

TANZANIA / JUDGMENT

LUCY ROMANUS NDUNGURU judgment

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA THE CORRUPTION AND ECONOMIC CRIMES DIVISION AT DAR ES SALAAM REGISTRY ECONOMIC CASE NO. 29141 OF 2024 THE REPUBLIC VERSUS LUCY ROMANUS NDUNGURU

JUDGMENT

12th and 13th December 2024 KISANYA, J.: The accused, Lucy Romanus Nduguru, faces a charge of trafficking in narcotic drugs, contrary to section 15(1)(a) and (3)(iii) of the Drug Control and Enforcement Act [Cap. 95 R.E. 2019] (“the DCEA”), as amended, read together with paragraph 23 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2022] (“the EOCCA”). It is alleged that on the 14th day of August 2023, at Miwaleni Mlandizi area within Kibaha District in the Coast Region, the accused was found in possession of narcotic drugs, namely cannabis sativa, commonly referred to as bhang, weighing 115.82 kilograms. Following the accused's plea of not guilty, the trial began with the prosecution, represented by Ms. Asifiwe Mnzava, Ms. Doris Kawonga, Mr. 1 Ditrick Mapunda and Mr. Charles Magai, all learned State Attorneys, presenting its case. Representing the accused on the adversary side were Messrs. Oswald Mpangala and Bugeza Mtalemwa, both learned Advocates. A total of six witnesses were called, and seven exhibits were introduced and admitted into evidence to support the prosecution case. The narrative that emerges from the evidence is simple and easy to follow. On the evening of 14th August 2023, while patrolling Msufini, Assistant Inspector Lauriano Charles Nziku (PW2) of Mlanzi Police Station within Kibaha District was alerted to the presence of cannabis stored in a house within the Kafulusu area. After contacting the local leader, commonly known as mjumbe and coordinating with his assistant, David Timotheo Shuma (PW3), PW2 conducted a search of the house resided by Lucy Romanus Ndunguru, the accused herein. He discovered four sacks containing leaves suspected to be cannabis sativa in one of the rooms. PW2 seized them, documented the process in a certificate of seizure (Exhibit P4) signed by witnesses (PW3 and DW2), and transported them together with the accused to the Mlandizi Police Station. At the police station, PW2 entrusted the sulphate bags of suspected narcotic drugs to F3065 SGT Austin, the Criminal Records Office (CRO) In-charge, now deceased. A case was subsequently opened under number 2 MLZ/IR/1707/2023, and each sulphate bag was properly labeled with that number. A day later, on 15th August 2023, F3065 SGT Austin handed over four sulphate bags suspected to contain narcotic drugs to the investigator, F3960 D/SGT Juma (PW6). PW6 then transferred the bags to the exhibit keeper, E8491 SGT Chumu (PW4), and the

transaction was recorded in the court exhibit register, commonly referred to as PF-16 (Exhibit P5) under entry number 201/2023, with both PW6 and PW4 signing PF13. PW4 further labeled each sulphate bag with the case number and exhibit register number 201/2023. He then stored the bags in the exhibit room until the next day, on 16th August, 2023 when he handed them over to G3952 D/CPL Falu (PW5) for delivery to the Chief Government Chemist for analysis. After receiving the exhibits, PW5 transported them to the Chief Government Chemist's office in Dar es Salaam. There, he handed them over to Theodory Ludanha (PW1), a chemist, using a forensic laboratory submission form (Exhibit P6). This form, which had been completed by PW5, contained a request for forensic examination of the exhibits. In his testimony, PW1 confirmed that four sealed sulphate bags containing dried leaves, suspected to be cannabis, were handed over to him by PW5, and he subsequently registered them under Lab No. HQ023-01755. He stated that he proceeded to weigh the contents, which totaled 115.82 kilograms, and extracted samples for analysis. Later, and in the presence of PW5, PW1 carried out a preliminary test using the Duquenois-Levine reagent. The reaction resulted in a purple color, confirming the presence of cannabis in all the leaves. Using the GCLA wax seal, he sealed the exhibits, signed them, affixed the label Lab No. HQ023-01755 on each sulphate bag, and then returned them to PW5. Besides signing Exhibit P6, PW1 filled out and signed the Sample Receipt Notification Form (Exhibit P1), which confirmed the receipt of four sulphate bags containing the suspected narcotic drugs. As PW5 departed, PW1 conducted a confirmatory test using Liquid Chromatography Mass Spectrometry (LC-MS). The test detected tetrahydrocannabinol (THC), thereby verifying that the substances in the sulphate bags as narcotic drugs, namely cannabis sativa. Based on these results, PW1 prepared a Government Chemist Analyst Report (Exhibit P2) which was approved by the Acting Director on 21st August 2023. Meanwhile, on the evening of 16th August 2023, PW5 returned the sulphate bags containing cannabis sativa back to PW4. The latter re-registered the items as exhibit entry number 204/2023 and kept them in the 4 exhibit room. In September 2024, PW4 temporarily transferred control of the exhibit room to SGT Joseph due to his training commitments. Upon his return in November 2024, PW4 found that Joseph had handed over the exhibits to PW2 for the court proceedings. The four sulphate bags containing cannabis sativa were collectively admitted into evidence as Exhibit P3, and the witness statement of F3065 SGT Austin, who is reported to be deceased, was admitted under Section 34B(2) of the Evidence Act [Cap. 6, R.E. 2022) as Exhibit P7. After the prosecution rested its case, the accused was found to have a case to answer. Upon being notified of this, she chose to defend herself under oath and called one additional witness in addition to her own testimony. The accused testified as DW1, stating that her parents, Romanus and Antonia, are both deceased, with her mother passing away in 2023 and her father in 2022. She claimed that she permanently resides in Songea, Nyasa District, Kiagala Ward, Tumbi Village and has five siblings, including Fadhili. DW1 explained that she had been in Miwaleni, Kibaha, from March to August 2023, caring for her sick mother until her mother's death in April 2023. After losing her mother, she remained at the family house in Miwaleni, waiting to secure transport fare for her return to Songea. 5 In her testimony, DW1 recounted that on 14th August 2023, while at her aunt's house, she was approached by someone, who later identified himself as a police officer and was instructed, along with her aunt, to proceed with him to her mother's house. Upon their arrival, they found two armed officers

