

TANZANIA / JUDGMENT

## AZIZI JUDGMENT

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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. 24 OF 2023 THE REPUBLIC versus kZTZI RASHID ABDALLAH

## JUDGMENT

05th July & 13th September 2024 OTARU, J.: Azizi Rashid Abdallah stands charged with two counts of drug trafficking offences. Both counts relate to Trafficking in Narcotic Drugs contrary to section 15(l)(a) and 3(iii) of the Drugs Control and Enforcement Act [Cap. 95 R.E. 2019] read together with paragraph 23 of the First Schedule to, and Section 57(1) and 60(2) of the Economic and Organized Crimes Control Act [Cap. 200 R.E. 2019]. The 1st count on trafficking cannabis sativa {bhang} leaves weighing 500.55 Kilograms, while the 2nd count on trafficking of one sack of cannabis sativa seeds weighing 26.43 Kilograms. The information that instituted the proceedings and facts read out during the preliminary hearing reveal that both offences were allegedly committed on 12th February 2021 at Msongola A within Temeke District in Dar es Salaam Region. At the plea taking and preliminary hearing, the accused person pleaded not guilty to the Information. He also disputed all the facts constituting the offences save for his names in the order of AziziAthumani Rashid'r, that he was arrested and arraigned in court. The plea of not guilty pushed the proceedings to the trial. At the trial, the Prosecuting Republic was represented by the able team of Mses. Marietha Maguta, Diana Lokondo and Blandina Mnung'a, learned State Attorneys. The accused, on the other hand enjoyed skillful legal representation of Mr. Josephat Mabula, learned Advocate. Counsel of both sides and everyone involved are thanked for their tireless effort in assisting the court in determination of this case. In proving their case, the Prosecution called 6 witnesses and tendered 6 exhibits. The accused on the other hand did not call any other witness apart from himself. He testified as DW1. The statements of PW1 (exhibit DEI) and PW6 (exhibit DE2) were admitted for purposes of contradicting these Prosecution witnesses and impeaching their credibility. 2 The Prosecution's case is to the effect that in the morning of 12/02/2021 while Joseph Pius Mirambo (PW3) was patrolling with his colleagues around Temeke area, he received a tip off from an informant about consignment of narcotic drugs 'bhang'i'bQvnq trafficked at a house in Msongola A. Immediately after receiving the information, PW3 and his team departed to the provided address which happened to be the accused's home. Following the set down procedures, PW searched the premises witnessed by Rashid Athumani (PW4) and the accused person. According to PW3, there was nothing found in

the sitting room or the dining room. As they moved towards the rooms, they found nothing in the 1st room either. In the 2nd room, they found some money and sacks which they suspected of containing narcotic drugs bhanghi. Upon inspection and counting the sacks, it was revealed that 38 sacks contained dry leaves and one sack had seeds. For purposes of identification, PW3 marked each sack with letters YZ and seized them (exhibit PE2) together with cash money totaling TZS. 2,000,000/= (exhibit PE5) (believed to be proceeds of sale of narcotic drugs) via certificate of seizure (exhibit PE4) prepared by PW3 and signed by PW4 together with the accused. PW4 appeared before the court but was declared hostile in the course of his testimony. 3 Upon arrest of the accused and seizure of exhibits PE2 and PE5, the arresting officer PW3 took the accused person along with the exhibits to Mbagala Police Station. At the station, he presented the accused person to the lockup and handed the exhibits over to the then exhibit keeper D.8757 Sgt. Jonas, currently Jonas Nyatoro Mahinya (PW5). PW5 recorded the exhibits under entry No. 61/2021 of Exhibit Registry PF16 (exhibit PE6) and opened file number MBL/IR/1622/2021. Due to insufficiency of storage capacity at Mbagala Police Station, PW5 was directed by OC-CID Temeke to transfer the exhibits to Chang'ombe Police Station as they had more storage capacity. At about midday of the same day, PW5 signed off the register (exhibit PE6) and transferred exhibits PE2 and PE5 to Chang'ombe Police Station as directed. Upon his arrival there, he handed the exhibits to exhibit keeper S/Sgt Anthony Masanja (PW6). PW6 registered the exhibits under entry No. 106/2021 of exhibit registry PF16. On 17/02/2021 F.4291 D/Sgt Andrew (PW1) of Mbagala Police Station was directed to submit exhibit PE2 to the chief Government Chemist Laboratory Authority (GCLA) for analysis. He went to Chang'ombe Police Station and was handed over the exhibit by PW6. He counted and confirmed the contents of the 39 sacks, sealed and marked each sack with 4 No. MBL/IR/1622/2021 in the presence of PW6 and the accused. He then signed the exhibit register under entry 106. The exhibit was received by chemist Joseph Jackson Ntiba (PW2) via Submission Form No. DCEA 001 (exhibit PE1) which was signed by PW1 and PW2 himself. PW2 registered the exhibit as Lab. No. 447/2021. He also weighed and sampled the contents of each individual sack. Before returning the sacks to PW1, he recorded laboratory registration number Lab. 447/2021, signed and sealed each sack with the seal of the laboratory. He then analyzed the samples and confirmed that dry leaves are narcotic drugs bhanghi or cannabis sativa weighing 500.55 kilograms and the seeds are seeds of bhanghi plant weighing 26.43 kilograms. Upon his return to Chang'ombe Police Station PW1 handed over exhibit PE2 back to PW6 for safe keeping. The report of the chemist was conveyed through Form No. DCEA 009 dated 04/03/2021 (exhibit PE3). At the closure of the Prosecution's case, the court found the accused to have a case to answer. Accordingly, the accused was invited to defend himself against the accusation. The accused testified as DW1 upon affirmation and vehemently denied trafficking in narcotic drugs as charged. Although he admitted his house being searched, he claimed that nothing was found there and that exhibit PE2 was seized from the house 5 of his landlady, one M<sup>^</sup>/z/awho lived in a separate house within the same compound as him. Having denied the charges, the accused prayed for his acquittal. In a nutshell, that was the evidence of the Prosecution and the Defense sides. At the end of the trial, Counsel filed their closing submissions as ordered by the court. In their submission, learned Advocate for the accused vehemently argued that the Prosecution failed to discharge their duty of proving the offence against the accused person. They claimed

