

TANZANIA / JUDGMENT

republic vs mashaka nathanael magia 2021 tzhcced 9 27 july 2021

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IN THE HIGH COURT OF TANZANIA CORRUPTION AND ECONOMIC CRIMES DIVISION AT
TABORA ECONOMIC CASE NO. 02 OF 2021 THE REPUBLIC Versus MASHAKA S/O NATHANAEL @
MAGIA

JUDGMENT

26/07/2021 & 27/07/2021 E.B. LUVANDA, J. The accused person Mashaka s/o Nathanael @ Magia is arraigned for trafficking in narcotic drugs contrary to section 15(l)(b) of the Drugs Control and Enforcement Act No. 5 of 2015, 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. 2002 as amended (first count) and possession of seeds in production of drugs contrary to section 11(l)(b) of Act No. 5 of 2015 (supra) (second count). It is alleged in the particular of offence that on 5/8/2017 at Igombe Forest Reserve within Uyui district in Tabora region, the accused trafficked in narcotic drugs, namely cannabis commonly bhang weighing 63.7 kilograms and was found in possession of seeds in production of drugs to wit cannabis sativa seed weighing 132.9- kilograms. The accused person denied the information, A recap of evidence adduced at a trial, is as below. It was the prosecution evidence in particular PW1 (SSP Shedrack Kigobanya) and PW3 (SP Bagati Kadelia Nhende) that on 5/8/2017 at 10.25 hours they conducted an operation in Igombe Forest Reserve, where they searched a hut plastered by mud soil and roofed by thatching grasses, arrested the accused therein and seized two sacks containing leaves suspected to be cannabis sativa and two sacks containing seeds suspected to be seeds of cannabis sativa via a certificate of seizure exhibit P1. The four sacks of cannabis sativa were admitted as exhibit P2 collectively. Thereafter they took the suspect and exhibit P2 proceeded to Tabora Central Police where exhibit P2 was handed over to CRO room and the suspect was remanded in lockup. Thereafter, PW4 (DC Seth) interrogated the accused and recorded his cautioned statement exhibit P4. 2 On 15/1/2019,. PW5 (WP CpI Dorothea) submitted the exhibit P2 to the weight and measurement agency (via a letter exhibit P5) for measuring weight. The report of weight and measurement agency exhibit P6, indicate that the weight of leaves of cannabis sativa was 63.7 kilograms and seeds of cannabis sativa was 132.9 kilograms. On 16/1/2019 PW5 submitted samples to the laboratory of Chief Government Chemist Lake Zone Mwanza via a letter exhibit P7, for analysis. PW2 conducted physical examination and confirmatory test in respect of sample contained in four small khaki

envelopes labeled A, Al, B, Bl being seeds and leaves, respectively (packed in a nylon envelop) and confirmed presence of chemical compound of tetrahydrocannabinol which according to PW2 is found in the plant of cannabis sativa, as per the report exhibit P3. The accused person on defence, disowned leaves of cannabis sativa and seeds of cannabis sativa exhibit P2 collectively. According to the accused (DW1) he was arrested in possession of five pieces of timber, which fact was supported by his mother one Sara Petro (DW2). The issue for determination, is whether the prosecution managed to prove the information beyond reasonable doubt. 3 While I appreciate the evidence tendered by PW1 and PW3 (arresting and seizing officers) that they seized exhibit P2 inside a hut plastered by mud soil and roofed by thatching grasses wherein the accused was also arrested, at Shokelashuka inside Igombe Forest Reserve. Thereafter, took the accused and exhibit P2 to Tabora Central Police, where PW1 handed over exhibit P2 at CRO room, I also shake hands with the argument of the prosecuting officer Mr. Deusdedit Rwegira learned State Attorney that the testimony of PW1 and PW3 was a direct evidence and the duo gave a consistence account of events on material facts regarding arrest of the accused person and seizure of exhibit P2. However, this testimony falls short: for one thing, it is unknown as to whom PW1 handed over exhibit P2 at the alleged CRO room at Tabora Central Police. No handing over form was tendered to substantiate the alleged handing over. For another, it is unknown as to where exhibit P2 was preserved from the date of seizure on 5/8/2017 to 15/1/2019, when PW5 submitted it to the weight and measurement agency for measurement and thereafter the custody was unaccounted and unexplained until when the exhibit P2 was brought and tendered in court on 20/7/2021. No explanations were offered whether it remained at CRO room for the entire 4 period or not. Unfortunate even PW5 did not explain as to where and who handed over to her exhibit P2 at the time she submitted to the weight and measurement agency. PW5 did not explained to had procured exhibit P2 at the alleged CRO room where PW1 had dumped and abandoned it. PW5 was silent as to the fate and aftermath of exhibit P2 after submission to the weight and measurement agency. This is because the testimony of PVV5 suggest that she only received sample from the weight and measurement agency. It is unknown as to when and who packed and sealed sample of the alleged four envelopes A, Al, B, and Bl packed in the nylon envelop, which were subject for laboratory analysis by PW2. The testimony of PW5 suggest that sample were taken at the office of weight and measurement agency Tabora as aforesaid. Although PW5 was not specific as who actually took, packed and sealed the said sample. Indeed, PW5 did not explain details of packaging material for sample which she submitted to the chief government chemist Mwanza Laboratory. According to a letter exhibit P5 which PW5 said was an introduction letter for the exhibit she submitted to the office of weight and measurement agency, it does not mention PW5 as a submitting officer, rather it mentioned the OC CID Tabora as a leading investigator assisted by D/Cpl Seth (the later testified as PW4). Exhibit P5 5 mention bhang generally, does not mention the alleged two sacks of leaves of bhang and two sacks of seeds of bhang. Admittedly in exhibit P5 the author had asked the measurement officer to take sample of exhibit for submitting to the chief government chemist. However, a letter exhibit P6 (which was a response to exhibit P5), is silent as to who actually took, packed and sealed those samples. Neither indicate to had handed over those samples to PW5, nor show the manner those samples were packed and sealed. Assuming that those samples were handed over to PW5, still it attracts