positioned outside the house, and a search was carried out after other police personnel joined them. She explained that the police officers broke into a locked room belonging to her brother and claimed to have found four green bags containing cannabis sativa. Despite denying ownership of the bags, DW1 stated that she was still taken into custody. DW1 further testified that the police did not verify the contents of the bags in her presence. She firmly denied any involvement with cannabis and clarified that the house where the search took place belonged to her late mother. DW1 emphasized that she did not share a room with her brother, Fadhil, who was involved in charcoal work, and that the room where the bags were allegedly found belonged to her brother. The accused called her aunt, Asha Mrisho Kuya (DW2), to support her defence. DW2 confirmed that the accused had traveled from Songea to Visiga Miwaleni to care for her ailing mother, who later passed away in 2023. She 6 stated that the accused had been staying at her late mother's house during this period. The accused was at her (DW2's) house when a person arrived and asked them to proceed to the accused's house. Upon reaching the house, DW2 saw two police officers standing outside, and one of them notified the accused about their plan to search the house for narcotics. It was her testimony that the accused, who lived there with her brother Fadhili, allowed the officers to proceed with the search. According her, the officers searched three rooms without finding anything. However, the fourth room, which was locked and identified as belonging to the accused's brother, was forcibly opened by the officers. Inside, they found bags that they alleged contained cannabis. The officers took the bags outside, and DW2, along with others, signed a form documenting the seizure. DW2 admitted to signing the form (Exhibit P4) as a witness but stated that she did not verify the contents of the form or inspect the bags to confirm what they contained. She also mentioned that she could not recall whether the accused signed Exhibit P4. Having considered the evidence presented by both parties, and recognizing that this is a criminal case, the main issue for determination is whether the prosecution has proved its case beyond a reasonable doubt. 7 As per sections 15(1)(a) and 3(iii) of the DCEA, under which the accused is charged, and section 2 of the DCEA, which considers possession as part of trafficking, the resolution of the main issue depends on whether the accused was found in possession of 115.82 kilograms of cannabis sativa (Exhibit P3). It is worth mentioning that, during the preliminary hearing, the parties agreed upon three memorandum facts, two of which are as follows:

1. That on 14/08/2023, the police officers searched a house at Miwaleni- Mlandizi area, in which the accused person was living with her brother, Fadhil Kuya.
2. That upon the search, four sacks containing substances suspected to be narcotic drugs were retrieved from a room which the accused person claimed belonged to her brother, Fadhil Kuya. Based on the above, the parties were not at issue that the search was conducted at a house where the accused lived with her brother, Fadhili Kuya, and that four sulphate bags containing suspected narcotic drugs were retrieved from a room the accused claimed as her brother's. Under section 192(4) of the Criminal Procedure Act [Cap. 20, R.E. 2022], these facts are deemed to have been established and require no further substantiation. 8 Therefore, the prosecution needed to furnish evidence proving the accused's involvement in possessing the four sulphate bags of narcotic drugs found in the house in question. In his testimony, the

