

TANZANIA / JUDGMENT

JUDGEMENT FOR HASHIMU OMARI MDEE NA KAIZA VICENT FABIANI

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IN THE HIGH COURT OF TANZANIA CORRUPTION AND ECONOMIC CRIMES DIVISION AT
MOROGORO ECONOMIC CASE No. 06 OF 2023 REPUBLIC Versus 1, HASHIM OMARI
MDEE 1st ACCUSED

2. KAIZA VICENT FABIAN 2nd ACCUSED

JUDGMENT

1st February & 1st March, 2024 OTARU, J.: Hashinn Omari Mdee, the 1st accused (DW1) and Kaiza Vincent Fabian, the 2nd accused (DW2), jointly and together stand charged with an offence of trafficking in narcotic drugs contrary to provisions of sections 15(1)(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]. The facts of the case as gathered from the prosecution as well as the defense are such that on 05/11/2021, at about 00.10hrs, a truck, Mitsubishi Fuso with registration Number T307 ANJ allegedly bound for Dar es salaam, was found with 8 sacks of narcotic drug known as cannabis sativa or bhangiat i a routine check at Sangasanga check point, within Mvomero District in Morogoro Region. It was alleged that when the truck was stopped at the check point, the driver directed DW1 (turnboy) to open the body of the truck to facilitate inspection of the load. The inspecting team comprised of E.5380 Sgt. Mohamed (PW4) and WP4410 D/Sgt. Janeth. As DW1 and the inspecting team moved to the back of the vehicle, the driver and another person travelling in the cabin, escaped. Meanwhile, Juma Rajabu Makelele (PW5) joined the inspecting team. Along the 110 sulphate sacks of potatoes, the inspecting team noticed 8 similar sacks containing dry leaves, suspected of being narcotic drugs. The 8 sacks were seized and sent to the Chief Government Chemist for analysis. The results confirmed the contents to be a narcotic drug, to wit cannabis sativa, commonly known as bhangi, weighing 136.55 Kilograms. DW1 was charged in connection with the narcotic drugs found. In the course of investigation, DW2 was also arrested and joined in the charge. He is alleged to be the person who escaped with the driver from the crime scene. Before this court, both accused persons pleaded not guilty to the charge and denied all facts that linked them with the criminal undertaking in the matter. When trial commenced, Ms. Tully Helela, learned Senior State Attorney assisted by Messrs. Fortunatus Maricha and Jumanne Milanzi, learned State 2 Attorneys took charge of the Prosecution. Their

counterpart for the Defense were Ms. Suzan Mafwere and Ms. Sophia Omary, learned Advocates for 1st and 2nd accused persons respectively. The trial process saw the Prosecution call nine witnesses and tender seven exhibits. At the end of the prosecution's case, the court found a prima facie case to have been established against both accused thus they both had a case to answer. The accused defended themselves under oath and without calling additional witnesses or relying on any exhibits. They both denied to have taken part in the commission of the offence. Additionally, DW2 denied having been at the scene of crime on the alleged day. At the conclusion of the trial, parties filed final submissions. I appreciate their effort and thank them and everyone else for their part in assisting the court determine this case. In their joint final submissions, counsel for the defense have challenged the evidence pertaining to arrest of DW2, admissibility of his Cautioned Statement and the chain of custody of the narcotic drugs. On the part of the Prosecution, they confined themselves to the following questions; whether the dry leaves were narcotic drugs, the chain of custody of the drugs and involvement of the accused persons in the commission of the offence. 3 From the factual settings as gathered during trial, the question that awaits determination of this court is whether the Prosecution have established the case against the accused persons to the required standard. In my view, the determination of the above question depends on the resolution of the following issues: -

