

TANZANIA / JUDGMENT

JUGMENT OF SAMWELI KAGISHA

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA CORRUPTION AND ECONOMIC
CRIMES DIVISION AT DAR ES SALAAM REGISTRY ECONOMIC CASE NO. 24327 OF 2024 THE
REPUBLIC VERSUS

1. SAMWEL KAGISHA EMMANUEL
2. BRIGITTE UWERA

JUDGMENT

29/11/2024 & 13/12/2024 I. Arufani, J The accused persons namely Samwel Kagisha Emmanuel and Brigitte Uwera stands charged before this court jointly and together of an information of trafficking in narcotic drug. They are charged under section 15 (1) (a) and (3) (i) of the Drug Control and Enforcement Act, Cap 95 R.E 2019 (hereinafter referred as the Drug Act), read together with paragraph 23 of the First Schedule and section 57 (1) and 60 (2) to the Economic and Organized Crime Control Act, Cap 200 R.E 2022. The brief facts of the information can be grasped from the information laid against the accused persons, the evidence adduced before the court by the prosecution's witnesses and the defence made to the court by the accused persons. The allegation of the offence is to the effect, on 30th January, 2024 at Shungubweni area within Mkuranga i District in Coast Region, the accused persons were found with an envelope containing flour and small particles (chenga chenga) of cream in colour which was under their bed and suspected it was narcotic drug. After the information was read over to the accused persons, they pleaded not guilty to the offence, which caused the court to proceed with the trial of their case. During the hearing of the case, the Republic was represented by Mr. Ditrick Mapunda, Mr. Charles Magai and Mr. John John Kaombwe, learned State Attorneys and both accused persons were represented by Mr. Tumaini Mgonja, learned Advocate. In substantiating the said information, the prosecution paraded before the court eight witnesses namely (1) Emmanuel Elia Haule, (2) Inspector Paschal Daudi, (3) H2732 CPL Jackson Shambwe, (4) Tishi Iddi Itogo, (5) Julius Peter Mazimu, (6) Inspector Johari Msirikale, (7) Salehe Ilala and (8) Inspector Beatus Tuyanywe and tendered to the court various documentary and physical exhibits which were admitted in the case as exhibits P1, P2, P3 and P4. On their side the accused persons adduced their own defence evidence and they tendered no any exhibit. Inspector Paschal Daudi, who testified in the case as (PW2) told the court he is working in the Drug Control and Enforcement Authority (DCEA) which the headquarter office is at Dar es salaam. He said in the 2

afternoon hours of 30th January, 2024 he was at Funza Village within Mkuranga District in Coast Region with his fellow officers from the office of the DCEA. He said they were there doing an investigation of the properties of a person who was being suspected he was trafficking in narcotic drug, a case which had been opened at their office with reference case number DCEA/PE/01/2024. He said while at the mentioned area he got an information from his informer that there was a person who was indulging in trafficking in narcotic drugs at Shungubweni area. He said as other fellow officers were at Shungubweni area for the same work of making follow up of the properties of the afore mentioned case, he communicated the said information to D/CPL Salehe Ilala who testified in the case as PW7. PW2 said PW7 was the incharge of the officers who were at Shungubweni area investigating the properties of the person involved in the case mentioned herein above. PW2 said to have given PW7 the telephone number of the informer and told him to make follow up with the said person. PW2 said to have told PW7 that, if he would have managed to get the said person, he should have put him under arrest as he had been informed that, if he would have delayed the said person would have escaped. PW7 said after getting the 3 telephone number of the informer and the informer directing him where was the house of the said person-, he went up to the said house. PW7 said to have gone to the said house while together with his fellow officers and find six people who five of them were men and one of them was a woman and they were out of their house. PW7 said after getting the said persons they introduced themselves to them as officers from the office of the DCEA and told them they were being suspected they were indulging in trafficking in narcotic drugs and put them under arrest. PW7 said to have informed by PW2 that he had managed to get the said persons and he had already put them under arrest. PW2 said after being informed by PW7 that the said persons had already been put under arrest he communicated with his leaders at Dar es Salaam to request for permission of going to search their premises and arrest the suspects and he was allowed to do so. PW2 said after getting the said permission, he went to Shungubweni village while with officers who were with him. He said before going to the house of the suspects he went to the office of Shungubweni village where he met the Village Executive Officer. He said after meeting the VEO and informing him his intention of going to their village was to go to search the house of the suspects, he requested him to give him a leader who 4 would have gone to witness the search they were going to conduct in the house of the suspects. PW2 said to have been given the Chairman of Shungubweni Hamlet namely Tishi Iddi Itogo who testified in the case as PW4. PW2 said after getting PW4 he went with him together with the officers who were with him up to the house of the persons suspected were trafficking in narcotic drug. PW2 said to have reached at the house of the suspects at 17:00. He said after reaching there, he found PW7 and other officers who were with him had put the said persons under arrest and they were out of the house of the first accused. PW2 said after reaching there, he introduced himself to the persons who had been put under arrest and told them his intention of going to their premises was to search their premises. PW2 said PW4 introduced the persons who had been put under arrest to him as the persons living in the place where they had been put under arrest. PW2 and PW7 said after PW2 introduced himself to the suspects and the suspects said they know PW4, PW2 appointed PW4, PW7 and DC Fauzia to participate in the search of the house of the first accused who had been introduced to him by PW4 as the person living in the said house with the second accused who is

