

TANZANIA / JUDGMENT

Republic vs

COURT
TANZLIIDECIDED
14 June 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ECONOMIC AND CORRUPTION DIVISION (IRINGA SUB REGISTRY) AT IRINGA. ECONOMIC CASE NO. 1 OF 2023 THE REPUBLIC VERSUS MWASEMA S/O RASHID BAKARI

JUDGMENT

3Cfh May, & 14th June, 2024 I.C. MUGETA, J: Through Oleda John Kahise (PW1) the prosecution has presented evidence that on 31/3/2023 at about 00:30 hour the accused person surrendered himself to Mtandika Health Centre Kilolo District claiming to have serious conditions of constipation. PW1 is a medical attendant at the said health facility. Genoveva Kavela (PW2), is a medical doctor at the Mtandika health centre. She said she attended the accused person and he told her words which implied that he had been sodomized. On that account, the medics refrained from treating him for want of a PF3. She decided to communicate with the police for help. Upon communication with the Ruaha Mbuyuni Police Station and explaining her case, the police insisted the patient must obtain the PF3 first. Treatment was withheld on that account. Page 1 of 11 In the morning, Olaide John Kahise left office and handed over to Veronica Mgandu (PW3) who is a nurse at the health facility. As the accused person was being attended by PW3, his condition worsened. On that account, PW3 testified, the accused person disclosed to her that he had narcotic drugs in his stomach. The nurse informed Salehe Matinya (PW4), the Mtandika hamlet chairman, who informed a policeman called Deus. Deus informed SACP Isa Juma Selemani (PW5) who was the then RCO for Iringa. According to PW5, he left with his team including Inspector Credo Mwakakusyu (PW7), CpI. Joel (PW10) and D/Sgt. Lewis (PW11) for Mtandika health centre where they collected the accused person to Iringa Region Referral Hospital for treatment. At the hospital, Dr. Huruma Mwasipu (PW8) treated the accused person in the presence of Fredy Brighton Chilale (PW9), the Kilimani Street chairman, who had been summoned by the police to witness the process. From 31/3/2023 - 2/4/2023, according to Dr. Mwasipu, he managed to remove from the accused person's stomach, through the anus, 58 pellets which were analysed by Gabriel Jacob Gabriel (PW6), a chemist in Page 2 of 11 the Chief Government Chemist Office and found the contents to be narcotic drugs Heroine type. Consequently, the accused was charged with trafficking in narcotic drugs contrary to section 15(l) (a) & (3)(i) of the Drugs Control and Enforcement Act [Cap. 95 R.E 2019] as amended 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 2022]. On 16/2/2024, the charge was read over to