- (i) Whether the 8 sacks of dry leaves (exhibit PE2) were narcotic drugs; (ii) Whether exhibit PE2 was found in the motor vehicle with registration No. T307ANJ make Mitsubishi Fuso (exhibit PE3) on the night in question; (Hi) Whether search and seizure of exhibit PE2 allegedly seized from exhibit PE3 conformed to the law; and (iv) Whether the accused persons trafficked exhibit PE2. It is trite law that conviction can only be grounded if, and only if, the prosecution makes out a case leading to an irresistible conclusion of the guilt of the accused. In so doing, the Prosecution has to conform to the evidential and legal standard of proof, which is beyond reasonable doubt (section 3(2)(a) of the Evidence Act [Cap. 6 R.E. 2022] is relevant). As such, an accused has merely to cast doubt in the evidence of the prosecution. This position has been pronounced in a number of cases which may be traced back to *Okare v R*

[1955] EA 555. Other cases include *Said Hemed v R* [1987] TLR 117, 4 *Mohamed Said Matula v R* [1995] TLR 3 and *Mswahili v R* [1997] LRT 25, to mention a few. In the case of *Said Hemed* (supra), the Court stated that; 'the standard of proof applicable in a criminal case ...is one beyond all reasonable doubt and that, where the evidence burden shifts onto the accused, it is sufficiently discharged by the accused by merely adducing evidence that casts a reasonable doubt in the prosecution case'. Starting with the issue as to whether exhibit PE2 were narcotic drugs, the testimony of Fidelis Begumisa Chrizant (PW3), a chemist from the Chief Government Chemist's Laboratory Agency answers it in the affirmative. This witness gave a detailed account from the moment he arrived at the Morogoro Central Police Station on 26/11/2021 and met G.9360 D/Cpl. Eusebius (PW6) who took him to the place where exhibits were stored. The exhibit keeper E.8949 D/Sgt. Kwilinus (PW1) handed over exhibit PE2 for analysis. PW3 explained further that he was handed 8 sulphate sacks containing dry leaves. He opened the sacks and confirmed that all of them contained the

dry leaves. He then weighed them and registered the total weight of 136.55 kilograms. He took a sample from each sack labelled them with the laboratory registration number CZ.LAB.NO. 421/2021 and sealed them. He then filled in Forms DCEA 001 which were handed over to PW6 together with the 8 sacks on the same day of 26/11/2021. After analysis of the 8 samples, DW3 confirmed that the dry leaves in all 8 sacks were none other than cannabis sativa or Zte7^/due to 5 presence of gland trycone which produces a substance known as Tetrahydrocannabinol (THC) found only in cannabis sativa plant. The Analysis Report (Form No. DCEA 009) was not challenged after its admission in court as part of prosecution evidence (exhibit PE5). It corroborates the testimony of PW3. That testimony is further corroborated by PW1 and PW6 who witnessed PW3 weighing exhibit PE2 and taking the samples for analysis. The testimonies of PW1, PW3 and PW6 together with Exhibit PE5 bring out a unanimous verdict that exhibit PE2 weighing 136.55 kilograms is indeed a narcotic drug. Consequently, the expert opinion of PW3 has done what is necessary in disposing of this issue in the affirmative. On the issue of whether exhibit PE2 was found in the motor vehicle with registration No. T307 ANJ make Mitsubishi Fuso (exhibit PE3) on the night in question are tackled jointly and together with whether search and seizure were in conformity with the law. E.5380 Sgt Mohamed (PW4), a traffic police narrated how on 05/11/2021 while on duty at the Sangasanga check point, he stopped the truck with registration No. T307 ANJ and make Mitsubishi Fuso (exhibit PE3). According to him, the driver did not show his drivers' license saying that he had forgotten it at home. Neither did he switch on the cabin lights as requested, claiming that they were out of order. The driver however informed PW4 that they were three 6 people in the cabin, the fact that PW4 visually confirmed. When PW4 asked about the load they were carrying, the driver answered that they were carrying sacks of potatoes. PW4 recalled that the driver seemed irritated when asked to open the truck for inspection, yet he instructed DW1 (turnboy) to do so. According to PW4 and DW1, while the inspecting team with DW1 were in the process of inspecting the load, the driver and the other person escaped into the night. PW4 further testified that inspection of the truck revealed presence of 8 sulphate sacks of dry leaves amidst the load of potatoes. That the strong smell of the drug enabled them to detect it. PW4 identified exhibit PE2 as the very same 8 sacks of dry leaves that they apprehended on the night of 05/11/2021. The inspection was also witnessed by one Juma Rajabu Makelele (PW5). PW5 was engaged by the search team as an independent witness, even though section 48(2)(c)(vii) of Drugs Control and Enforcement Act (supra) does not imperatively provide for need of an independent witness. Section 38(1) of the CPA (supra) however, requires an independent witness to sign the seizure certificate, if he is present. In other words, it is not mandatory to have an independent witness, however if one is procured, his signature is mandatory. 7 In the case at hand, PW5 confirmed his presence and witnessing the search exercise of exhibit PE3 at the crime scene. He clearly added weight, value and credence to the prosecution's case. Like PW4, PW5 also identified exhibit PE2 as the exact 8 sacks seized from exhibit PE3 on 05/11/2021. Exhibit PE2 was not challenged by the defense after it's admission in court as part of prosecution's case. Both PW4 and PW5 stated that search and seizure were done in the presence of DW1.