another query as to where PW5 had preserved it after obtaining it from the measurement officer on 15/1/2019 to 16/1/2019 when PW5 allegedly submitted them to the chemist. This create a serious doubt if at all what was alleged to have been seized from the accused (on 5/8/2017) to wit two sacks of leaves and two sacks of seeds of cannabis sativa, were the same submitted to the weight and measurement agency on 15/1/2019, later transmitted to the chemist on 16/1/2019. It was the testimony of PW5 that the sample were received by the clerk at the office of chief government chemist Mwanza, thereafter taken to the chemist. PW5 did not mention to have handed over to PW2 neither to had seen PW2 when she (PW5) handed over the sample to the alleged clerk at 6 the office of chemist Mwanza. PW2 conceded that the sample were received by one Elizabeth Manyanya, although PW2 attempted to defend that they (PW2 and Elizabeth Manyanya) jointly received it. However, when PW2 was put to task during cross examination, she conceded that a signature reflected in a form attached to exhibit P3, belong to Elizabeth Manyanya who is indicated as the one who received sample from DC Dorothea (PW5). The alleged Elizabeth Manyanya was not summoned to clear the doubt. Unfortunate even the alleged form attached to exhibit P3 (which the learned prosecuting officer insisted that it was for internal use at the office of chief government chemist, citing the testimony of PW2), did not depict description of sample received, that is to say the alleged four envelopes A, Al, B and Bl said to be packed in the nylon envelop, are missing not mentioned therein. More importantly, it was unexplained as to why it took such long period of time to pack and submit the sample in respect of exhibit P2 to the chemist for analysis, to wit from 5/8/2017 to 16/1/2019. At any rate a period of one year and five months which was not accounted for, is disproportionately excessive and therefore inexcusable. There was also no explanation as to why it took such so long period, to submit exhibit P2 from CID office Tabora to the office of weight and 7 measurement agency, which according to PW5 is located on just a walking distance of fifteen or twenty minutes. Seemingly after seizure of exhibit P2, it was mishandled and exchanged hands locally by untraceable people. This can be evidenced by the testimony of PW1 who said that after seizure and on arrival at Central Police Ta bora, he just sprawls it at CRO room. PW1 did nothing more. In other words, PW1 did not bother to make follow up if exhibit P2 was preserved under safe and reliable custody, including to ensure that it is properly handed over to the exhibit keeper and registered or labeled in the exhibit register. In absence of paper trail, and in view of the above depicted shortfalls, loopholes and gaps on the chain of custody, it cannot be said that the prosecution have proved their case on the required standard. This is because there was notable breakage of chain of custody, to the extent of creating serious doubts if at all what was received by PW2 was an exactly samples taken from exhibit P2. To be precisely, there is no evidence to prove that what was received by PW2 is the same package of sealed samples which were taken from exhibit P2. Unfortunate the alleged samples which PW2 said were contained in four small khaki envelops 8 packed in the nylon envelop were not tendered in court for PW5 to establish if are the very same she handed over to the clerk at the office of chief government chemist Mwanza. Although PW2 alleged to had handed over to PW5 on 31/1/2019 after proceedings of analysis were Over, but PW5 was silent on this aspect. Regarding a caution statement exhibit P4, is also suspect, as PW4 who recorded it did not make a declaration that he read it to the accused, neither appended a signature at a certification. Indeed, PW4 stated that the accused is illiterate. This

offends the provision of section 48(2)(a)(ix) and (x) of Act No. 5 of 2015 (supra). More important, the time for commencement and completion of interrogation is confusing, as in exhibit P4 indicate commencement time is 10.00 hours and completion time is 20.44 hours which connote that interrogation had commenced even prior the accused was arrested at 10.25 hours as reflected in exhibit Pl. Again exhibit P4 indicate was recorded on 5/7/2018 being after elapse of eleven months counting from when the accused was arrested on 5/8/2017. This makes a caution statement exhibit P4 unreliable. 9 As a matter of appreciation, majority of the shortfalls adumbrated above were argued by the defence Counsel Mr Justine Saikoni learned Advocate in his closing submission. In view of the above glaring shortfalls, I decline to the invitation by the learned prosecuting officer who argued and forcefully persuaded me to hold that those are mere technicalities curable by the application of overriding objective. But to my view, the depicted anomalies above are so material and substantial which have manifestly dented the prosecution case. I therefore nod with the learned defence Counsel, that the prosecution have failed to prove their case beyond reasonable doubt as required by the law. That said, the information in respect of an offence of trafficking in narcotic drugs contrary to section 15(l)(b) of the Drugs Control and Enforcement Act No. 5 of 2015, 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. 2002 as amended and second count for possession of seeds in production of drugs contrary to section 15(l)(b) of Act No. 5 of 2015 (supra) are dismissed. The accused person is acquitted. \ 7B. Luvanda zJudge 27.7.2021 li

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