that the evidence is silent as to how exhibit PE2 found its way to PW1 (a month before retirement of PW6 in July 2023), who eventually tendered it here in court. They also argued that the state of the exhibit suggests that it was tampered with. Concluding that the chain of custody of exhibit PE2 was not maintained to the required standard as to prove that what was tendered in court is the same as what was seized on the date in question, thereby creating a doubt in favor of the accused, the Defense urged this court to acquit the accused. In support of their arguments the Defense relied on the cases of Majid John Vicent @Mlindagabo & Another v. R, Criminal Appeal No. 264, R v. Amos Chacha Marwa & 3 Others, Econ. Session No. 3 of 2023 (HC Musoma) DPP v. Shirazi Mohammed Sharif, Criminal Appeal No. 184 of 2005, 6 DPP v. Mussa Khatibu Sembe, Cr. Appeal No. 130 of 2021 (CAT Tanga), Jumanne Athumani Mketo v. R [1982] TLR 232 and Boniface Mathew Malyongo @Shetani Hana Huruma & Another v. R, Criminal Appeal No. 358 of 2018 (CAT Dodoma), all unreported. The learned Advocate as well argued that having declared PW4 hostile, the court should expunge his testimony from the court record. Believing that in so doing, the effect of it will be that search and seizure was conducted in the absence of an independent witness. In conclusion, Counsel humbly prayed for the court to find the accused not guilty, henceforth acquit him. The Prosecution, on the other hand, argued that they proved the case against the accused to the required standard; starting with search and seizure of exhibits; arrest of the accused; credibility of witnesses; maintenance of the chain of custody of exhibits coupled with admission of the accused on circumstances of his arrest and search, as well as his failure to shake the case of the Prosecution. In the Prosecution's contention, there is nothing to suggest that there was any tampering of exhibits or that the chain of custody was broken. They humbly urged the court to find the accused guilty and convict him as charged. Upon conclusion of the trial, the court is bound to weigh the evidence adduced by the Prosecution in relation to that of the Defense and make a finding, as to whether the Prosecution has been able to discharge the duty of proving the case against the accused person and if the accused has managed to cast doubt/s on the Prosecution's case. The duty gets its legitimacy from the provision of section 112 of the Evidence Act [Cap. 6 R.E. 2019], which provides that: 'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.' It is vital to underscore that this being a criminal matter, section 3(2)(a) of the Evidence Act (Cap. 6 R.E. 2019) is applicable. That is, in criminal matters a fact is said to be proved when the Prosecution proves beyond reasonable doubt that such fact exists. In other words, the guilt of the accused must be established beyond reasonable doubt. Also see the case of Nathaniel Alphonse Mapunda & Benjamin Alphonse Mapunda v. Republic [2006] TLR 395. Generally, and always such duty lies with the Prosecution, except where any statute expressly provides otherwise. Consequently therefore, the issue for determination before this court is whether the Prosecution has proved the case against the accused, 8 beyond reasonable doubt. However, determination of this issue is directly dependent on the following sub-issues: -