his wife. PW2 and PW7 said the officers 5 appointed to participate in the search exercise, searched themselves on their bodies for the purpose of clearing doubt of having carried anything bad which they might have planted in the house of the accused persons. PW2, PW4 and PW7 said that, after finishing to search themselves the first accused was searched on his body by PW2 and found he had an Infinix mobile phone whose colour was cream and an NMB Bank Card which was found in the back pocket of his trouser. They said the second accused was searched on her body by DC Fauzia and found with a black Infinix mobile phone. PW2, PW4 and PW7 said that, after searching the accused persons on their bodies, they went to search in their kitchen and store while being led by the first accused but nothing suspected was relating to the alleged trafficking in narcotic drugs was found therein. PW2, PW4 and PW7 went on saying that, after the search being conducted in the kitchen and the store, they went to the bed room of the accused persons and after the search being conducted therein, they found one passport and citizen identity card showing the second accused is a citizen of Rwanda. They also found two Tanzanian birth certificates of the first and second accused persons which were in the file which was in the drawer of the table found in the room of the accused persons. PW2, PW4 and PW7 said that, when the mattress and the rack (chaga) holding the 6 mattress was removed from the bed they saw a khaki envelop which was under the bed. PW2, PW4 and PW7 said that, after PW2 cut the said khaki envelope they found inside there was a transparent nylon packet and inside the said transparent nylon packet there was a white cloth bag which was written the words "Blue Sapphire" and number "999" and "555" They said that, after the white cloth bag being cut, they found other two transparent nylon packets which were put together. They said inside the two transparent nylon packets there was flour and small particles (unga na chenga chenga) of cream in colour which emitted strong smell (harufu kali). PW2 said by using his experience of dealing with cases of narcotic drugs, he suspected that was a narcotic drug. PW2 said when he asked the first accused where he got the stated narcotic drug, he told him to ask his wife who is the second accused as she is the one stays at home and is the one used to do cleanliness of their room. PW2 said when he asked the second accused how they got the stated narcotic drug, she didn't say anything. PW2 and PW7 said that, later on the first accused told him he used to get the said narcotic drugs from his boss whose name is Salehe Baseleman. 7 PW2, PW4 and PW7 said that, the things they found in the room of the accused persons were taken by PW2 and they went out of the room of the accused persons. They said they took the four youths who were under arrest out of the room of the accused persons and went to search their room but nothing was found in their room. PW2, PW4 and PW7 said after the said exercise, PW2 prepared a certificate of seizure and listed therein all the things he seized from the bodies and in the room of the accused persons. They said the certificate of seizure was signed by PW4 as an independent witness in the search exercise and the accused persons wrote their names, signed and put their thumb prints on the certificate of seizure. PW2 tendered to the court the said certificate of seizure together with two mobile phones, two birth certificates, NMB Bank card, passport and citizen identity card of Rwanda and they were admitted in the case as exhibit P3 collectively. PW2 and PW7 said that, as they were informed Salehe Baseleman has a house at Boza Village they went to search his house while together with the first accused person and reached there at about 18:50 PM. PW2 said after searching the house of Salehe Baseleman, they didn't get anything associated with the offence of

trafficking in narcotic drug. PW2 and PW7 said that, thereafter they returned to Shungubweni hamlet and 8 told the second accused who had been left at Shungubweni area to get prepared as they were going together to the office of the DCEA which is at Dar es Salaam. PW2 and PW7 went on saying that, they took the accused persons together with two youths found at the premises of the accused persons who were citizens of Burundi and went to the office of the DCEA where they reached at 01:30 of 31st January, 2024. PW2 said after reaching at their office he handed over the first accused to PW7 and the second accused to DC Fauzia. He said to have handed one of the Burundian youths they had arrested to DC Haruna and another one to DC Kaunda for further steps of investigation. PW2 said that, thereafter he went to lock the exhibits he seized from the accused persons in the cabinet of his office where nobody can enter as he used to keep the key of his office himself. PW2 said after locking the exhibits in his cabinet he opened two case files which one of them was for investigation of the exhibits he seized from the accused persons and another one was for the two youths who were citizens of Burundi. He said as their exhibits keeper was not present in the office he waited until 12:00 noon of 31st January, 2024 when he handed over the exhibits, he seized from the accused persons to their 9 exhibits keeper namely Inspector Johari Msirikale who testified in the case as PW6 for safe custody. PW2 said before handing over the exhibits to PW6 he had marked all the exhibits by using letters and he handed over the said exhibits to PW6 by signing in the exhibits register kept by PW6. PW6 said after receiving the said exhibits from PW2 and entered them in their register, she kept the same in their exhibits room to wait for further instructions. PW6 said at about 14:00 hours of the same date she took out the khaki envelope handed over to her by PW2 which had substance suspected to be narcotic drug and went to their special room used for packing exhibits so that it can be packed and sent to the laboratory of the Chief Government Chemist (CGC) for analysis. PW6 said to have taken the exhibit to the packing room where there were both accused persons, H2732 CPL Jackson Shambwe who testified in the case as PW3 and Julius Peter Mazimu who testified in the case as PW5. PW6 said to have told the afore mentioned persons that their role was to witness when she was packing the exhibit for the purposes of being taken to the laboratory of the CGC for analysis. PW6 said to have opened the exhibit which was in the khaki envelope in the 10 presence of the afore mentioned persons and find inside there was a flour and small particles of a cream in colour suspected to be narcotic drug. She said after showing them what was inside the exhibit she repacked the same as it was and inserted the same in another big khaki envelope with words "exhibit bag" and closed the exhibit by using transparent sellotape and sealed the exhibit by putting red sealing tape with words "evidence". PW6 said to have written the number of the case and put mark "A" on the exhibit and gave the same to the accused persons to write their names, signed and put their thumb prints on the exhibit. PW6 said to have also gave the exhibit to PW5 who witnessed packing of the exhibit as an independent witness and PW3 who was taking the exhibit to the laboratory of the CGC for analysis so that they can write their names and signed the exhibit. PW6 said after packing the exhibit as stated herein above, she kept the same in the exhibit room until 15:15 hours when she handed the exhibit to PW3 for the purpose of taking the same to the laboratory of the CGC for analysis. PW6 said to have handed over the exhibit to PW3 by recording in their exhibit register which was signed by PW3. PW3 said after being handed over the exhibit he filled the form of taking exhibit to the CGC for analysis. After filling the form, he