Thereafter, PW4 filled in seizure certificate Form no. DCEA 003 (exhibit PE7) which was signed by PW4, PW5 and DW1 at the place where search was conducted. This was in conformity to section 38(3) of the CPA (supra), (also see the case of David Athanas @Makasi 8 & Another v. Republic, Criminal Appeal No. 168 of 2017, CAT-Dodoma (unreported)). Although DW1 in his defense tried to negate the fact that the search resulted in finding exhibit PE2 in the truck, he did not stick to his version for long. When cross examined by the prosecution, he quickly changed his version by admitting that exhibit PE2 was found in the truck and that he signed the seizure certificate (exhibit PE7). At this juncture, I find it significant to trace the chain of custody of exhibit PE2. Counsel for the defense claim that the chain of custody was broken while the prosecution claim that it was maintained. The importance of maintaining the chain of custody of an exhibit is to ensure that there is no human intervention that could possibly tamper with the exhibit and remove any possibility of planting anything to the detriment of the accused. To demonstrate how serious this issue is in dispensation of justice, once the chain of custody is broken, its consequence is rejection of the exhibit by the court. This position has been demonstrated in the cases of John Joseph @Pimbi v Republic, Criminal Appeal No. 262 of 2009 (CAT Mwanza), Majid John Vicent @Mlindangabo & Another v Republic, Criminal Appeal No. 264 of 2006 (CAT Mwanza) and Chacha Jeremiah Murimi and 3 Others v Republic, Criminal Appeal No. 551 of 2015 (CAT Mwanza), all unreported. In the case at hand, the chain of custody was established by the prosecution through both oral and documentary evidence. PW4 who seized exhibit PE2 proceeded to state that during search and seizure he marked each sack from A1 to A8. This is also confirmed by PW5. As a result, DW1 was arrested and exhibit PE2 handed over to D/Cpl Alau (PW7) at CRD office, Mzumbe Police Station at about 01.00hrs of the same night. This incidence was registered in Occurrence Book (OB) entry No. 34 of 2021 (exhibit PE4). Case file No. MZU/IR/534/2021 was opened at Mzumbe Police Station. Consequently, the accused was charged with the offence of drug trafficking and the 8 sacks were marked with the case file number. At 06.00hrs, PW7 handed over the station including exhibit PE2 to WP 6387 Cpl. Lightness (PW8) and Cpl. Husna via entry No. 35 of exhibit PE4. At 12.10hrs of the same day, PW8 created two entries for No. 38. One entry was in respect of afande Ally of the Office of RCO and the other was in respect of A/Insp. Lameck (PW2). In her testimony, PW8 explained that the first entry was to be cancelled because it was not effected as she was directed to hand over exhibit PE2 to PW2 instead of afande Ally. She handed over the exhibit to PW2, the then head of investigations at Mzumbe Police Station via the second entry 38 of exhibit PE4. Just 1hr and 20 minutes thereafter, exhibit PE2 was delivered to PW1 (exhibit keeper at Morogoro Central Police Station). The latter filled in the court exhibits register (PF16) entry No. 527 (exhibit PE1) followed by appending label No. IR 527/2021 on the exhibits. He stored them until 26/11/2021 when the contents of exhibit PE2 were subjected to chemical analysis by PW3. On that day, PW1 handed the exhibit over to PW6 who handed the same to PW3 via Form No. DCEA 001 (exhibit PE6). As indicated earlier, both PW1 and PW6 oversaw the weighing, taking samples, re-sealing and marking of exhibit PE2 by PW3. On the same day, exhibit PE2 was returned to PW1 for safekeeping. PW3 prepared, the report