1. Whether the dry leaves and seeds suspected of being narcotic drugs are indeed narcotic drugs; and

2. If No. 1 above is affirmative, whether the Prosecution has established the link between the narcotic drugs and the accused person. Starting with the first sub-issue, PW2, the chemist confirmed receiving 39 sacks (exhibit PE2) from PW1 on 17/02/2021. Before this court, PW2 identified the sacks as the ones he was handed over by PW1. He did so from appearance, the marks and the contents. He testified that he weighed the contents of each of the thirty-nine (39) sacks and analyzed their samples then prepared his Report. As stated earlier, the Report was admitted in court as exhibit PE3. It shows that the contents of the 38 sacks were 500.55 kilograms of narcotic drugs bhanghi (cannabis sativa) and the sack of seeds being 26.43 kilograms of seeds of the bhangi plant (cannabis sativa). It is important to note that seeds are excluded from the definition of the word 'cannabis' under section 3 of the Drug Control and Enforcement Act (supra). As Such, it is not a narcotic drug and possession thereof is not an offence under the charged provision. By virtue of Section 48A(2) of the Drug Control and Enforcement Act (supra), a report signed by a Government Analyst is admissible as evidence of the facts stated therein without formal proof. Such evidence is conclusive, if it is not rebutted. Exhibit PW3 being a report of a chemist falls squarely within the ambits of this section. Apparently, it has not been rebutted. As such, the contents of 38 sacks are hereby proved to be narcotic drugs cannabis sativa or bhanghi, while one sack containing seeds is proved not to be a narcotic drug but seeds of such plant. Consequently, as no conviction may lie for possession of bhangiseeds, the offence of drug trafficking is not valid for the 2nd count but only for the 1st count. Having established that the dry leaves are narcotic drugs cannabis sativa or bhanghi but not the seeds, the next sub issue is whether the Prosecution has established the link between the said narcotic drugs and the accused person. As stated earlier, the accused had admitted being searched at his home. Although he claimed that exhibit PE2 was seized from the house of his land lady Warda, and that he was coerced by Police into signing the io search warrant, none of these are the focus of his Counsel's final submissions. The Defense submissions are based solely on the chain of custody d exhibit PE2. Claiming that there is no evidence showing how exhibit PE2 reached PW1, which according to the Defense, raises doubt as to whether exhibit PE2 is the same as what was seized at Msongola A. First and foremost, PW3 was not cross examined by the accused along the lines of his Defense. Such that he did not challenge the circumstances of his arrest, seizure of exhibits PE2 and PE5 from his place and signing of the certificate of seizure. It is trite law that, a person who fails to cross-examine a witness on a certain matter will be estopped from asking the court to disbelieve what the witness testified against him, as narrated in the case of Nyerere Nyague v. R, Criminal Appeal No. 67 of 2010, (unreported). I strongly believe that the story of Warda, and retrieving exhibit PE2 from her house as well as coercion in signing the search certificate are mere afterthoughts which do not shake the evidence of the Prosecution. In addition, the accused admitted that PW4 was present during search. Even though PW4 was declared hostile and his testimony may not be relied on by the court, it is imperative to note that the fact that the accused himself admits that search was conducted in the presence of 11 independent witness PW4, this fact does not need further proof for being undisputed. Such that, based on the evidence of PW3, DW1 and exhibit PE2, even in the absence of PW4's own testimony, there is no doubt in my mind that exhibit PE2

