR 117, as cited by the defense counsel. For a case to be considered proved beyond a reasonable doubt, the evidence must be robust against the accused, leaving a remote possibility in their favour that can be readily dismissed. [Refer to the case of **Magendo Paul & Another vs R** [1993] TLR 2019].

The law is further settled that, any doubt on the issue under determination should be resolved in favor of the accused person. Thus, the accused is entitled to acquittal if the court is convinced that the evidence given by the prosecution or the defence casts a reasonable doubt on the alleged offense. See for example, the case of **Zakaria Japhet @Jumanne & Others vs R**, Criminal Appeal No. 37 of 2003, CAT at Arusha (unreported).

In this case, the accused faces charges of trafficking in narcotic drugs. As per section 15(1)(a) and 3(iii) of the DCE Act, this offence is defined to occur when a person engages in the trafficking of narcotic drugs weighing more than fifty kilograms (now more than hundred kilograms). The term "trafficking" is defined in section 2 of the DCE Act, encompassing various modes such as importation, exportation, buying, sale, giving, supplying, storing, possession, production, manufacturing, conveyance, delivery, or

distribution of narcotic drugs in violation of the law. Although the particulars of the offence did not explicitly specify the mode of trafficking, the evidence presented by PW2 and PW3 indicates that the alleged trafficking was carried out through the possession of the narcotics. Thus, the accused was duly notified of the mode of trafficking of narcotic drugs subject to this case.

Given this context and considering the evidence on record, the establishment of the prosecution's case hinges around addressing the following issues:

1. *Whether the accused was found in possession of narcotic drugs, commonly known as mirungi.*
2. *Whether the weight of the narcotic drugs in question amounted to 55.2 kilograms.*

Let's delve into the first issue, whether the accused was found in possession of narcotic drugs. In the testimony adduced by PW2, it was revealed that on 21.08.2021, he, along with fellow officers from Ngorongoro National Park, intercepted a person riding a motorcycle (Exhibit 2), suspecting the presence of illegal substances. During this encounter, PW2 enlisted the assistance of PW3, who happened to be passing by, to witness the search of the motorcycle. According to both PW2 and PW3, the rider identified himself as Paul Marmo Bahh and admitted that the sulphate bag in his possession

contained mirungi. Both witnesses concurred that, upon opening the sulphate bag, they discovered fresh leaves, suspected to be mirungi, concealed by pieces of gazette and banana leaves. PW2 and PW3 were unequivocal that the sulphate bag, containing substances suspected to be narcotic drugs, along with a motorcycle (Exh. P2) and a techno mobile were seized from the accused person. To corroborate their testimonies, PW2 and PW3 referred to the certificate of seizure (Exh. P3), signed by the seizing officer (PW2), PW3, Yesse Rabson Kowero, and the accused person. Notably, Exhibit P3 explicitly states that one sulphate bag, housing fresh leaves suspected to be a narcotic drug, was recovered from the accused person.

However, the alleged narcotic drugs were not physically tendered in evidence. The prosecution contend through the evidence of PW1, PW2 and PW4 that, the narcotic drugs in question were destroyed on 31.08.2021. To support this contention, the prosecution tendered as evidence, certificate of destruction (Exh. P6), still pictures (Exh. P10) and certificate of photographs (Exh. P7).

This prompts the question whether the purported narcotic drugs were disposed of in compliance with the law. I have taken into account that, with the exception of Exhibit P1, the documentary exhibits relied upon by the

prosecution were crafted under the DCE Act. These exhibits include, the certificate of seizure (Exhibit P3), certificate of destruction (Exh. P6), certificate of photographs (Exh. P7) and still pictures (Exhibits P9 and P10). It follows that, in the course of performing his duties, PW2 operated under the regulatory framework outlined in the DCE Act. Now, the procedure for disposing of perishable narcotic drugs is regulated by section 36(2) and (3)(a) of the DCE Act which stipulates that:

> *"(2) Where any narcotic drug or psychotropic substance has been seized the officer seizing such drug or psychotropic substances or precursor chemicals or substances used in the process of manufacturing of drugs or other substances proved to have drug related effects shall prepare an inventory of such narcotic drug or psychotropic substance containing such details relating to-*
>
> *(a) their description, quantity, mode of packing, marks, numbers;*
>
> *(b) such other identifying particulars of the narcotic drugs or psychotropic substances or precursor chemicals or substances used in the process of manufacturing of drugs or other substances proved to have drug related effects;*
>
> *(c) packing in which they are packed; (d) country of origin;and*

(d) other particulars as such officer may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act.

(3) An officer seizing such narcotic drug, psychotropic substance, precursor chemicals or other substances proved to have drug related effects shall make an application to any magistrate having jurisdiction under this Act, for the purpose of-

(a) certifying the correctness of the inventory so prepared;."

