

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA CORRUPTION AND ECONOMIC
CRIMES DIVISION AT PAR ES SALAAM ECONOMIC CASE NO. 7 OF 2022 REPUBLIC

1. IBRAHIM SALUM @ HERRY
2. ABBAS MOHAMED @ AHMAD

JUDGMENT

Date of Last Order: 20/09/2023 Date of Judgement: 31/10/2023 Isava, J.: The two accused persons in this case, namely; Ibrahim Salim @Herry and Abbas Mohamed @Ahmed being the first and second accused persons respectively, jointly and together stand charged with the offence 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] read together with paragraph 23 of the 1st Scheduled to and sections 57(1) and 60(2) of the Economic and Organised Crime Control Act [Cap.200 R.E.2019]. The particulars of the offence in the information reveal that on the 6th, of June 2020 at Mbwewe Chalinze area, within Bagamoyo District in the Coastal Region, jointly and together, the accused persons were found i trafficking in narcotic drugs namely Catha Edulis commonly known as Khat (Mirungi) weighing 206.59 kilograms, by using a motor vehicle with registration number T 356 DDW make Toyota NOAH. Both accused persons pleaded not guilty to the information. As the day follows the night, the prosecution had a legal task to prove the case to the required standard. In their bid to prove the case against the accused persons beyond reasonable doubt, the prosecution paraded six (6) witnesses to testify, besides they produced seven exhibits which this court admitted into evidence. On the other hand, both accused persons testified themselves under oath as defence witnesses (DW1 and DW2). They tendered three exhibits witnesses' statements of PW3 and PW6 (Exhibits DI and. D2 respectively) and the primary mining license (Exhibit D3). I should from the outset wish to extend my gratitude and appreciation to the team of members of the bar for their cooperation, hard work, and perseverance in the whole process of the trial. The prosecution team included Ms. Laura Kimario, Ms. Fidests Uisso, Mr. Grey Uhagile, and Ms. Amina Mwacha, Learned State Attorneys. And the defence side had Mr, Ole Yangalai Mkulago, Samwel Shadrack, and Baraka Mahugo, the Learned Advocates for the accused persons. 2 The summary of the prosecution evidence, in this case, can be captured as that, on 6th June 2020 at

Mbwewe area within Bagamoyo District in Coast Region, along Tanga road, the accused persons while traveling by motor Vehicle No. T 356 DDW, Toyota NOAH (Exhibit P2) which was driven by the second accused person, they were stopped by a traffic policeman E6977 Sgt Florian Lutaha (PW1) for over speeding. PW1 was suspicious of them after smelling perfume from the car and seeing boxes on Exhibit P2, he asked the 2nd accused person if they were not carrying "Mirungi", (Khat) but he denied it After that PW1 asked the second accused person to open the rear boot, he (PW1) opened and saw a small opening in the box, he enlarged it a bit and saw "khat" and he identified it because he had a long experience. PW1 informed his fellow police officer namely CPL Gwamaka and WP Upendo that the vehicle carried "mirungi". Since they had no recording material at the scene of crime, PW1 and his fellow took the accused persons with their vehicle to Mbwewe Police Station which is not far from the point they were. He seized the four boxes and two small bags containing "Mirungi" and Exhibit P2 (Vehicle with registration No. T.356 DDW Toyota Noah) 3 through a certificate of the seizure (Exhibit P1). He then handed the accused persons, the four boxes, two bags, and the vehicle to CPL John at the CRO. On the same day a policeman F. 6414 Detective CPL John (PW5) while at Mbwewe Police Station was ordered by the officer incharge of Police Station Mbwewe to record the cautioned statement (Exhibit P7) of Ibrahim Salim (first accused person) and he did what he was instructed where the; first accused person confessed that he trafficked Mirungi. After recording, the accused persons together with four boxes containing Mirungi (Exhibit P5) and Exhibit P2 were taken to OCD at Chalinze Police Station where the exhibits were received by one Hassan Ally Athumani (PW3). On 08th June 2020 PW3 handed (Exhibit P5) to E 8313 D/SSgt Hilary (PW4) who handed to F. 8691 D/Sgt Willy (PW6) for the purpose of taking to the Government Chemist Laboratory Authority (GCLA) for laboratory analysis. At the GCLA Exhibit P5 was received by the Laboratory analyst Joseph Jackson Ntiba (PW2) who conducted Laboratory test and it was revealed that the leaves in the four boxes were Khat weighed 206.59 kilograms, he prepared an Analyst Report (Exhibit P4). On the same day, PW2 handed over Exhibit P5 to PW6 who took the same to Chalinze Police Station where it was handed to PW3 for the safe Custody. 4 At the closure of the prosecution case, the court found that both the first and second accused persons had a case to answer in respect of the offence charged pursuant to Section 41(1) of the EOCCA. The accused persons (DW1 and DW2) testifying on affirmation firmly denied being involved in trafficking in narcotic drugs in question. DW1 in his evidence had the version that on the material date he was a passenger traveling on a motorcycle from Kwamjema where he went to buy gemstones. When they reached Kwavoda Village they were stopped by police officers for the offence of failure to wear a helmet. On further inspection, it was revealed that the rider had no driving license. He further deposed that thereafter the police officer ordered the first accused person to take down his consignment for inspection. That he opened and the police officer saw the Minerals. He started to demand a permit to transport minerals which DW1 had forgotten at home. Thus, the policeman demanded Tshs—5,000,000/= from him for his release. According to him, he offered to give him Tshs. 300,000/= only. In the course of the negotiation of the said claimed bribe, DW1 was recording the conversation through his mobile phone. The police however, discovered that he was recording. They decided to arrest him as a result and took him to Mbwewe Police Station and 5 later to Chalinze Police Station where he was kept locked up. In the end, he was taken to the Court where he was joined by a