of his analysis of the samples taken from exhibit PE2 confirming presence of narcotic drug cannabis sativa or bhang and weighing 136.55 kilograms (exhibit PE5). Exhibit PE2 continued to be kept by PW1 until 08/02/2024 when it was tendered and admitted in this court. The defense side has picked on the fact that exhibit PE4 had two entries for the same number 38, and that there are no documentation showing the exhibits as well as the potatoes sacks to have been transferred from PW6 to PW8 contending that the chain of custody of exhibit PE2 was not established in the manner spelt out in the famous case of Paulo Maduka & 4 Others v Republic, Criminal Appeal No. 110 of 2007 (CAT Dodoma) (unreported); that there must be sufficient evidence to prove or establish the chain of custody. As stated above, PW8 explained why there were two entries for number 38 in exhibit PE4. He stated that the 1st entry having not been effected, it was redundant. The correct entry being the 2nd, whereby exhibit PE2 was handed over to PW2, the fact which is corroborated by PW2 via his testimony in court. It therefore seems that the 1st entry No. 38 is genuinely redundant. It could have happened due to negligence, yet it does not break the chain of custody. The chain is well maintained through the 2nd entry of No. 38. On the transfer of exhibits from PW6 to PW8 having no paper trail, one can observe that the role of PW6 concerning exhibits was to witness PW3 taking samples from exhibit PW2 for chemical analysis, which is evidenced through exhibit PE6. Such that, there is no event that has not been recorded or lacked explanation. Thus, what can be gathered from the evidence, is a well- established chronological account of how exhibit PE2 was seized, stored, ii transferred, analyzed and finally tendered in court. I thus hold that the prosecution have successfully established how the chain of custody of exhibit PE2 was maintained. Coming back to exhibit PE7, it's admission and contents were not challenged by the defense counsel. Further, PW4 and PW5 whose credibility I have no reason to doubt (see the case of Nimo Samu v Republic, Criminal Appeal No. 31 of 2019 (CAT Mbeya) (unreported)) were not cross-examined concerning exhibit PE7. By virtue of the Court of Appeal of Tanzania in the landmark case of Nyerere Nyegue v Republic, Criminal Appeal No. 67 of 2010 (CAT Arusha) (unreported); 'failure to cross examine a witness on a fact draws a conclusion that the account of facts narrated in the testimony is nothing but the truth.' It is therefore my conviction that the evidence adduced by the prosecution proves to the required standard that search and seizure were done procedurally resulting in exhibit PE2 to have been found in the truck. Consequently, this finding answers the 2nd and 3rd issues in the affirmative. In answering the issue as to whether the accused persons were trafficking the narcotic drugs, I find it pertinent to consider the definition of trafficking under section 3 of Cap. 95, which means:- 12 importation, exportation, buying, sale, giving, supplying, storing, possession, production, manufacturing, conveyance, delivery or distribution, by any person of narcotic drug or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer To start with DW1, he was apprehended at the crime scene being in possession of exhibit PE2. According to the prosecution, DW1 was a turn boy on exhibit PE4 thus he was in control of the vehicle and had knowledge of exhibit PE2 by virtue of being the turn boy. In his affirmed testimony, DW1 claimed to have been travelling for the