As evident from the above quoted provision, the seizing officer responsible for handling narcotic drugs is required to prepare an inventory specifying the description, quantity, mode of packing, marks, and numbers of the narcotic drugs. This inventory is to be in the prescribed form (Form No. DCEA 006) made under section 36(2) of the DCE Act and incorporates additional particulars such as any orders or remarks issued by the magistrate or judge. Furthermore, the seizing officer is required to submit an application to a magistrate with jurisdiction to secure certification regarding the accuracy of the prepared inventory.

In contrast to this provision, PW2 did not produce the inventory for the disposal of the exhibit. Moreover, the magistrate who purportedly issued the order for the disposal of narcotic drugs was not summoned to testify. Both omissions raise doubts about whether the particulars of the narcotic drugs in question were certified by the magistrate as required by the law and whether a proper order for disposal was indeed issued by the court. It is noteworthy that, under section 36(5) of the DCE Act, an inventory certified by the magistrate stands as primary evidence concerning the offence laid against the accused. Therefore, the absence of evidence regarding the inventory and the order for disposal creates a significant gap in the prosecution's case regarding whether the accused was found in possession of the narcotic drugs in question. Consequently, the resolution of the first issue is negative.

Even if, for the sake of argument, the Court accepts that, that the accused person was indeed found in possession of narcotic drugs, the second issue of whether the weight of the said narcotic drugs equaled 55.2 kilograms would still need to be addressed. It is pivotal to restate the established legal position that, the responsibility for weighing and analyzing substances suspected to be narcotic drugs lies exclusively within the purview of the Chief Government Chemist (CGC). This principle has been time after time upheld in

various authorities, including the case of **Lilian Jesus Fortes vs R,** Criminal Appeal No. 151 of 2018 (unreported), where the Court of Appeal highlighted that:

> *"The above provision does not, in our view, impose on the police a duty to prepare an accurate report as to the weight of drugs seized by them because it requires them to weigh 'where it is possible and that the weight may be gross or net. We, therefore, go along with Ms. Kitaly in her submission that the office of the CGC is the one which has the means and mandate to make accurate measurements of weight."*

The above stated position has been reaffirmed in the recent case of **Watson Daniel Mwakasege vs R,** Criminal Appeal No. 666 of 2020 (unreported) in which the Court of Appeal addressed the question of whether the substances suspected to be narcotic drugs should be weighed by the seizing officer by holding that:

> *"We have previously held that weighing of drugs requires special tools which are owned and kept by the CGC offices only."*

In light of the foregoing legal position, it is imperative to assess whether the substances in question underwent proper weighing and analysis by the CGC. Any deviation from this standard procedure could cast doubt on

the accuracy and reliability of the evidence pertaining to the weight of the alleged narcotic drugs.

In this case, the GCLA weighed the samples and not the narcotic drugs in question. Contrary to the legal requirement outlined in various authorities, PW2, during his testimony, admitted to weighing the substances recovered from the accused person himself, thereby contravening the established legal stance that mandates the CGC to handle such measurements. Such admission also raises concerns about the accuracy and reliability of the weight attributed to the narcotic drugs in question.

Furthermore, under regulation 16 of the Drugs Control Enforcement (General) Regulations, 2016, PW2 was required to take all reasonable steps to ensure that the gross or net weight of the substances recovered from the accused person was accurately measured and recorded. Despite PW2's claim of having the substances, there is a lack of record to support this assertion.

That aside, PW2 admitted that the alleged 55.2 kilograms of the narcotic drugs (55.2 included the weight of an empty sulphate bag, banana leaves, and pieces of gazettes that covered the substances suspected to be narcotic drugs. It is my considered view that this admission raised doubt about the precise weight of the narcotic drugs measured by PW2, thereby

casting doubt on the accuracy of the recorded weight. As per the legal principle that doubts should be resolved in favour of the accused, the second part of the second issue is answered in the negative. Therefore, there is a lack of conclusive evidence to firmly establish that the alleged weight of the narcotic drugs recovered from the accused was 55.2 kilograms.

Considering the above analysis, I hold that that the prosecution has failed to prove its case beyond a reasonable doubt. Consequently, I find the accused not guilty and acquit him of the charge of trafficking in narcotic drugs. I further order that the accused be released from custody unless held for other lawful cause.

DATED this 5th day of February, 2024.

S.E. KISANYA
JUDGE
05/02/2024

Order: The Motor cycle (Exhibit P2) is to be returned to the accused person.

S.E. KISANYA
JUDGE
05/02/2024

Court: Judgment and order delivered through virtual court system on this 5th day of February, 2024 in the presence of Ms. Belinda Rwakatare, learned State Attorney, the accused person and Mr. Fridolin Bwemelo, learned advocate for the accused person.

Right of appeal is well explained.

S.E. KISANYA
JUDGE
05/02/2024