

TANZANIA / JUDGMENT

republic versus nuhu ibrahim lukali

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IN THE HIGH COURT OF TANZANIA CORRUPTION AND ECONOMIC CRIMES DIVISION AT DAR ES SALAAM REGISTRY ECONOMIC CASE NO. 14 OF 2022 THE REPUBLIC VERSUS NUHU IBRAHIM@LUKALI

JUDGMENT

18.08.2023 & 25.08.2023 Isaya, J.: Nuhu Ibrahim @ Lukali stands charged in this case with the offence of trafficking in narcotic drugs contrary to section 15(1) (a) 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] It alleged that on 8th March 2020 at night hours in the Kwambonde area, within the Kibaha district in the Coastal region, the accused person was found trafficking in narcotic drugs namely cannabis Sativa commonly known as bhanghi weighed 90.73 Kg, by using a motor vehicle with registration number T144 DSP makes Toyota 1ST. i From the outset, I wish to extend my gratitude and appreciation to the team of members of the bar for their cooperation, hard work, and attentiveness. The prosecution team included Mr. Clemence Kato, Ms. Laura Kimario, Mr. Clement Kato, Ms. Sofa Bimbiga, Ms. Gladness Mchami, Ms. Gloria Simpasa, and Ms. Neema Kwayo, Learned State Attorneys. And the defence side had Mr. Mbwana Ally Chipaso, the Learned advocate. In the bid to prove the case against the accused person beyond a reasonable doubt, the prosecution paraded twelve (12) witnesses to testify, besides they produced nine exhibits which this court admitted into evidence. On the other hand, the accused person testified himself under oath as a sole defence witness (DW1), and nothing was tendered as an exhibit. The summary of the prosecution evidence, in this case, can be captured as that, on 8th March 2020 at the Kwambonde area within Kibaha District in Coast Region, along the Morogoro road, the accused person while driving motor Vehicle No. T 144 DPS, Toyota 1ST (Exhibit P3) was stopped by a traffic police officer G 3585 CPL Steven (PW3) for wrong overtaking. PW3 was suspicious of him and told him to park on the side of the road then he called for assistance from other police officers who were in patrol. Upon arrival, with the presence of the accused person and Dotto Salehe Kizae 2 (PW8) an independent witness, Inspector Ally Masimike (PW2) conducted a search in the above-named vehicle. Seven (7) sacks (viroba) containing leaves alleged to be narcotic drugs were found within the vehicle. PW2 seized Exhibit P3 and P5 by preparing and listing seized items in a certificate of seizure