took the exhibit to the 11 laboratory of the CGC where it was received by Emmanuel Elia Haule who testified in the case as PW1. PW1 told the court he is a Chemical Analyst working at the laboratory of the CGC. He said after receiving the exhibit taken to their laboratory by PW3 and seeing what is filled in the form used to take the exhibit to them tallied with what is in the exhibit, he registered the exhibit and gave it laboratory number HQ 024 - 00163 and entered the same into their register known as Sample Receipt Book. PW1 said after opening the exhibit, he weighed the same and find its weight without covering materials was 978.42 grams. He said to have taken sample from the exhibit for conducting preliminary test. He said he conducted preliminary test by using chemical reagents to see the colour of the exhibit and discovered the substance contained in the exhibit was narcotic drug of the type of heroin as its colour changed into green which is a colour of heroin drug. PW1 said to have conducted the preliminary test in the presence of PW3 and after getting the preliminary result he took another sample from the exhibit for confirmatory test and repacked the exhibit. He said after repacking the exhibit he sealed the same by using their sealing tape, he signed the exhibit and stamped the same with their rubber stamp. 12 Thereafter he returned the exhibit to PW3 and proceeded with doing confirmatory test to see whether the exhibit is a narcotic drug and the effect it has to the human being as requested in the form used to send the exhibit to their laboratory. PW3 said after the exhibit being returned to him by PW1 he took the same back to PW6. PW6 said to have received the exhibit from PW3 at about 16:40 of the same date. PW6 said after receiving the exhibit from PW3 she entered the same in their exhibit register which was signed by PW3 to show he had returned the exhibit to her and put the exhibit in their exhibit room to wait for further steps. PW6 tendered to the court the court the exhibit register she said she used to record movement of the exhibit and its copy was admitted in the case as exhibit P4. PW1 said after conducting confirmatory test by using the machine known as Liquid Chromatography - Mass Spectrometry he discovered the sample he took from the exhibit sent to their laboratory by PW3 was narcotic drug of the type of heroin. He said after getting the said result, he prepared his analysis report which he signed and it was also signed by his incharge and stamped the same by using their rubber stamp. Thereafter, PW1 called PW3 and handed over to him the final report of 13 the analysis he conducted in relation to the exhibit taken to their laboratory. PW3 said on 7th February, 2024 he went to collect the confirmatory test report of the chemical analysis done to the exhibit he took to the laboratory of the CGC and took the same to Inspector Beatus Tuyanywe who testified in the case as PW8 and said he was a leading investigator of the accused persons' case. PW1 tendered to the court the sample receipt notification which is Form Na. GCLA 001, Fomu ya Uwasilishaji Sampuli Maabara which is Fomu Na. DCEA 001, and Taarifa ya uchunguzi wa Maabara ya Serikali which is Fomu Na. DCEA 009 and all of them were admitted in the case as exhibit P1 collectively. He also tendered to the court the khaki envelope which inside there is substance which is in the form of flour mixed with small particles of cream in colour which was found it is a narcotic drug of type of heroin and it was admitted in the case as exhibit P2. After the prosecution side closed its case, the court considered their evidence and found it has satisfactorily managed to establish prima facie case upon which the accused persons were invited to make their defence in rebuttal of the prosecution's case as required by section 293 (2) of the Criminal Procedure Act Cap. 20 R.E 2022. The accused persons told the 14 court through their

learned counsel that they will give their evidence on their own behalf and they will call no any witness in their defence. In their defence the first accused, Samwel Kagisha Emmanuel and the second accused, Brigitte Uwera testified as DW1 and DW2 respectively and give the evidence which was almost similar. They denied to have trafficked in narcotic drug admitted in the case as exhibit P2. They said they were living as husband and wife in the house where they were arrested which DW1 said is the house of his employer namely Ahmed Ally Said. They said they were living with their two babies namely Noela and Nelson together with four youths who were working with DW1. They said on 30th January, 2024 they were at their home with their daughter Noela and the co-workers of DW1. They said their young baby Nelson who by that time was one month old was asleep in their room which its door had been left open so that they could have hear if he would have cried. DW1 said that, while there PW7 went to their home and requested for some water for cooling his vehicle as its boiling temperature was raising. DW1 said to have shown him the water tape and allowed him to fetch the water and after fetching the water he departed. DW1 and DW2 went on saying that, after half of an hour PW7 returned with other people who in total were eight men and two of them 15 had carried guns. They said PW7 returned with the water gallon he used to fetch the water and a small bag which he had carried on his back. They said after the said people arrived at their home, they surrounded them and after putting them under arrest, they handcuffed DW1 together with the youths who were co-workers of DW1. They said DW2 was told to sit down but after telling them she had delivered her baby Nelson by way of operation one month ago, they told her to kneel down. They said while under arrest, their baby who was asleep in their room awakened and cried. They continued saying that, when DW2 wanted to go to take the baby she was told by the people who had put them under arrested that she was tired of life and she wanted to die. She was told to wait as the baby would have been brought to her. DW1 and DW2 said PW7 who was carrying the bag on his back and another person who was among the eight persons went to their home entered into their bedroom and take out the baby and handed him to DW1. They continued saying that, while there another group of five people which included PW2 and PW4 went to their home. DW1 said PW2 told them he had gone to take his drugs and DW2 said PW2 said he had gone to take the drugs of Salehe. The accused persons said they were searched by PW2 and find them with mobile phones and NMB Card which was found 16 in the pocket of the first accused. They said thereafter PW2 took DW1 and went together with PW4, PW7 and other people who were with him to search in their kitchen but nothing was found therein. They said that, having failed to get anything from their kitchen, they went to search their bed room. DW1 said that, after entering into their room the said people started to throw down things which were in their bedroom. He said when the said exercise was continuing one woman who was in the search asked him what was in the envelope she had carried on her hand while he don't know where the said woman got the said envelope. DW1 said he was not shown what was inside the envelope. DW1 said that, thereafter they went out of their bedroom and went to search the room of the co-workers of DW1 but nothing was found in their room. DW1 said after getting out of the room of his co-workers, the people who went to search their premises said they had not finished their work and said they were going to Boza Village. DW1 and DW2 denied to have signed the certificate of seizure at their home and said to have seen the same at the office of the DCEA and continued to point out some discrepancies and contradictions they said are in the evidence