first time in that type of vehicle. He also claimed that when the truck reached Mikumi national park, the driver informed him that the brakes weren't working properly thus called a motorcycle - bodaboda to take him to Dorna town to buy some food, while the driver fixed the brakes. About an hour later, when he rejoined the driver, there was someone else in the cabin. That person was introduced to him as 'Kaiza'. At first, DW1 testified that there was no sufficient light in the cabin such that he could not see properly the 3rd person. He later said that there was sufficient light. He also claimed at first that he did not witness the seizure of exhibit PE2, which again he reversed during cross examination and admitted the signature, on exhibit PE7, as his. It is evident that the accused witnessed the search as well as the seizure of exhibit PE2. In addition thereto, according to PW6, DW1 is named 'Kaiza' as their companion, from the very beginning. That information had assisted investigators to follow up and investigate further until they found out full name and other particulars that resulted in arresting DW2. I am wondering why weren't prosecution witnesses cross examined by the defense along their line of defense? Each of the accused had legal representation, but none of the advocates indicated the direction which their clients took. Surely, this defense is a mere afterthought. It is thus my contention that DW1 was not being truthful in every aspect. I am in agreement with the prosecution that DW1 was a turnboy of exhibit PE3; he knew that there was exhibit PE2 and he knew DW2, but for reasons better known to himself, he planned to shield him. I must quickly add that the fact that DW1 was not truthful does not automatically make him guilty of the offence charged. It however creates doubt as to what he was trying to hide. In the case of *Felix Lucas Kisinyila v Republic*, Criminal Appeal No. 129 of 2002 (CAT Dsm) (unreported) the Court stated that, lies of an accused person, may corroborate the prosecution's case the Court explained further:- 'That was held to be so in a Zanzibar case of *Kombo bin Khamis v the Crown*, 8 ZLR122. RUBAMA, J. was of the opinion in *Saium Yusuf Liiundi v R*, Criminal Appeal No, 26 of 1984, Mtwara Registry (unreported). In that case, three persons were accused of theft, two of them confessed while the third, a watchman denied even being on duty on the material night while in fact he was. His lies were held to corroborate the confessions of the other two.' A lie may therefore corroborate other evidence. According to PW6 who interrogated the accused persons, both accused had admitted trafficking exhibit PE4. The defense had not challenged this contention. Further, according to PW4, when DW1 opened the load for inspection at the Sangasanga check point, he looked nervous. Does being a nervous in addition to being a liar make one guilty? I do not think so either. However, if his lying and nervousness are put together, they act to his detriment and assist in interpreting his overall demeanor, corroborating the existing evidence in favor of the prosecution. On the part of DW2, he was connected with the crime in the course of investigation. PW6, informed the court that he interrogated both accused persons whereby DW2 admitted to have been the 3rd person in the truck and confessed to be the owner of exhibit PE2, which he shared with one Azizi Sharif. This is corroborated by A/Insp. Ally Lupindo (PW9) investigator of the case, who acquired information during investigation that DW2 was indeed the 3rd person who had run away on the day of the incident and that he was the