(Exhibit P2) which was signed by him, the accused person together with PW8. Thereafter, the seized items that is Exhibit P2 and Exhibit P5 together with the accused person were taken to Kibaha Police Station where they were handed over for safe custody exhibits and charged the accused person as well as for filling a case file. On 9th March 2020 Exhibit P5 was taken by Inspector James Buringa (PW7 and D/CPL Faustine (PW12) to the Chief Government Chemist (CGC) for a laboratory test Later after being taken for a Laboratory test, the Government Chemist, Gabriel Jacob Gabriel tested the same and reported through the analyst report (Exhibit P1) that the analysis revealed the same to be narcotic drugs namely cannabis sativa (Bhangi) (Exhibit P5). Exhibit P5 was taken back to Kibaha Police Station for safe custody on the same date from the CGC. Again, on the same date, A/ Inspector Scholastica Mbuguni (PW10) was assigned file No KBA/IR/996/2020 to investigate the incidents involving this case. PW10 conducted the investigation to its 3 completion, and having satisfied himself with the evidence collected in relation to the offence, she forwarded the case file to the Prosecution office. At the closure of the prosecution case, the court found that the accused person had a case to answer in respect of the offence charged. The accused person (DW1) firmly denied being involved in trafficking in narcotic drugs in question. His evidence was to the effect that, on the material date he was a passenger traveling in a private small vehicle, when reaching Kibaha Kwamponde, the motor vehicle was stopped by police. The driver stopped and disembarked from the vehicle. He was followed by the policeman, after a while about 20 minutes the policeman went to the said motor vehicle and asked the accused person as to why the driver ran away. Thereafter the policeman made a phone call. After 30 minutes some policemen arrived at the scene of the crime and took him to Kibaha Police Station where he was kept. Before, PW2 had given him a paper that was handwritten to sign in order to be taken to the court. The accused stated that he knows nothing about the offence charged and Exhibit P5, the motor vehicle in question (Exhibit P3), or PW11 who alleged to hand over Exhibit P3 to DW1. I have gone through the evidence from both sides, the prosecution and the accused person. At this juncture, it is crystal clear that on the day 4 in question, the accused person was traveling from Morogoro to Da es Salaam using a private car. The accused person does not dispute that upon reaching at Kwamponde area, within the Kibaha district, along Morogoro road, they were stopped by the police. Though he has stated that he does not remember the description of the vehicle he traveled with, he however agrees that the vehicle was apprehended by the police. He himself was arrested and taken to the Kibaha police station alongside the vehicle apprehended. The accused has asserted that he was a passenger in that vehicle and not a driver. He is strongly claiming his innocence. The prosecution side has endeavoured to prove that the accused person was a driver of the vehicle in question and he committed the offence too. Under the circumstance, I find three issues for determination in this case, One, whether Exhibit P5 was found and retrieved from Exhibit P3 while trafficked by the accused person, Two, whether the chain of custody of Exhibit P5 was maintained and Three, whether the accused person raised any doubt against the prosecution case. Before the determination of the issues at hand, 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 enunciated 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 supplementary or advisory nature. Therefore, 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 PW1 is a chemist at the Government Chemist Laboratory Authority, the one who weighed Exhibit P5 and got a total weight of 90.73 kg, then he collected samples from all 7 sulphate bags to conduct two tests namely preliminary and confirmatory tests over the Exhibit P5. He testified that in the preliminary test where he mixed samples with chemicals, it was revealed that the leaves were cannabis sativa (bhanghi) due to a change of color from colorless to violet color (that is to say a colour test). In the confirmatory test, he put samples in the machine thereafter, after the 6 laboratory process, the seven samples were revealed to contain the compound namely Tetra Hydro Cannabinol (THC) which is available only in cannabis Sativa. Thereafter he prepared a Laboratory Analyst Report (Exhibit P1) which was approved by the head of their department. The said Exhibit P1 shows that Exhibit P5 is narcotic drugs namely cannabis sativa 'bhanghi' weighed 90.73 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 PW1 and Exhibit P1 give conclusive proof that Exhibit P5 is a narcotic drug namely cannabis sativa 'Bhanghi' weighing 90.73 kilograms. Now let us come to the first issue. In this issue, I will consider the evidence of PW2, PW3, and PW8. It is the evidence of PW3 that after stopping the car (Exhibit P3), he informed PW2 who arrived at the crime scene immediately. Thereafter PW3 left all to PW2. It is the testimony of PW2 and PW8 that on the material date and time at the crime scene, they found the accused person in the motor vehicle (Exhibit P3). PW1 conducted a search on the said Exhibit P3 in the presence of the accused person, and PW8 found seven (7) sulphate bags containing leaves which later were confirmed to be cannabis sativa (Exhibit P5). PW1 seized the same via the certificate of seizure (Exhibit P2) in which he listed all seized items. Thereafter PW1, PW8, and the accused person append their signatures on the said exhibit P2. On the other hand, during cross-examination of PW1, the accused person through his advocate contested the signature in the certificate of seizure that was not of the accused person, and in his defence the accused person stated that he signed on a handwritten document and not prescribed as it was contended by PW1 and PW8. However, there was nothing produced by the accused person to show his real signature thus disproving his alleged signature in the Exhibit P2. In the case of Samweli Kibundali Mgaya versus Republic, Criminal Appeal No. 180 of 2020 CAT at Musoma (unreported), the Court of Appeal underscores the position held in the cases of Shabani Kindamba v. Republic; Criminal Appeal No. 390 of 2019, and Selemani Abdallah and Others v. Republic, Criminal Appeal 8 No. 354 of 2008 (both unreported) on the need to issue a certificate of seizure, where it was stated that; "The whole