person he did not know and was informed that he was accused of trafficking in narcotic drugs* In his defence, the second accused person (DW2) testified to the effect that he was arrested together with other three people while they were drinking alcohol at Chichi Pub, Chalinze on 5th June 2020 around 1:00 am. The evidence of DW1 shows that he was taken to Chalinze Police Station after attacking a policeman with a bottle and causing injury to his eye. He was beaten and on 09th June 2020, he was arraigned in court for the offence of trafficking in narcotic drugs.

Unfortunately, the parties did not comply with the order of the court to file final submissions save for the first accused person whose advocate submitted the same out of time. For that very reason, this court disregarded it. Having carefully considered the evidence on record of both sides, I find the main issues for determination are, One, whether Exhibit P5 is narcotic drugs; Two, whether Exhibit P5 was retrieved from the 1st and 2nd accused persons while being trafficked and, Three, whether the chain of custody of exhibit in question was maintained. 6 The first issue is whether Exhibit P5 is a narcotic drug. In this issue, it is important to note that the duty of an expert is to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the court to form its own independent judgment by application of these criteria to the facts proven in evidence. This is well articulated in the case of *Sylvester Stephano v. Republic*, Criminal Appeal No. 527 of 2016 CAT at Arusha (unreported). Likewise, it is the settled law that, usually what the expert witness states is simply an opinion, and the court is not bound to accept it. Essentially, an expert is not a witness of fact and thus, his evidence is of a supplementary or advisory nature. The credibility of an expert witness depends on the reasons stated in support of his conclusion and the tools, techniques, and materials that form the basis of such a conclusion {See the case of *Fauzia Jamal Mohamed versus Oceanic Bay Hotel Limited*, civil appeal No 162 of 2018, CAT at Dar es Salaam (unreported)} In the case at hand, PW2 is a Laboratory Analyst at the Government Chemist Laboratory Authority. He is the one who weighed Exhibit P5 (bundle of fresh leaves in four boxes) and got a total weight of 206.59 kg, then he collected samples from all four boxes to conduct the two tests namely 7 preliminary and confirmatory tests over Exhibit P5. He testified that in the preliminary test, he mixed samples with methanol 10 mm and then mixed them through the machine called Vortex. In the confirmatory test, he put samples of 100 microliters and mixed them with 900 microliters called mobile phase, which he injected into the machine (liquid Chromatography Mass Spectrometer) thereafter, after both of the laboratory processes, the sample from four boxes revealed that the leaves contained chemical substances namely Cathine and Cathenol to mean that the leaves are narcotic drugs known as *Catha Edulis* or Khat (Mirungi). Thereafter he prepared a Laboratory Analyst Report (Exhibit P4) to show the respective laboratory findings. The said Exhibit P4 shows that Exhibit P5 is narcotic drugs namely *Catha edulis* or Khat (Mirungi) weighing 206.59 kilograms. The law requires that any document purporting to be a report signed by a Government Analyst shall be admissible as evidence of the facts stated therein without formal proof and such evidence shall, unless rebutted, be conclusive. [See section 48A (2) of the Drugs Control and Enforcement Act, [Cap 95 R.E 2019]. Having in mind that this piece of evidence was not contested in any way, and the court is satisfied that PW1 is an approved Government chemist, I find that the evidence of PW2 and 8 Exhibit P4 give conclusive proof that Exhibit P5 is a narcotic drug namely *Catha edulis* or Khat (Mirungi) weighing 206,59 kilograms. The second question for