of the prosecution. (j2®1 17 Upon completion of hearing the evidence from both sides the counsels for both sides told the court they are leaving the case to the court to set a date for delivering its decision and said they had no final submission to make in the case. That being the position of the case the court has found it is incumbent upon it to state here it is a fundamental legal principle in criminal cases like this one that, the burden of proof rests with the prosecution to prove the charge laid against the accused persons beyond doubt. The stated principle is well enunciated in sections 3 (2) and 114 (1) of the Evidence Act Cap 6 R.E 2022. Therefore, in determining this case the main focus of the court will be to see whether the prosecution has managed to discharge the stated burden of proof. In addressing the stated pivotal question, it is to the view of this court important to start by having a look on what is required to be proved in the offence levelled against the accused persons. Section 15 (1) (a) and

(3) (i) of the Drugs Act upon which the charge levelled against the accused persons is preferred, requires the prosecution to prove two essential elements: the first element is the accused persons trafficked in narcotic drug namely heroin and the second element is the weight of the heroin involved in the case exceeds two hundred grams. In ascertaining the prosecution has discharged its burden of proving the charge laid against 18 the accused persons to the standard required by the law the court will be guided by the following issues:

1. Whether search of the premises of the accused persons and seizure of what was alleged was a narcotic drug adhered to the legal procedures.
2. Whether what is alleged it was seized from the accused persons was a narcotic drug namely heroin and its weight was 978.42 grams.
3. Whether the chain of custody of the alleged narcotic drug was properly maintained.
4. Whether the accused persons have raised any reasonable doubt to the prosecution's case that they were found trafficking in narcotic drug alleged it was seized from their bedroom. Starting with the first issue the court has found PW2, PW4 and PW7 said that, after the accused persons being arrested and their house being searched, a khaki envelope with substance like flour mixed with small particles of cream in colour suspected to be narcotic drugs was found under the bed which was in the room of the accused persons. The accused persons challenged in their defence the way search and seizure of the alleged narcotic drugs was conducted in their bedroom that is why the court framed this issue. The accused persons said in their defence that, there is a suspicion that the envelope with what was suspected to be narcotic drug admitted 19 in the case as exhibit P2 was taken to their house by the persons went to search their house. They stated in their defence that, PW7 went to their premises while carrying a bag and they don't know what was inside the said bag. They said PW7 entered into their room while carrying the said bag when he went with his fellow officer to take out the baby who was crying inside their bedroom for the purpose of handing him over to the second accused. They said that happened before the search conducted in their premises commenced. They stated further that, the persons entered into their room to conduct search, who among others were PW2, PW4 and PW7 were not searched to see

whether they had carried anything bad on their bodies. They went on saying that, PW4 had worn a big coat and the second accused said there were two women in the search team who had worn big gowns and they had put scarfs on their shoulders when they were in the search exercise and all of them were not searched before entering in their room to conduct the search. After considering the defence of the accused persons, the court has gone through Criminal Procedure Act, Cap 20 R.E 2019, Police Force and Auxiliary Service Act, Cap 322 and the Police General Orders (PGO) which regulates search in our country. The court has failed to see any provision 20 requiring a law enforcement officer conducting a search to be searched before searching a suspect or before entering into any premises to conduct a search. However, for the purposes of clearing suspicion that a law enforcement officer conducting a search has not carried anything suspicious that may be planted to a suspect, he is required to satisfy the suspect that he has not carried anything bad which can be planted to him or her. The court has found that, although, the accused persons said the officers entered and searched their room were not searched or searched themselves before starting to conduct the search, but PW2, PW4 and PW7 said before entering into the room of the accused persons to conduct the search, all persons appointed to participate in the said search, they searched themselves on their bodies. They said they searched themselves in the presence of the accused persons to clear doubt of having carried anything bad which they might have planted to the accused persons. The question here is whether the above stated defence of the accused persons has managed to raise any reasonable doubt to the prosecution's evidence that the persons entered into their room were not searched to clear doubt of carrying exhibit P2 which as stated by the prosecution's witnesses was found under the bed which was in the room 21 of the accused persons. The court has failed to see anything material in the defence of the accused persons which establishes the persons entered into their room they did not search themselves before starting to conduct search in the premises of the accused persons as stated by the prosecution's witnesses. The court has come to the stated finding after seeing that, although PW4 said he was not searched as he was a hamlet chairman and trusted person, but there is no cogent reason given by the accused persons moving the court to disbelieve the evidence of PW2, PW4 and PW7 who categorically stated in their sworn testimonies that, all officers entered into the bedroom of the accused persons to conduct search, they searched themselves on their bodies in the presence of the accused persons. The court has also come to the stated finding after seeing the accused persons have not told the court why the mentioned prosecution's witnesses would have lied against them that they searched themselves in their bodies before searching them and before entering into their bedroom to conduct the search therein. Moreover, the court has found the accused persons have not adduced any reason which would have moved the officers from the DCEA who went to search their room plus PW4 who was their hamlet chairman 22 to conspired to take exhibit P2 found in their bedroom to the place where it was found. That makes the court to fail to see any justifiable reason of making it to disbelieve the evidence of the prosecution's witnesses in respect of how exhibit P2 was seized from the bedroom of the accused persons. The court has come to the stated finding after seeing the position of the law as stated in the case of Godluck Kyando V. R, [2006] TLR 363 is very clear