purpose of issuing a receipt to the seized items and obtaining the signature of the witnesses is to make sure that the property seized came from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that the evidence arising from such search is fabricated will to a great extent be minimized." In the case at hand, the seizure of items was made via the certificate of seizure which was signed by PW8 an independent witness, PW2 an officer executing search and seizure as well as the accused person. In his defence as stated above the accused disowned his signature on Exhibit P2. The Court of Appeal in the case of Ramadhan Idd Mchafu versus Republic, Criminal Appeal No. 328 of 2019, CAT at Arusha (unreported), the Court of Appeal underscores its stand in the case of Abdallah Said Mwingereza vs. Republic, Criminal Appeal No. 258 of 2013 (unreported) where it was stated that, "It may be observed however that normally under section 38(3) of the Criminal Procedure Act seizure receipts are issued following the issue of search warrants. But even if the seizure certificate were to be ignored still there was sufficient evidence from PW1 and PW2 which proved that the appellant was found with the pistol and seven rounds of ammunition." In the case at hand, the evidence of PW2, PW3, and PW8 was to the effect that the accused was found in the motor vehicle (Exhibit P3) within which there was Exhibit P2. In addition, the evidence of PW2 and PW8 is of satisfaction to this court to hold that, Exhibit P5 was found and retrieved from Exhibit P3 while trafficked by the Accused person herein. To this end, it is my settled view that the first issue is answered affirmatively. The second issue is all about the maintenance of the chain of custody of Exhibit P5. It is the evidence of PW2 and PW8 that Exhibit P5 was seized from the accused person, again it is the evidence of PW2 that immediately after seizing the same he took the accused person together with Exhibit P2 and P5 to Kibaha Police Station where he handed the accused and exhibits to WP 4903 Sargent Pili (PW6) via Occurrence Book (OB). PW6 stated that after receiving the Exhibits in question on 8th March 2020 around 23; 00 p.m. she kept the same until the following day at 06:00 a.m. when she handed over the same to E 9194 Sargent Julius (PW4). The evidence shows that after receiving it, PW4 kept the said Exhibit until WP 3665 Sargent (PW5) Mwamvita arrived at Kibaha Police Station. It is the evidence of PW4 and PW5 that the handing over of the Exhibit in question was achieved on 09th March 2020 at 9:00 am. PW5 testified that immediately after receiving Exhibit P5 she registered the same on the Exhibits Register (Exhibit P4) with entry no. 40 of 2020, she thereafter labelled Exhibit P5 and P3 with exhibit register No. 40 of 2020 together with Investigation Register (IR) number KBA/IR/996/2020 and kept Exhibit P5 in the Exhibits room. PW5 went on to state that, on the same day she handed over Exhibit P5 to Inspector James Bubinga (PW7) for the purpose of taking the same to the Government Chemist Laboratory Authority (GCLA), PW7 after receiving the said Exhibit he sealed it with the police red seal written evidence. Thereafter he took the same to the GCLA accompanied by F 4039 D/CPL Faustine (PW12). It is the evidence of PW12 that before leaving for the GCLA he filled in the sample Submission form (DCEA 001) Exhibit P8. The prosecution evidence reveals further that on arrival at the GCLA, upon the instructions of PW7, PW12 submitted Exhibit P5 to the Chemist (PW1) who received the same and registered the same with Laboratory number 941 of 2020. After drawing samples and a preliminary test, PW1 sealed Exhibit P5 with the GCLA seal, signed and wrote the Laboratory number on it. PW1 also filled in the Sample Receipt Notification (Exhibit P9) ii which was signed by PW1 and PW12. On the same