consideration is whether Exhibit P5 was retrieved from the 1st and 2nd accused persons while being trafficked. The prosecution side alleges that 206.59 kilograms of Catha edulis or Khat (Mirungi) were seized from the first and second accused persons at Mbwele Chalinze area, within the Coastal Region, whereas, on the other hand, the first and second accused person raised the defence of alibi. Nonetheless, their alibi was raised in contravention of the law because according to section 42 (1) (2) of the EOCCA, the accused person ought to have notified the Court of his intention to rely on an alibi as his defence during the preliminary hearing. Sadly, they did not do so. Likewise, they failed to furnish the prosecution with the particulars of their alibi before the closure of the prosecution case as required by law. During the testimony of PW1, they did not raise that they were not arrested at the Mbwele Chalinze area, instead, they were arrested at different places and times. The first accused person alleged that he was arrested at kwavoda village. The second accused person alleges to have been arrested at Chichi Pub, Chalinze area. As stated above, I find that their alibi was not genuine and not honest. 9 In the further scrutiny of the second issue, let us focus on the testimonies of PW1, PW5, and Exhibit P1. I must hasten to state rightly that PW1 gave contradictory evidence on who witnessed the search of Exhibit P2 (motor vehicle) and who witnessed the seizure of Exhibit P5. After a careful study of his evidence and that of PW5, one will find that they are materially different from what appears in Exhibit P1 (the certificate of seizure), especially on the things that were seized at the crime scene and who witnessed the search. PW1 in his chief testimony claimed that he filled in the seizure certificate (Exhibit P1) which was signed by PW1 himself and PW5 at Mbwele Police Station, 300 meters from the place where the accused were apprehended. On the other hand, Exhibit P1 shows that the same was signed by PW1, E 7053 CPL Gwamaka, and both accused persons. But again, the testimony of PW5 stated that he was only assigned to record the first accused person's cautioned statement and he did not witness the search or deal with Exhibit P5 in any way. It is the settled principle laid in the case *David Athanas@ Makasi and Another vs the Republic*, Criminal Appeal No. 168 of 2017, CAT at Dodoma (unreported), where the Court of Appeal held that '...the certificate of seizure ought to have been signed at the place where the search was conducted and in the presence of an independent witness...'. In the instant case, the evidence of PW1 shows that search and seizure were conducted at the police station and not at the scene of the crime with the justification that there was no material to write on. Since there are only 300 meters from the point of arrest to the police station, I do not find a strong reason to justify the failure of getting a seizure certificate for the seizure of Exhibit P5. There is no exceptional circumstance as to why search and seizure were conducted at a place other than the scene of the crime. Another thing to raise eyebrows is that Exhibit P1 (certificate of seizure) shows that it was signed in the absence of an independent witness as required by law. It is the evidence of PW1 that he arrested the accused persons at 13:00 hours and conducted a search in the afternoon hours at Mbwele Police Station near People's residence. In the case of *The Director of Public Prosecutions vs. Hatibu Mussa Sembe*, Criminal Appeal No. 130 of 2021, CAT at Tanga Court of Appeal while expounding the provisions of section 48 (2) (c) (vii) and 48 (5) of the Drugs Control and Enforcement Act, (Cap 95 RE. 2019) and Section 38 (3) of the Criminal Procedure Act (Cap 20 RE. 2022) had this to say; ii " Though the phrase used in the above provisions is 'a witness' and not 'independent witness', it is a matter of prudence that, such a