the accused. He denied it. It was substituted on 25/3/2024. Still the accused pleaded not guilty and the trial commenced. The charge sheet has it that he trafficked the drugs at Mtandika area, Kilolo District. In his defence the accused neither denied nor admitted that he had been at Mtandika Health Centre at any given time. He testified that on 31/3/2023 at around 23:00 hours while at Ruaha Mbuyuni, he was held hostage by two young men who sprayed unknown substance in his face leading to his loss of consciousness. He gained consciousness on 2/4/2023 only to find himself admitted at Iringa Regional Referral Hospital held under arrest. He testified further that he knows nothing about the 58 Page 3 of 11 pellets which were tendered as exhibits P3 - P13 despite admitting that at hospital he had been forcefully made to sign some papers. The issue for my determination is whether the offence charged has been proved beyond reasonable doubts. According to the disputed evidence of prosecution witnesses, the story starts at Mtandika Health Centre, Most prosecution witnesses (PW1, PW2, PW3, PW4, PW5 and PW7) said they met the accused person there. The accused does not dispute this evidence. I consider this fact as proved for the reasons hereunder: The accused person impressed on me that if at all he was at the Mtandika Health Centre, he was unconscious after being intoxicated at Ruaha Mbuyuni on 29/3/2023 at around 23:00 hours. That he gained conscience on 2/4/2023 while admitted at Iringa Region Referral Hospital. This story, even though possible, is highly improbable. According to PW1, the accused presented himself at Mtandika Health Centre on 31/3/2023 at 00:30 hours. PW2 attended him at 00:45 at the health facility and PW3 did the same at 07:30 hours. At 08:00 hours PW4 met him at the facility and at 12:00 hour PW5 and PW7 met him at the same health facility. PW5 and PW7 collected him to Iringa Regional Referral Hospital for health care. All Page 4 of 11 these witnesses said the accused appeared sick but he was conscious. The same apply to Dr. Mwasipu (PW8) who treated him by removing out of his anus a total of 37 pellets on 31/3/2023 by 20:30 hours. This is according to his testimony and that of Credo Mwakakusyu (PW8). I have no reason to doubt the testimony of the said prosecution witnesses whose credibility was not shaken by cross examination. The accused never cross examined any witness who testified on his being at Mtandika Health Centre being sick but conscious. It is a trite principle of law that failure to cross examine a witness on an important matter amount to acceptance of the truth of the evidence of that witness. This was stated in Rashidi Sarufu vs Republic, Criminal Appeal No. 467/2019, Court of Appeal - Iringa (unreported). It follows, therefore, that by 23:00 hours on 29/3/2023, the accused was at Ruaha Mbuyuni as he claims. However, it is not true that he was involuntarily intoxicated. Further, the evidence of the prosecution that he was transferred to Iringa Regional Referral Hospital from Mtandika Health Centre unopposed. This is because in his defence, the accused said he does not know how he got to that hospital. I find this defence a mere prevarication. I move to determine where the 58 pellets came from. Page 5 of 11 The accused denied to know anything about the narcotic drugs. However, Dr. Mwasipu (PW8), Credo Mwakakusyu (PW7), Fredy Brighton Chilale (PW9) and F. 6959 D/Sgt. Lewis said the 58 pellets were removed from his stomach through the anus. PW8 and PW9 are civilians, therefore, independent witnesses. Their credibility was not discredited and I have no reason to doubt them. PW9, specifically, is a street chairman who was summoned to witness the removal of the pellets from the accused's body. Further, exhibit P15 which called "fomu ya uangalizi" shows step by step how the pellets were removed from the body of the accused person starting with 13 pellets at