seizing officer (PW2) and the investigator (PW6) refrained from asserting that the room where the narcotic drugs were discovered was under the ownership or control of the accused, thereby failing to counter the defence's position. During cross-examination by Mr. Mtalemwa, however, PW2 agreed that the accused had indicated the house was owned by her and her siblings. This evidence was supported by the witnesses (PW3 and DW2) to the search who testified that, the four sulphate bags were recovered in the room which the accused informed them belonged to his brother who was not present. Therefore, the ownership of the room in which the narcotic drugs were found was a critical aspect of this case, but it was not adequately addressed in the prosecution's evidence to refute the defence claim. Consequently, I find no valid basis to dismiss the accused's longstanding assertion that the narcotic drugs were retrieved from her brother's room. If the drugs were located in a room owned by her brother, the accused's culpability rests on whether it can be shown that she had constructive possession of the narcotics drugs stored therein. It is well-established principle in this jurisdiction that for a person to be found in possession, whether actual or constructive, of certain goods, it must be proven that they had knowledge of the goods' presence and exercised control over them. Alternatively, it must be shown that the goods arrived in their presence by invitation or arrangement. This legal principle has been reaffirmed in cases such as *Moses Charles Deo vs Republic* [1987] TLR 134, *Nurdin Akasha Habab vs Republic* [1995] TLR 227, and *Seng Lei vs The DPP*, Criminal Appeal Nos. 16A of 2016 and 17 of 2017 (unreported). Applying this principle to the case at hand, the sole evidence connecting the accused to the possession of the narcotic drugs is the testimony of PW2, who claimed that the accused had the keys to the house and used them to unlock the room where the drugs were found. This assertion, however, is contradicted by PW3 and DW2, the independent witnesses listed in the certificate of seizure (Exhibit P4), who testified that the door to the room where the narcotic drugs were recovered was locked and had to be forcibly opened by the officers. When cross-examined by Mr. Mpangala, PW3 clarified that it was PW2 who had used a hoe from one of the 10 rooms to break the lock. This narrative finds support not only in the testimony of DW1 and DW2 but also in that of the investigator (PW6). Since the manner in which the room was accessed is crucial in determining the accused's possession or knowledge of the narcotic drugs found therein, I find PW2's testimony to be lacking credibility. The contradictions between PW2's account and the testimonies of PW3, PW6, DW1, and DW2 cast doubt on the reliability of PW2's evidence. The reason for this is that, if the accused did not possess the keys to the room, as confirmed by the testimonies of PW3, PW6, DW1, and DW2, it is plausible that she was unaware of her brother's use of the room to store cannabis sativa, as the room did not belong to her. Such uncertainty creates a doubt that must be resolved in her favor. Furthermore, no evidence has been presented to suggest that the four sulphate bags containing the narcotic drugs could not have been stored in the room without the accused's knowledge. Such evidence would have been crucial in establishing that the accused had constructive possession of the drugs. In the absence of such proof, the link between the accused and the drugs remains speculative, and the case against her is weakened. 11 For these reasons, I conclude that the evidence provided is insufficient to establish the accused's possession or knowledge of the

narcotic drugs found in her brother's room. To make matters worse, the investigator (PW6) stated that the investigation into locating Fadhil Kuya, the accused's brother, whose room was found with narcotic drugs, was still ongoing. He further conceded that the investigation file pertained to this case and claimed that the accused had revealed her brother's engagement in narcotic drug dealings. In light of this, it is unclear why the prosecution hastily charged and prosecuted the accused while PW6 asserted the investigation into the matter was still underway. Taking these factors into account, I am firmly of the opinion that the prosecution has failed to prove its case beyond reasonable doubt, as required by law. Before I wrap up, I would like to highlight that, from the prosecution's evidence, this case illustrates how lapses in the investigative process can lead to the unjust detention of an innocent person, while the actual wrongdoer is left at large. This is particularly troubling in cases involving offences that carry bail restrictions. It is therefore essential for investigative agencies to carry out their work effectively and professionally to prevent miscarriages of justice and to ensure that the right individuals are held accountable. In the final result, I find the accused, Lucy Romanus Nduguru, not guilty of the charge of trafficking in narcotic drugs. Therefore, I acquit her of the offence charged and order her release from custody, unless there are other valid legal grounds for her detention. DATED at DAR ES SALAAM this 13th day of December, 2024. S.E. KISANYA JUDGE Delivered delivered this 13th day of December 2024 in the presence of Ms Grace Ndanzi, learned State Attorney for the Republic, Mr. Oswald Mpangala, learned Advocate for the accused, the accused person, Hon. S. Minja, Judge's Law Assistant and Ms. Angel, RMA. Right of appeal is explained. S.E. KISANYA JUDGE 13/12/2024 13 ORDER The four sulphate bags containing cannabis sativa (Exhibit P3) are to be destroyed in compliance with the Drug Control and Enforcement Act [Cap. 95, R.E. 2019] as amended, along with its Regulations. In the interim, Exhibit P3 shall be kept in the custody of the Tanzania Police Force until the execution of this order. S.E. KISANYA JUDGE 13/12/2024 14

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