that, before disbelieving the evidence of a witness there must be a cogent reason for the court to disbelieve his or her evidence. The court has also found there is no any clear question asked during cross examination of the prosecution's witnesses to establish the officers went to search the accused persons' room they did not search themselves on their bodies as they have stated in their evidence. Since there is no cross examination made to the prosecution's witnesses in relation to the issue of the officers went to search the premises of the accused persons to search themselves on their bodies before starting to search the premises of the accused persons, the court has found as stated by the Court of Appeal in many cases including the case of Cyprian Athanas Kibogoyo V. R, Criminal Appeal No. 88 of 1992 (unreported) it implies the accused persons accepted to the truth of what was said by the prosecution's witnesses. ' 23 The court has also been of the view that, even if it will be accepted that the persons participated in the search of the accused persons' bedroom, they did not search themselves as stated by the prosecution's witness but the accused persons have not stated with clarity as to who exactly took exhibit P2 in their bedroom. The court has considered the evidence of the accused persons that PW4 had worn a big coat, PW7 had carried a bag which it was not known what was inside and there were two women who had worn long big gowns and covered their shoulders with scarfs but failed to see how the stated evidence can be taken it has raised any reasonable doubt to the prosecution' evidence that exhibit P2 was found in the bedroom of the accused persons. The court has come to the stated view after seeing there is no question asked to any of the prosecution's witnesses during their cross examination to establish the afore mentioned persons had carried exhibit P2 stated was found in their bedroom either in the bag carried by PW7 or in the apparels alleged had been worn by PW4 and two women mentioned by the second accused. As stated earlier the position of the law as stated in the case of Cyprian Athanas Kibogoyo (supra) it implies the accused persons accepted to what was said by the prosecution's witnesses. In other words, the defence of the accused persons in relation to what they 24 have alleged in their defence has not any grain of truth in relation to how exhibit P2 was seized from their room. To the contrary the court has found their defence is just an afterthought defence concocted to exonerate the accused persons from the charge they are facing. The court has also considered the defence of the first accused person who said when the search was being conducted in their house, he was asked by one woman who was in the search about what she had hold on her hand and after looking at her, he saw the said woman holding an envelope on her hand while he didn't know where she obtained the same. As stated hereinabove and as stated by the first accused when he was cross examined by the counsel for the prosecution, there is no question asked to any of the prosecution's witnesses about exhibit P2 to be carried by any woman when the search was being conducted in the bed room of the accused persons. To the contrary the court has found the evidence of PW2, PW4 and PW7 is very clear that the envelope which has narcotic drug admitted in the case as exhibit P2 was found under the bed of the accused persons and it was not carried on hand of any woman participated in the search conducted in the house of the accused persons. The court has come to the stated finding after seeing the Court of Appeal held in the case of 25 Nyerere Nyague V. R, Criminal Appeal No. 67 of 2010 (unreported) that: a matter of principle, a party

who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said." That being the position of the law the court has considered the evidence from both sides about the search conducted in the premises of the accused persons and come to the settled view that, the prosecution's evidence has managed to establish the search conducted in the premises of the accused persons was properly conducted and exhibit P2 was found in the house which was being used by the accused persons as their bedroom. The court has also come to the above finding after seeing the evidence of PW2 and PW7 is very clear that the search conducted at the premises of the accused persons was an emergency search which could have been conducted without a search warrant provided under section 38

- (1) of the Criminal Procedure Act. Emergency search is regulated by section 42 of the Criminal Procedure Act which its subsection (1) (b) states a police officer may enter upon' any premises on which he believes on 26 reasonable ground that anything connected with an offence is situated and may seize any such thing that he finds in the course of that search. The emergency search conducted under the afore cited provision of the law was well stated in the case of Marceline Koivogue V. R, Criminal Appeal N. 469 of 2017, CAT at DSM (unreported) that, where the circumstances of a case make it difficult for an officer empowered to conduct search to obtain a search warrant from an incharge of a police station or from the court before conducting the search he can conduct a search without a search warrant. It was stated a search officer can conduct the search without warrant pursuant to the provision of section 42 (1) of the Criminal Procedure Act as it was done by PW2 in the case of the accused persons. The court has found the search conducted at the premises of the accused persons was an emergency search after seeing PW2 said in his evidence that, he went to conduct the said search after getting an information from his informer of the commission of the offence preferred against the accused persons while at Funza Village. He said after getting the said information he communicated with his incharge who permitted him to go to searching the persons who were suspected they were committing the reported offence. He said after being permitted by his 27 leader he went to conduct the search in the premises of the accused persons. The court has found PW2, PW4 and PW7 said after the search being conducted in the premises of the accused persons, PW2 filled the certificate of seizure admitted in the case as exhibit P3 and it was signed by PW2 as an arresting officer, PW4 as an independent witness and it was also signed by the accused persons and appended thereon their thumb prints to comply with the requirement of the law provided under order 226 (18) and (19) of the PGO. The court has found the accused persons challenged the filling and signing of the certificate of seizure by saying in their defence that it was not filled and signed at their home premises and denied to have signed the same. The court has found the defence of the accused persons is without any merit because when they were cross examined by the counsel for the prosecution, they said there was no objection raised on their side when the prosecution prayed the said certificate of seizure to be admitted in the case as an exhibit. There was also no cross examination made to any prosecution's witnesses to establish the certificate of seizure was not filled and signed