day, PW12 together with PW7 took Exhibit P5 to Kibaha Police Station where PW7 handed over the same to E 6064 Sergeant Mzee (PW9) who kept the said Exhibit until the following day on 10th March 2020 where he handed the same back to PW7 who took and handed over to PW5. After receiving Exhibit PW5 entered the same in Exhibit P4 with entry number 44 of 2020. Thereafter, he put the same in the Exhibits room until 12th May 2023 when she handed the same to one P/C Hemed to take the same to the court. 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, 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 2020, CAT at Dar es Salaam (both are unreported). In the case at hand prosecution paraded both oral and documentary evidence to wit PW1, PW2, PW4, PW5 PW6, PW7, PW9, and PW12 also tendered Exhibits P1, P3, P4, P8, and P9 in the bid to prove chain of custody of Exhibit P5. Again, it is important to note that the importance of the integrity of the chain of custody of exhibits is the assurance of their reliability. Together with 12 the evidence above showing the movement and handling of Exhibit P5. It is the evidence of PW5 that on 12th May 2023 Exhibits P2 and P5 were passed from PW5 to one person namely P/C Hemed. However, there is neither oral nor tangible evidence showing that the exhibits in question were handed back to PW5 or went out of the hands of P/C Hemed to somebody else. In that sense, there is no evidence showing where and how the Exhibits in question particularly Exhibit P5 were kept by P/C Hemed and came to the court during tendering and admission. The evidence of PW5 is that on 12th May 2023, she was at the court premises and the said Exhibits were left there. She kept the key of Exhibit P3 wherein the said Exhibit P5 was kept. Her evidence leaves much to be desired because as per the court records on the said date, only two witnesses appeared and were warned before this court who were PW1 and PW2. If there was a handing over of Exhibits P3 and P5 between PW5 and P/C Hemed why does the key of Exhibit P3 remained in the hands of PW5? After all, the evidence of PC Hemed is lacking to make the chain of custody intact. In the absence of evidence of P/C Hemed on how and when Exhibit P5 went in and out of his hands until reaching the stage PW5 tendered them to the court, the chain of custody breaks. Indeed, there is no sufficient cause why 13 he was not paraded as a witness in this case. The Court of Appeal in the recent case of Simon Mugejwa and Another versus Ibrahim Magembe, Civil Appeal No. 223 of 2020, CAT at Mwanza (Unreported) underscores the principle expounded in Boniface Kundakira Tarimo v. Republic, Criminal Appeal No. 350 of 2008 (unreported) where it was stated that; "...It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one." Based on aforesaid reasons it is safe for this court to hold that the exhibit in question was in danger of being tampered with, therefore the chain of custody of Exhibit P5 was not maintained; See the case of Abuhi Omari Abdallah and Others V Republic, Criminal Appeal No. 28 of 2010, (Unreported). Thus, the second issue was answered negatively Determination of the last issue in the present case mostly relied on the answers to the two issues above, however, it is prudence for this court to look at important aspects of this case as that, PW1 being the witness who sealed the Exhibit P5 for a very last time and PW2 as a witness who seized 14 the same could not identify the exhibit in

question in the court. Alongside this, there is no one among the prosecution witnesses who dealt with the exhibit in question given an opportunity to identify the same during their testimonies before the court other than PW5 (Exhibit keeper) herself. The omission that witnesses who dealt with the exhibit particularly the seizing officer PW2 to identify Exhibit P5 in the court where the guilty or otherwise of the accused was discussed and looked into is a fatal irregularity. See the case of Mustafa Darajani versus Republic, Criminal Appeal No. 277 of 2008, Court of Appeal at Songea (unreported). Alongside the argument above there is no evidence as to when PW10 being the investigator familiarized herself with Exhibit P5 the subject matter of the case. No prosecution witnesses testified to the effect that there was a point an investigator was given or shown the Exhibit in question for her to conduct the duties required under the Police General Orders particularly PGO 229. This creates doubts about how the case was investigated as far as Exhibit P5 is concerned. From the answers on the issues above together with all discussed in the issue at hand, it is my considered opinion that there are doubts in the case in the way the prosecution tried to prove the commission of the offence. 15 Having so said, this court finds that the prosecution has failed to prove the case to the hilt against the accused person on the offence of trafficking in narcotic drugs contrary to section 15(1) (a) 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 person not guilty and I hereby acquit Court: Judgment delivered in open court this 25th day of August, 2023 in the presence of the accused person, Ms. Gloria Simpasa, State Attorney, Mr. Mbwana Chipaso, Advocate for the accused person, Ms. Saida (B/C), and 16

1. Exhibit P5 be destroyed in accordance with the Drugs and Enforcement Act, [Cap. 95 R.E 2019] with its Regulations.
2. The prosecution is hereby advised to deal with Exhibit P3 (Motor Vehicle Toyota 1ST with Registration Number T 144 DPS which is an instrumentality of crime) as per section 49A of the Drugs Control and Enforcement Act, Cap 95 RE. 2019. 17

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