and PE5 were indeed seized from the accused person's house. In further disassociating the accused from exhibit PE2, the Defense Counsel questioned the chain of custody of the exhibit. I am in agreement with the Defense that it is crucial that the chain of custody of an exhibit is well maintained in order to ensure that there is no human intervention that could possibly tamper with the exhibit or plant anything to the detriment of the accused. As per the cases cited by the Defense Counsel, the consequence of breaking the chain of custody is rejection of the exhibit. This is not disputed. It should however be noted that there are circumstances where the exhibit will not be rejected even if the chain of custody is broken. This has been well illustrated by the Court of Appeal of Tanzania in the case of Abas Kondo Gede v. R, Criminal Appeal No. 472 of 2017 (CAT Dsm) (reported) where the court held that: even where the chain of custody is broken, the court may still receive the exhibit into evidence depending on the prevailing circumstances in every particular case, provided it is established that no injustice was caused to the other party'. Having seen that evidential value of an exhibit does not necessarily diminish merely because the chain of its custody is broken, the next item for determination is if indeed the chain of custody of exhibit PE2 was broken or otherwise. The chain of custody may be established by paper trail and/or by oral account of the witness/es. This is well narrated in the case of Chacha Jeremia Muri mi and 2 Others v. R, Criminal Appeal Mo. 551 of 2015 (unreported). In the case at hand, exhibit PE2 can be traced from the time of seizure up to July 2023 through oral testimonies of PW1, PW2, PW3, PW5, PW6, DW1 as well as the seizure certificate, exhibit submission form, exhibit register and the chemist's report (exhibits PE4, PE1, PE6 and PE3, respectively). There is clear oral and documentary account which provides a detailed sequence of how exhibit PE2 changed hands prior to July 2023. Evidently, the defense side does not seem to dispute that. The dispute arises only after July 2023 a month before retirement of PW6 who assured the court that all exhibits were placed under the custody of his assistant Cpl. Kennedy. 13 Although PW6 retired from service in July 2023, exhibits PE2 and PE5 continued to be kept in the same exhibit room until they were tendered in this court. Exhibits PE2 and PE5 were identified by PW1, PW3, PW5 and PW6 as the same that were seized from the accused and taken to Chang'ombe Police Station on 12/02/2021. PW2 as well identified exhibit PE2 as the one that he analyzed on 17/02/2021. Regarding exhibit PE2, as stated earlier, DW1's claim is that the same were retrieved from his landlady's house. At no point did he say that the sacks have been tampered with, even with their visibly dilapidated state. All these witnesses had noted that the original light green sacks had disintegrated, losing much of the volume of their contents. This is notably so. The green sacks are visibly thin, soft and do not look durable. Only those with white sacks underneath (8) are intact. The rest of the sacks are dilapidated. Clearly, they have been put inside more durable white sacks in order to facilitate their storage and transportation to court. From the marks pointed out and observed by the witnesses, the sacks are without doubt the same as those seized from the accused on 12/02/2021. Thus, it is the views of this court that even in the absence of the testimony of Col. Kennedy, the chain of custody of exhibit PE2 was well maintained including when it was sent for analysis. The analysis report being conclusive evidence of the nature of the contents. It is my considered view that the fact remains that 14 what was

retrieved from Msongola A is 500.55 kilograms of cannabis sativawti a sack of seeds. What followed thereafter, indicates that exhibit PE2 remained in the same location and there were no changes save for the same being taken over by his assistant, even if the chain was broken after retirement of PW6, the court finds that no injustice can be caused to the accused by giving the exhibits the evidential value they deserve. As such, the Prosecution has successfully established the link between the narcotic drugs (exhibit PE2) and the accused person. As stated earlier, during cross examination of PW6, the Defence Counsel sought to shake the credibility of PW1 and PW6 by raising what he called contradictions from the statements of these two witnesses (exhibits DEI and DE2 respectively). He pointed that PW6 stated that PW1 arrived at the station with the accused; that PW1 sealed and labelled exhibit RE2 prior to its delivery to the Chief Government Chemist; that the exhibit was marked MBL/IR/1622/2021; and that the exhibit was registered in the exhibit book after it was returned from the Government Chemist; while such details are not reflected in the statement of PW1. I am alive of the rule which requires to make an assessment or evaluation regarding the gravity of contradictions or discrepancies founded on the Prosecution witnesses. In the case of Dickson Elia 15 Nsamba Shapata and Another v. Republic, Criminal Appeal No. 92 of 2007 Court of Appeal of Tanzania (unreported), the court held that;- 'In evaluating the discrepancies, contradictions and omission it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statement. The court has to decide whether inconsistencies or contradictions are only minor or go to the root of the matter.' I have thus gone through the statement of PW1 (exhibit DEI) in which the witness explained how he sent exhibit PE2 to the Government Chemist. Here in court, he had provided more details and clarified the whole process which was not shaken during cross examination. Both PW6 and PW1 had clarified their statements when testifying in court. Both stated that the accused was present on 17/02/2021 when exhibit PE2 was taken to the chemist, that PW1 sealed and marked the exhibit before taking it to the chemist and signing off the exhibit register at PW6's. Honestly speaking, I do not see the testimonies of PW1 and PW6 to have any contradictions either between themselves or in comparison to their or each other's statements. Rather, there are minor omissions of details in the statements which were clarified during examination in chief as well as cross examination. In the circumstances, the court finds the 16 omissions to have been minor and do not go to the root of the matter. This could be why the Defense Counsel did not pursue this point in his final submissions. Equally, I do not see any reason for impeaching credibility of either PW1 or PW6. As to whether the Prosecution has proved the case beyond reasonable doubt, credibility and reliability of witnesses comes to play. In the course of testifying, PW4 was declared to be hostile witness hence the court decided not to rely on his evidence. The remaining witnesses in this case are Police whose evidence is weighed in the same scale as of any other person as stipulated in the case of Jimmy Anderson Mwapashi