at their premises. The court has found there is plethora of authorities of the Court of Appeal on failure to cross examine or object to 28 tendering of an exhibit. One of them is the case of Anna Moises Chissano V. R, Criminal Appeal No. 273 of 2019 (unreported) where it was held that: "An accused is expected to challenge a witness testimony by way of cross examination or object to the tendering of a document or physical exhibit during the trial. Once certain evidence goes into the record unchallenged, it is, in law, taken to have been admitted by the accused." Therefore, the assertion by the accused persons that exhibit P3 was not filled at their premises after the search being completed and they were given many documents at the office of the DCEA and required to sign is an afterthought which cannot diminish the evidence of PW2, PW4 and PW7 that the exhibit was filled and signed at their premises. Basing on all what has been stated hereinabove, the court has found the first issue is supposed to be answered in affirmative that the search and seizure of the narcotic drugs admitted in the case as exhibit P2 from the premises of the accused persons adhered to the legal procedures. The second issue requires the court to determine whether what was seized from the accused persons was a narcotic drug namely heroin which its weight was 978.42 grams. The court has found as stated in the first issue, PW2 said clearly in his evidence how he was tipped by his informer 29 about a person who was engaging in trafficking in narcotic drugs. He also said clearly how he communicated the said information to PW7 who managed to put the accused persons and other persons found at their premises under arrest. PW2, PW4 and PW7 stated clearly in their evidence how search was conducted in the premises of the accused persons and how exhibit P2 was found in the room where the accused persons used to sleep with their children. As stated in the first issue the defence of the accused persons that exhibit P2 was brought to their house by the persons went to search their house has not managed to convince the court to find it has raised any reasonable doubt to the evidence of the prosecution. To the contrary the court has found the evidence of PW2, PW4 and PW7 managed to establish exhibit P2 was found under the bed of the room where the accused persons used to sleep with their children. The stated finding of the court is supported by the certificate of seizure (exhibit P2) which as stated in the first issue it was signed by the accused persons and appended their thumb prints thereon. It was also signed by PW4 as an independent witness and PW2 as an arresting officer to show the exhibit P2 was found and seized from the room which was been used by the accused persons. Since the tendering of the stated 30 exhibit was not disputed by the defence side, the court has found it supported the evidence of PW2, PW4 and PW7 that exhibit P2 was found in the room which was being used by the accused persons as their bedroom. To establish what was seized from the room of the accused persons was narcotic drug it was stated by PW2 that, after seizing the said exhibit he took the same and handed it over to PW6. PW6 said later on she handed the exhibit to PW3 who took the same to the laboratory of the CGC for test and chemical analysis. PW1 who received the exhibit at the laboratory of the CGC weighed the same and find its weight was 978.42 grams and the result of both preliminary and confirmatory tests he conducted showed the exhibit was a narcotic drug of the type of heroin. The report of the analysis of the said exhibit was admitted in the case as evidence and marked exhibit P1. As provided under section 48A (2) of the Drugs Act the said

report which was signed by the Chemical Analyst is considered as conclusive evidence unless rebutted. Since the said report was not objected by the accused persons when it was tendered to the court as evidence and PW1 was not asked any question during cross examination to challenge what is contained in the said report, the court has found the said evidence has 31 established what was seized from the accused persons was a narcotic drug of the type of heroin and its weight was 978.42 grams. The question asked to PW1 by the counsel for the accused persons when he was cross examining him was about whether what was sent to their laboratory was in the form of flour as stated in his statement or in the form of flour mixed with small particles as he stated in the evidence he adduced before the court. The answer given by the said witnesses shows the question asked to him did not manage to tilt the prosecution evidence about the form of the substance found in the room of the accused persons. That is because even if he mentioned flour alone in his statement, but the court has been of the view that a mere omission to mention in the said exhibit it was mixture of flour and small particles is not enough to make the court to find what was seized from the bedroom of the accused persons is different from what was taken to the laboratory of the CGC and analysed by PW1. In the strength of the above analysis the court has found the second issue is supposed to be answered in affirmative that, what was found in the bedroom of the accused persons was narcotic drugs namely heroin and its weight is 978.42 grams. 32 It is now time to move to the third issue relating to the maintenance of chain of custody of exhibit P2 stated it was retrieved from the bedroom of the accused persons. The court has framed the above issue after seeing there are some questions asked to the prosecution's witnesses touching maintenance of the chain of custody of exhibit P2 stated it was found in the bedroom of the accused persons and suspected it was a narcotic drug. The court has found the position of the law as laid in number cases including the case of Chacha Jeremiah Murimi & Three Others V. R, Criminal Appeal No. 551 of 2015 CAT at Mwanza (unreported) is that, movement of an exhibit from one person to another from when it was seized until when it is tendered in the court as evidence must be handled with great care to eliminate any possibility that there may have been tampering of the exhibit. What is required in the doctrine of chain of custody is to satisfy the court that, the exhibit seized from the suspect is the same exhibit which was taken to the laboratory of the CGC for analysis and it is the same exhibit tendered in the court as evidence. The Court of Appeal held in the case of Chacha Jeremiah Murimi (supra) that, in establishing a chain of custody of an exhibit has not been broken the court should look at documentation used to keep and move the exhibit as well as other factors 33 prevailing in every particular case. That being the position of the law the task of the court in this issue is to determine whether the chain of custody of exhibit P2 was properly maintained in the instant case. The court has found PW2 told the court in his testimony that, after seizing the exhibit suspected to be narcotic drug from the bedroom of the accused persons, he kept the same in his own possession and after arriving at his office he put the same in the cabinet of his office which is inaccessible by anybody else as he was the sole custodian of the key of his office. He said he kept the exhibit until on 31st January, 2024 at about 12:00 hours when he handed over the exhibit to PW6 who was their exhibit keeper. He said after handing over the exhibit to PW6 he signed the