owner of the narcotic drugs (exhibit PE2). All in all, the investigation into the allegations returned the verdict that placed DW2 in a culpable role that triggered the prosecution's decision to institute the instant proceedings. 15 When DW2 testified in court during his defense, he denied committing the offence or knowing DW1. He also claimed to have been fast asleep at his home at the time the offence was being committed. In addition thereto, he said that, his arrest of 28/11/2021 was instigated by hatred and revenge from a militiaman called Manane who refused to pay for haircutting services he rendered to him. He was then maliciously charged for threatening to kill this militiaman. As stated earlier, in the prosecution's contention, DW2 admitted his involvement in the crime to PW6, yet DW2 through his learned advocate has not challenged this contention. The defense, in their final submissions challenged a Cautioned Statement which was not part of evidence in court. One would thus be tempted to consider DW2's silence as an admission of what the prosecution alleged. The settled position on oral confessions or admissions is that, they are admissible and can be the basis for finding an accused person guilty. Courts are warned, however, that they must exercise extreme care before they make a decision to give value and weight to such testimony. Thus, in the case of John Peter Shayo & 2 Others v Republic [1998] TLR 198, it was held: As a general rule, oral confessions of guilt are admissible though they are to be received with great caution.' 16 The most elaborate guidance when considering oral confessions is in the case of Zabron Joseph v Republic, CAT-Criminal Appeal No.447 of 2018 (unreported), in which the Court stated as follows: - 'Therefore, what we take from the above decisions of the Court, as regards oral confessions, is that one, the reliability of the witnesses to whom the oral evidence was made should be considered, and two, that oral confessions must be received with great caution.' In the case at hand, what is considered by the prosecution as an oral admission of commission of the offence was a two-man affair that involved DW2 and PW6. The same is corroborated by the testimony of PW9 who was also not challenged by the defense. I have considered and reconsidered the evidence on the guilt of DW2. Having cautioned myself, I find no reason to doubt the water tight evidence as presented by the prosecution that DW2 trafficked the exhibit PE2. What about the defense of alibi as raised by DW2? In their final submissions the prosecution argued that the defense did not meet the requirement of section 194(4) and (5) of the CPA for failure to give notice or cross examine prosecution witnesses in line with the defence of alibi. They cited the case of Mwitika Godfrey Mwandemele v Republic, Criminal Appeal No. 388 of 2021 CAT at Dsm (unreported). I am in full agreement with the 17 prosecution. Clearly, the defense of alibi was introduced as an afterthought since the same was raised during the defense and not in the course of the prosecution's case. As a result, I see nothing to discount the evidentiary position established by the prosecution. In the final note, I wish to state that the prosecution's witnesses were nothing short of credible, coherent and consistent such that they established the link between the accused persons and exhibit PE2. The level of credibility of the testimony and that of the witnesses themselves was high and met the criteria set in the case of Shabani Daudi v Republic, Criminal Appeal No. 28 of 2000 (CAT), (unreported), in which it was held that: ' The credibility of a witness can also be determined in two ways:

one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person.' The overall effect of the testimony of the defense, has done little to create any doubt in the prosecution's case. On the contrary, on account of evasiveness, general denial and obvious lies, the defense evidence has corroborated the prosecution's case in a profound way (See: Felix Lucas Kisinyila v Republic, -Criminal Appeal No. 129 of 2002 (CAT) (unreported)). 18 In consequence of the foregoing, I am of the certain mind that the prosecution has made out the case against both accused persons onto the culpable role of trafficking in narcotic drugs as charged. Accordingly, I find them guilty and convict each of them of the offence with which they are charged, that is, trafficking in narcotic drugs contrary to the provisions of section 15(1)(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 1st day of March, 2024. SENTENCE I have heard the submissions by both parties herein on the sentence. While I take note of the fact that the convicts have no past criminal records, I also take cognizance of the fact that the law has provided stern sentence to be imposed upon conviction, the gravity of the offence of trafficking narcotic drugs, that the convicts have been in remand for over 2 years and other factors as submitted by counsel for both sides. Consequently, I sentence the accused persons, Hashim Omary Mdee and Kaiza Vicent Fabian, each, to twenty-five (25) years imprisonment. ORDER Simultaneous with imposition of the sentence of imprisonment, it is hereby ordered, as follows:-

1. That the eight sulphate sacks of narcotic drugs (exhibit PE2) be destroyed without undue delay with involvement of the relevant law enforcement bodies.
2. That motor vehicle with registration No. T307 ANJ, make Mitsubishi Fuso (exhibit PE3) be released and handed to its registered owner as 20 there is no evidence that links him with the charged offence. It is so ordered. U=^.^ A ■k \\ M.P. Otaru ri Judge iw 1/03/2024 & ray?. ^£00150^^ COURT: Judgment is delivered virtually in the presence of both accused persons; Mr. Shabani Kabelwa, learned State Attorney for the Republic; Ms. Suzan Mafwere, learned Advocate for the 1st accused person, also holding brief for Ms. Sophia Omary learned Advocate for the 2nd accused person. Also present were Ms. Sophia Minja (JLA) and Mr. Juma Maiga (RMA). The right of appeal against the conviction, sentence and the consequential orders is duly explained to the parties. M.P. Otaru Judge 01/03/2024 21

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