witness as a general rule should be independent. This does not mean however that under exceptional circumstances for instance where independent witness cannot be procured, a policeman cannot qualify as a witness." i In the instant case, the accused persons were arrested at a place where there were residential houses at the time the independent witness could easily be procured. I think, under the circumstances, police officer E 7053 CPL Gwamaka could not qualify to be an independent witness during the search and seizure as exhibited in Exhibit P1. Let us assume that Police Officer E 7053 CPL Gwamaka is qualified to be an independent witness in the matter at hand. Still, the prosecution failed to parade him as a witness in this case without any justified reason. It is the trite law that the court shall draw an adverse inference against the prosecution case for failure to call material witnesses, see the case of Samwel Japhet Kahaya vs Republic, Criminal Appeal No. 40 of 2017, CAT at Arusha (unreported) and the case of Boniface Kandakira Tarimo vs Republic, Criminal Appeal No. 350 of 2008, CAT (unreported). Upon failure to call in an important witness to the search, PW1 being the only prosecution witness who testified that he arrested the accused 12 persons, conducted the search in Exhibit P2, and seized Exhibit P5 as well as the circumstances where there is no independent witness to the said search also search to be conducted out of scene of crime cannot be enough to urge this court to arrive in the finding that search and seizure was legally conducted. Equally, as the accused persons have disowned Exhibit P5, it becomes doubtful and dangerous to find that it was retrieved from them. Coming now to the third issue which is all about the maintenance of the chain of custody of Exhibit P5, it is common knowledge that, proving the offence of trafficking in narcotic drugs begins at the stage of searching. In addition, search and Seizure are the first steps in the process of establishing the chain of custody. In that regard, whenever there is contradiction or illegality at the stage of search and seizure that goes to the root of the matter. The finding of the issue above is for the court's discretion to determine the remaining issue (s) or not. Well, considering the evidence of PW1, PW3, P4, and PW5 as well as Exhibit P1, it is the evidence of PW1 that he seized four boxes and two bags both of them containing fresh leaves which were later discovered to be narcotic drugs as a subject matter of the case at hand. He went on to state that after the seizure exercise, he handed the same to PW5. However, in his 13 testimony, it is very unfortunate that PW5 denied having received the; said consignment (claimed Exhibit P5) from PW1 or in any way dealing with the said Exhibit. Also, the evidence of PW1 stated that the said Exhibit P5 and the accused persons remained at Mbweve Police Station until on 9th June 2020 when they were taken to Chalinze Police Station. However; the testimony of PW4 shows that he received the said exhibit from Mbweve Police Station on 6th June 2020 without stating from whom he received the exhibit. In cross-examination, PW4 stated that he received the exhibit from PW5 while PW5 in his testimony denied dealing with the exhibit in question rather he was involved in writing the 1st accused person's statement. On the other hand, PW3 stated that he received Exhibit P5 from PW3 on 6th June 2020 he kept it until 8th June 2020 when he handed it over to PW4 who handed it back to him on 9th June 2020 for safe custody. PW3 stated that he kept the Exhibit until 30th June 2020 when he retired from work. Both PW1 and PW5 denied having transported Exhibit P5 from Mbweve Police Station to Chalinze Police Station. It is a trite law that, the chain of custody may be established by oral evidence, See the cases of Abdallah Rajabu Mwalimu vs. Republic, Criminal Appeal No. 367 of 2017; Abas Kondo Gede vs. Republic, 14 Criminal Appeal No. 472 of