exhibit register admitted in the case as exhibit P4 to show he had handed over the exhibit to PW6. PW6 said after being handed over the exhibit, later on she handed over the same exhibit to PW3 who took the same to the laboratory of the CGC for chemical analysis and PW3 said to have handed over the said exhibit to PW1 who analysed the exhibit at their laboratory. PW1 said after weighing the exhibit and conducted preliminary test and after getting the result of the test he conducted he repacked the exhibit and after sealing the same he returned it to the' PW3. PW3 said after the exhibit been 34 returned to him by PW1 he took the same back to PW6 and signed in exhibit P4 to show he returned the exhibit to PW6. PW6 said after receiving the exhibit from PW3 she kept the same until when she was required to bring the same to the court for being used as evidence in the case. When the counsel for the accused persons was cross examining the prosecution's witnesses about exhibit P2, he asked PW2, PW3, PW6 and PW7 about when mark "K" appearing on the white cloth bag which is one of the materials used in the packing of exhibit P2 was put on the said bag. He also asked PW6 about exhibit P2 to be seeing it was opened and closed by using transparent sellotape when it was handed over to her. Another question he asked to PW1 is whether the exhibit he received at the Laboratory of the CGC was in the form of small particles alone as indicated in the Form No. DCEA 009 admitted in the case as an exhibit P1 or in the form of flour mixed with small particles as he said in his testimony. Another question was about why exhibit P4 was not signed by PW6 after receiving the said exhibit from PW3 to show the exhibit was returned to her by PW3. After considering the answers given by the prosecution's witnesses to the questions asked to them by the counsel for the accused persons, 35 the court has found PW2 explained clearly in his testimony why the exhibit was seeing it was opened and closed by transparent sellotape when it was being handed over to PW6. PW2 said the exhibit was seeing the way it is stated above because after getting the exhibit he cut the same by using a knife to see what was inside. He said after seeing what was in the exhibit, he closed the exhibit where he cut by using transparent sellotape. The evidence of PW2 was also supported by the evidence of PW4 and PW7 who said they were in the search conducted in the premises of the accused persons. They said they witnessed when PW2 was cutting the exhibit to see what was inside and after seeing what was inside, he closed the same by using transparent sellotape. As for the issue of mark "K" appearing on the white cloth bag used to pack the exhibit the court has found that, although it is true that there are some witnesses said they don't know when the said mark was put on the exhibit but the court has failed to see how it can be said the said mark affected the chain of custody of the exhibit P2 tendered in the case as evidence. The court has come to tho stated view after seeing that is not a sufficient ground to establish the exhibit was tempered because it is possible that the witnesses said the exhibit had no such a mark, they did not see it and keep the same as their mark of identifying the exhibit but 36 they used the other marks appearing on the same bag like the word "Blue Sapphire" and number "999" and "555" which has not been challenged by the accused persons. As for the issue of PW1 to state in the Form DCEA 009 that exhibit was in the form of small particles and without mentioning presence of flour in the exhibit the court has found the said omission cannot be enough to find what was taken to the laboratory of the CGC and received

by PW1 for analysis is different from what was seized from the bedroom of the accused persons and what was received in the court as evidence. The court has also come to the above finding after seeing PW1 said in his testimony when the exhibit was taken to their laboratory was in the form of flour and small particles. What was said to the court by PW1 is similar to what was said to the court by almost all the prosecution's witnesses with exception of PW8 who did not say to have seen the exhibit. In the light of what has been stated hereinabove the court has found the questions asked to the prosecution's witnesses by the counsel for the accused persons have not raised any reasonable doubt to the prosecution's case that the exhibit tendered in the case is different from the exhibit seized from the premises of the accused persons or it was tempered in whatsoever manner. Consequently, the court has found the 37 third issue is supposed to be answered in positive that the chain of custody of the exhibit seized from the premises of the accused persons was properly maintained and it was not broken in anyhow. The above finding is moving the court to the fourth issue which requires the court to determine whether the accused persons engaged in trafficking in exhibit P2. Trafficking is defined under section 2 of the Drugs Act to include a wide range of activities involving narcotic drugs, such as importation, exportation, buying, selling, giving, supplying, storing, possession, production, manufacturing, conveyance, delivery or distribution by any person. The Court of Appeal stated in the case of Haji Rashid Matundu & Another V. R, Criminal Appeal No. 314 of 2021 (unreported) that, trafficking in narcotic drugs may be carried by any of the modes set out under section 2 of the Drugs Act. While being guided by the above stated position of the law the court has found its task here is to determine whether the prosecution's evidence has managed to establish the accused persons engaged in trafficking in narcotic drug allegedly was found in their bedroom by proving their possession, storing, controlling or participation in any of the activities or means specified in the above cited statutory definition. As stated in the preceding issues the court has found that, although the accused persons 38 denied to have trafficked in exhibit P2 but the question of the said exhibit P2 to be found in the house they were using as their bedroom has already been determined by the that it was found under the bed which was found in their bedroom. Upon carefully considering the evidence from both sides, the court has found the evidence of PW2 shows the information he was given by his informer was about a person who was engaging in trafficking in narcotic drugs at Chungubweni area. The information received by PW2 as he stated at the beginning of his testimony was not about persons who were trafficking in narcotic drugs but a person who was trafficking in narcotic drug. The evidence of the position of the information given to PW2 by his informer to be about a person and not persons is supported by the evidence of PW7. PW7 told the court the information given to him by PW2 was that there was a person who was engaging in trafficking in narcotic drugs at the mentioned area and not persons. PW7 said he was told by PW2 the person who was trafficking in narcotic drug was Samwel Kagisha who is the first accused in the case at hand. The question of the information given to PW2 by his informer to involve more than one person named by PW7, he is Samwel Kagisha who is the first accused in the instant case, started to appear after the accused 39 persons and other people found at their premises be arrested. In other word there is nowhere stated the persons who