- v. Republic, Criminal Appeal No. 419 of 2007, (CAT Mbeya) (unreported), that;- 'The evidence of police officers stands on the same footing as that of any other witness, and that cannot be rejected simply because the witness is a police officer. The merit of the evidence is to be

considered and not the person who comes to depose it' It is also trite law that every witness has a right to be believed unless there is good and cogent reason not to do so. There is no reason for the court to disbelieve any of the witnesses apart from PW4. This Judgment 17 is therefore based on the testimonies of PW1, PW2, PW3, PW5, PW6 and DW1, as well as the supporting documentary and non-documentary exhibits. In consequence of the foregoing, I am of the certain mind that the Prosecution's evidence has proved beyond reasonable doubt the 1st count of trafficking in narcotic drugs against the accused Azizi Rashid Abdallah. Therefore, I find the accused Azizi Rashid Abdallah guilty and I hereby convict him with the offence of trafficking in narcotic drugs contrary to the provisions of section 15(l)(a) and (3) (iii) of the Drugs Control and Enforcement Act [Cap. 95 R.E. 2019], 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]. It is so Ordered. DATED at Dar es Salaam this 13th day of September, 2024. M.P. Otaru JUDGE 18 SENTENCE The accused Azizi Rashid Abdallah is convicted on the 1st count of trafficking in narcotic drugs, an offence that carries a maximum penalty of life imprisonment under section 15(l)(a) of the Drug Control and Enforcement Act [Cap. 95 R.E. 2019], read together with the proviso to section 60(2) of the Economic and Organized Crime Control Act [Cap. 200, R.E. 2019]. This position finds support in the case of Islem Shebe Islem v. R, Criminal Appeal No. 187 of 2020 (unreported), where the Court of Appeal enhanced the sentence of thirty years meted by the trial court to life imprisonment. In that regard and despite the mitigating factors presented by the Defense, the court is bound by the statutory sentencing provisions. Considering further the substantial quantity of cannabis sativa involved in this case (500.55 Kgs), the court finds it appropriate to impose the maximum penalty as set out by law. Therefore, the accused, Azizi Rashid Abdallah is sentenced to life imprisonment in consonance with the dictates of section 15(l)(a) and (3)(iii) of the Drug Control and Enforcement Act (supra). This sentence is intended to deter others and underscore the seriousness of drug trafficking offences. M.P. Otaru Judge 13/09/2024 19 Court: Conviction and Sentence pronounced in open court, this 13th day of September, 2024 in the presence of Mses. Elizabeth Muhangwa (SSA) and &. Benedicta Kolle (SA), for the Republic, Mr. Josephat Mabula learned Advocate for the accused, Ms. Farida Kazuvi (JLA) and MsxSajdO&madhani (B/C). ..... Court: The right of appeal against the conviction and sentence is duly explained; parties. Ijl^M.P. Otaru kW Judge 13/09/2024 ORDER Simultaneous with imposition of the sentence of imprisonment, it is hereby ordered, as follows:-

1. The 38 sacks of narcotic drug cannabissativa and one sack of cannabis sativa seeds (exhibit PE2) is hereby ordered to be destroyed in accordance with the law. Until it is destroyed, the exhibit shall remain in the custody of Tanzania Police Forces.
2. Tanzanian Shillings Two Million only (TZS. 2,000,000/=) is forfeited to the Government of the United Republic of Tanzania. 20 It is so Ordered. M.P. Otaru Judge 13/09/2024 21

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