15:35 hours on 31/3/2023 up to the last pellets on 2/4/2023. This exhibit is what the accused said he was forced to sign. I hold that his evidence is false because he signed the form in the presence of the doctor Mwasipu (PW8) and Fredy Chilale (PW9). Those civilians testified about signing exhibit P15 together with the accused every time he defecated the pellets. They did not testify about use of force and the accused did not question them about being forced to sign it. On the strength of the evidence of the said witnesses that the accused person defecated the pellets and exhibit P15 which contain the Page 6 of 11 record of incidences of removing the pellets from the accused person, I find that the 58 pellets came out of the accused's body. The next question for my determination is whether the pellets contain narcotic drugs heroine type as charged. The evidence of Gabriel J. Gabriel provides a positive answer to this issue. He is a chemist who analysed the contents and concluded that it is heroine weighing 1.01 kgs. His analysis report was tendered as exhibit P14. On the strength of his evidence and exhibit P14, I hold that the pellets (exhibits P3 - P13) contains narcotic drugs heroine type. If the 58 pellets contain heroine, are they the same pellets that the accused defecated? This question seeks to establish the intactness of the chain of custody. I shall trace it in the reverse order. The pellets (exhibits P3 - P13) were sent to Gabriel J. Gabriel (PW6) by D/Sgt. Lewis (PW11) on 5/3/2023. This is proved by exhibit P1. After taking some sample out of it, PW6 sealed the container box (exhibit P2) and gave it back to D/Sgt. Lewis. Lewis had gotten it from CpI. Joel (PW10), the exhibit keeper of police. CpI. Joel got it from Credo Mwakakusyu (PW7) who got it from Dr. Huruma Mwasipu (PW8). PW8 recovered the pellets from the accused's body. The above stated chain of Page 7 of 11 custody of the pellets is contained in exhibit P16 which was tendered by Credo Mwakakusyu. Besides the paper trail, the said prosecution witnesses testified on how they exchanged the exhibits among themselves. DR. Mwasipu testified on recovering the pellets through the anus of the accused person and handing the same over to Credo Mwakakusyu. Mwakakusyu gave them to CpI. Joel. CpI. Joel (the police exhibit keeper) who testified that on 5/4/2023 he sealed them in a box which he gave to D/Sgt Lewis. Lewis took the box to Gabriel for laboratory analysis. After the analysis, Gabriel gave it back to Lewis who again, on 6/4/2023 gave it to CpI. Joel. The said Joel testified that on 26/3/2024 he brought the sealed box to this court and handed it to Gabriel J. Gabriel. Indeed, on the said date, Gabriel unsealed and tendered it in court as exhibit P2. On account of the foregoing oral evidence of the said prosecution witnesses and the chain of custody record in exhibit P16, I hold that exhibit P3 - P13 is the same substance removed from the body of the accused person, analysed by PW6 and established that the contents therein is Heroine. Page 8 of 11 Admittedly, the prosecution evidence contains some contradictions which I must resolve by determining whether they are minor or go to roots of the matter. PW1 said when she met the accused together with PW2, he said he had been sodomised. On her part PW2 testified that he said "nimefanywa vibaya nisaidieni" which implied he had been sodomized. I find the contradiction of no effect because whether he was sodomized or not is not a material fact. Another contradiction is in the evidence of PW6 and PW11. PW6 said, PW11 gave him the pellets for analysis on 5/4/2023 at noon hours while PW11 said it was at evening hours. Indeed, the handing over was on 5/4/2023. As the means of transport PW11 used from Iringa to Dar es Salaam is not established in evidence, I have failed to ascertain between them who is correct. However, I find the contradiction minor one due to human forgetfulness. The material fact which is undisputed is that PW11 delivered exhibit P2

to PW6 for analysis as to the contents of the 58 pellets. To cut the long story short, it is my holding that all the contradictions and inconsistencies in the prosecution evidence regarding occurrences time are minor which does not go to the roots of justice in this Page 9 of 11 case nor have prejudiced the defence of the accused in whatsoever manner. Another thing for my attention is the name of PW9. He said on oath that he is called Fredy Brighton Chilale while in exhibit P15 he is recorded as Fredy Brighton Kilale. I have followed with the committal proceedings and during preliminary hearing his name was recorded as Fredy Brighton Chilawe. On cross examination, the defence counsel wanted to know his actual name. He said it is Fredy Brighton Chilale. I admit that use of different names can lead to identity challenges. I have failed to fathom the reasons for misspelling the last name of PW9. However, as there is no evidence that he is a different person, the probative value of his evidence as a witness is not affected. The story is, however, different if the mix up involves an accused person. For the foregoing, I am satisfied that the 58 pellets were removed from the accused person's body. The said pellets (exhibit P3 - P13) weighs 1.01 kgs and contain narcotics heroine type. The said weight, by any standards, is for commercial use therefore, the accused person was trafficking them. The prosecution has, therefore, proved the case beyond reasonable doubt, the standard required in criminal cases as provided Page 10 of 11 under section 3 (2) (a) of the Evidence Act [Cap. 6 R.E 2022] and the case of Woolmington v. DPP [1935] A.C 462. Consequently, I find the accused person guilty as charged. I convict him under section 15(l)(a) & (3)(i) of the Drugs Control and Enforcement Act read together with paragraph 23 of the 1st schedule to and section 57(1) and 60(2) of the Economic and Organised Crime Control Act [Cap. 200 R.E 2022]. Court: Judgment delivered in the presence of accused person in person, Muzzna Mfinanga, learned State Attorney and Lazaro Hukumu, learned advocate for the accused person. Sgd: I.C. MUGETA JUDGE 14/6/2024 Page 11 of 11

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Prepared on 13 October 2026 · Esheria