were trafficking in narcotic drugs were the first and second accused persons or anybody else. The court has seen even the way the search was conducted in the premises of the accused persons shows the main target of the person stated was trafficking in narcotic drug was the first accused and not together with the second accused or any other person. The court has come to the above finding after seeing that, as stated by PW2, PW4 and PW7 when they went to search the kitchen and store used by the accused persons, they were led by the first accused alone and the second accused was left out of their bed room while under the custody of Fauzia. That means the second accused was not involved in the search conducted in their kitchen and store. The court has also found that, even when the team which was searching the accused persons went to search the house of Salehe Baseleman which it was said the first accused had mentioned him as a person used to give him the narcotic drug found in their bedroom, the second accused was not involved and she was left at their home. It is the view of this court that, although it was said the second accused had delivered a baby by operation and she was breast feeding 40 her baby but the prosecution witnesses did not tell the court if that was the reason caused them to desist to involve her in the search conducted in the mentioned places or not. Failure to state the reason for not involving, her in the said search caused the court to believe she was not one of the targeted persons said to PW2 by the informer she was trafficking in narcotic drug found in their bedroom. To the view of this court the second accused was just joined in the case as one of the persons found trafficking in narcotic drug simply because the narcotic drug admitted in the case as exhibit P2 was found under their bed which was in the room where they were sleeping. It is the further view of this court that, a mere fact that the narcotic drug was found under their bed is not enough to establish the second accused was trafficking in narcotic drug because she was sleeping or living in the room with the first accused who told PW2 she was being given the narcotic drugs by Salehe Baseleman. Since there is no clear evidence given by the prosecution to establish the second accused was possessing, storing, controlling or participating in any of the activities or means specified under section 2 of the Drugs Act the court has found the offence of trafficking in narcotic drug levelled against her in the case at hand has not been proved to the standard 41 required by the law which as stated earlier is beyond reasonable doubt. The court has also come to the above finding after seeing the evidence of the second accused that she was just joined in the case for the purpose of coercing the first accused to admit to have committed the offence if he would have seen her suffering has raised some reasonable doubt to the evidence given against her by the prosecution' witnesses that she was found trafficking in narcotic drug. As for the first accused, the court has found the evidence given by the prosecution's witnesses managed to establish he was either in possession, storing, controlling or participating in trafficking in the narcotic drug found under the bed which was their bedroom and not anybody else. The court has come to the stated finding after seeing that, although it was said by PW2 that when they asked the first accused about how the narcotic drug found under their bed reached there, he told them to ask the second accused who was cleaning their room but when the second accused was asked, she didn't say anything. PW2 said after the second accused failed to say anything the first accused told them he used to get the narcotic drugs from Salehe

Baseleman. The court has considered the evidence of the first accused that he did not commit the offence levelled against him and his evidence that he 42 has never engaged in committing any crime because he is a church leader but found his defence has not raised any reasonable doubt to the prosecution's evidence. The court has also found that, as stated in the issues discussed in this judgment and without repeating what has already been stated, the whole evidence given by the first accused in his defence has not managed to move the court to find it has raised any reasonable doubt in the prosecution's evidence. In totality of all what has been stated hereinabove the court has found the prosecution has managed to prove the charge levelled against the first accused to the standard required by the law which is beyond reasonable doubt but it has not managed to prove the charge levelled against the second accused to the required standard. Consequently, the first accused is hereby found guilty and convicted of the offence of trafficking in narcotic drug 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 and section 57 (1) and 60 (2), to the Economic and Organized Crime Act, Cap 200 R.E 2002. The second accused is found not guilty of the stated offence and is hereby acquitted. I. Arufani 43. B ■ Jud9e 13/12/2024 Xv"" Dated at DBrSsbalaam this 13th day of December, 2024. I. Arufani Judge 13/12/2024 Court: Judgment delivered today 13th day of December, 2024 in the presence of Ms. Grace Ndanzi, learned State Attorney for the Republic, the accused persons and Mr. Tumaini Mgonja, learned counsel for both accused persons. I. Arufani Judge 13/12/2024 SENTENCE: The court has carefully considered the prayer made by the counsel for the Republic and the mitigation made to the court by the counsel for the first accused person as recorded in the proceedings of the case. However, the court has found the first accused person has been convicted 44 of trafficking in narcotic drug contrary to section 15 (1) (a) and (3) (i) of the Drugs Control and Enforcement Act, Cap 95 R.E 2019 read together with paragraph 23 of the First Schedule and section 57 (1) and 60 (2), to the Economic and Organized Crime Act, Cap 200 R.E 2002. The sentence provided under section 15 (1) (a) and (3) (i) of the Drugs Act is a mandatory sentence of life imprisonment and there is no alternative sentence. There are so many decisions of the Court of Appeal which stress on imposition of the stated mandatory sentence in the offence like the one the first accused person has been convicted of. One of the said cases is Islem Shebe Islem V. R, Criminal Appeal No. 187 of 2020 (unreported) where the Court of Appeal enhanced the sentence of 30 years imprisonment which had been pronounced to the appellant to life imprisonment. In the premises the first accused person is hereby sentenced pursuant to section 15 (1) (a) and (3) (i) of the Drug Control and Enforcement Act, Cap 95, R.E 2019 to serve mandatory sentence of life imprisonment. 45 Court: Right of appeal to the. Court of Appeal against conviction or sentence or both conviction and sentence is fully explained to the parties. DISPOSAL OF EXHIBITS: The narcotic drug namely heroin admitted in the case as exhibit P2 should be destroyed in accordance to the law governing destruction of the mentioned narcotic drug. The other exhibits which were the properties of the accused persons admitted in the case as exhibit P3, are two mobile phones, the NMB Bank card of the first accused, the passport and the citizen identity card of the second accused together with birth certificates of both accused

persons. If there is no other lawful cause for continuing to hold them, they should be returned to the accused persons. 46 I. Arufani Judge 13/12/2024 47

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