2017; and the current case of the Director of Public Prosecutions versus Akida Abdallah Banda, Criminal Appeal No. 32 of 1320, CAT at Dar es Salaam (both are unreported). In the case at hand prosecution paraded both oral and documentary evidence in the bid to prove the integrity of the chain of custody of Exhibit P5. On the careful study of Exhibit P5, the evidence of PW1 and PW5 was to the effect that PW1 retrieved four boxes and two bags. However, there is no evidence from a single prosecution witness as to the whereabouts of the two bags containing fresh leaves suspected to be "Mirungi". The importance of the integrity of the chain of custody of exhibits is the assurance of their reliability. That is to ensure what has been seized at the crime scene is what has been finally tendered in court. In the instant case, the prosecution evidence has never stated where the seized two bags are. This casts a shade of doubt as far as the chain of custody is concerned. Again, there is a missing link on the chain of custody when assessing who was handed over the said Exhibit by PW1 if PW5 denied having received the same. Also, PW4 is not consistent as to from whom he received Exhibit P5, whether it was from PW5 or PW1 who were both mentioned by PW4 during cross-examination by the defence Counsel on delivering Exhibit P5 at 15 Chalinze Police Station. But PW5 denied having done the same, this also leaves doubt in the prosecution case regarding the integrity of the chain of custody. Yet, there is another unanswered question as to where was exhibit in question kept before being taken to Chalinze Police Station. And who kept the same from the time of seizure to when it was taken to the Chalinze Police Station? Who was the custodian of the same exhibit after the retirement of PW3? There is still a lot to be desired as far as the chain of custody is concerned. It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness as held by the Court of Appeal in the case of Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003,, CAT at Mbeya (unreported). In the present case, the piece of evidence of PW1, PW3, PW4, and PW5 in this aspect poses a convincing reason for the court to fail to believe them and hold that they are not credible and reliable witnesses. Again, I am much aware that, not every inconsistency in the prosecution's evidence will cause their case to flop. Still, it is upon the duty of this Court to decide whether it goes to the root of the matter {See the 16 case of Mohamed Said Matula v. Republic [1995] TLR 3 and Dickson Elia Nsamba Shapwata and Another v. Republic, Criminal Appeal No. 92 of 2007 CAT (unreported)}. Guided by the principle above, and considering the inconsistencies regarding the maintenance of the chain of custody of the Exhibit in question, this court is of the view that the inconsistencies so apparent go to the root of the case since there are all possibilities for the exhibit to be tampered with. I should find the issue to be answered negatively Basically, the accused person has no duty to prove his innocence. Likewise, the conviction of an accused person cannot be based on the weakness of his defence, however foolish, unfounded/or improbable. Having so said, this court finds that the prosecution has failed: to prove the case to the hilt against the accused persons on the offence of trafficking in narcotic drugs contrary to section 15(1) (a) and 3(iii) of the Drugs Control and Enforcement Act, [Cap 95 RE 2019] read together with paragraph 23 of the First Schedule to and section 57(1) of the Organized Crime Control Act [Cap 200 RE 2019]. Consequently, I find the accused persons not guilty and I hereby acquit them from the offence charged. It is so ordered. 17 G.N. Isaya Judge 31/10/2023 Court: Judgment delivered in open court this 31st day of October 2023 in the presence of the accused

persons, Mr. Uhagila, Learned state Attorney, Mr. Mtuli, Advocate, for the 1st Accused, and Mr. Benjamin, Advocate, for the 2nd accused. BC Saida Ramadhani. G[^]fc2aya Judge 31/10/2023
G.NTIsaya Judge 31/10/2023

1. Exhibit P5 be destroyed in accordance wftth the Drugs and Enforcement Act, [Cap. 95 R.E 2019] with its Regulations.
2. The prosecution is hereby advised to deal with Exhibit P2 (Motor Vehicle Toyota NOAH with Registration Number T 356 DDW which is 18 an instrumentality of crime) as per section 49A of the Drugs Control and Enforcement Act, Cap 95 RE. 2019. 19

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