IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA CORRUPTION AND ECONOMIC CRIMES DIVISION

AT MTWARA

ECONOMIC CASE NO. 3 OF 2023

THE REPUBLIC

VERSUS

HAMISI BAKAR MILANZI@BIGI

JUDGMENT

3rd & 14th November, 2023

KISANYA, J.:

Hamisi Bakari Milanzi @Bigi, the accused person herein, was arraigned before this Court for the offence of trafficking in narcotic drugs, contrary to section 15 (1) (a) of the Drug Control and Enforcement Act, Cap. 95, R.E. 2019 (the DCEA), 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 [now R. E. 2022] (the EOCCA). It is alleged that, on 25th June 2021, at Mitunguru Village within Nchingwea District in Lindi Region, the accused person, did store in his house, 283.18 kilograms of cannabis sativa, commonly known as "bhangi". He pleaded not guilty to the information.

At the trial, Mr. Yahya Gumbo, Ms. Tully Helela, Ms. Batilda Mushi and Mr Godfrey Mramba, all learned State Attorneys, represented the Republic. On the other hand, the accused person had the legal services of Ms Radhia Luhuna, learned advocate.

In a bid to prove its case, the prosecution called five witnesses whose testimony was supported by five (5) documentary and physical exhibits. It is gathered from the evidence on record that, on 25th June, 2021, the Officer Commanding-Criminal Investigation Department (OCCID) of Nachingwea District one, SSP Peter Majengo (PW2), led a team of police officers which was conducting a normal patrol within Nachingwea District. In the course of executing that duty, PW2 received a tip from an informer. The tip was to the effect that, one person was in possession of bhangi. The informer went on leading PW2 and his colleagues, including (PW4) to the house of the person who was suspected to have been in possession of bhangi.

PW2 and other police officers left the vehicle few meters from the house. They proceeded to that house. Two persons were found outside the house. The police officers managed to restrain one person who happened to be the accused person herein. The second person who turned out to be the accused person's wife fled.

Upon searching the accused person's house in the presence of a local leader one, Jaffary Hamisi Chinguile (PW5), 18 bags containing dry leaves suspected to be narcotic drugs were found and seized. A certificate of seizure was filled and signed by PW2, PW5 and the accused person. During the trial, eighteen (18) sulphate bags containing dry leaves said to be bhangi were admitted in evidence as Exhibit P3 collectively, while the certificate of seizure

was admitted as Exhibit P4. In addition, the sketch map of the crime scene which was drawn by PW4 was admitted in evidence as Exhibit P5.

Subsequent to the said search and seizure, the accused person was taken to Nachingwea police post, together with the seized sulphate bags (Exhibit P3). At the directives of PW2, PW4 handed Exhibit P3 to the exhibit keeper one, H 8117 PC Halifa (PW3), who kept the same in the exhibit room.

On 4th July 2021, PW3 handed Exhibit P3 to PW4 for purposes of dispatching them to the Government Chemist Laboratory Authority (GCLA) for laboratory analysis. On that day, PW4 labelled the sulphate bags and sealed them with a police seal. He packed and kept Exhibit P3 in the vehicle before travelling to Dar es Sallam on next day. On 6th July 2021, he handed Exhibit P3 to Leonidas Daniel Michael (PW1) of the GCLA - Dar es Salaam. The dispatch was through Exhibit Submission Form-DCEA 001 which was tendered and admitted in evidence as Exhibit P2.

At the office of GCLA, Exhibit P3 was assigned Laboratory Number 2031/2021. The dry leaves in the sulphate bags (Exhibit P3) weighed 283.18 kilograms. The preliminary test showed that the substances in Exhibit P3 were narcotic drugs known as cannabis sativa (bhangi). Thereafter, PW1 extracted samples from each sulphate bag for laboratory analysis. He sealed Exhibit P3 with the seal and stamp of the Government Chemist and handed them back to PW4 on the same day. On 8th July 2021, PW4 returned Exhibit P3 back to the exhibit keeper (PW3) for custody.

Few days later, on 22nd July 2021, the findings of confirmatory test were recorded in the report. Pursuant to the said report, Exhibit P3 collectively were confirmed to be narcotic drugs known as cannabis sativa, commonly known as bhangi weighing 283.18 kilograms. The laboratory analyst report was admitted as Exhibit P1.

Having heard the prosecution's case, I held the view that a *prima facie* case had been established against the accused person. Upon being informed of the right to give evidence and call witnesses, the accused person opted to testify on oath. He neither called witness nor tendered any exhibit to supplement his oral testimony.

In his defence, the accused person admitted that his house was searched in the presence of his local leader (PW5). It was his defence that his house has three rooms whereby only his bedroom has a door. He told the court that the police officers searched his bed room for about half an hour and that they found nothing in relation to any offence. The accused person adduced that he was surprised to find a consignment of viroba in the third room. He alleged that PW4 told him that the consignments contained bhangi and that, one of the police officers stated that the total number of bags containing bhangi was 18. The accused person further stated the sulphate bags were taken outside his house and parked in the police vehicle. Although the accused person admitted that he signed the certificate of seizure (Exhibit P4), he vehemently denied to have stored in his house Exhibit P3.

After closure of the defence case, leave was granted for the parties to file their respective final submissions. The learned counsel for both parties complied with the said order. I will consider their arguments in the course of dealing with the issues pertaining to this case.

I have considered the evidence of both parties and the submission of the counsel for the both sides. This being a criminal case, the grand issue for determination is whether the prosecution has proved its case beyond all reasonable doubts.

Before I delve into the determination of the said issue, I find it appropriate to state that, in terms of section 15 (1) (a) of the DCEA, the offence of trafficking in narcotic drugs is committed when a person trafficks in narcotic drugs. In that respect, the prosecution is charged with a duty of establishing that the accused person trafficked in narcotic drugs. Furthermore, if the narcotic drug subject to the offence of trafficking in narcotic drugs is cannabis sativa, as in the instant case, it must be proved that the cannabis sativa weighed more than fifty kilograms. This is pursuant to section 15(3)(iii) of the DCEA. And, according to section 3 of the DCEA, storing of narcotic drugs amounts to trafficking.

From the above position of law and the particulars of the offence preferred against the accused person, the prosecution was required to prove the accused person stored in house cannabis sativa weighing 283.18 kilograms. Based on the evidence on record and the contending submissions,

the grand issue, whether the prosecution has proved its case on the required standard is resolved by addressing the following issues:

- 1. Whether the accused person stored in his house 18 sulphate bags containing dry leaves which were suspected to be cannabis sativa.
- 2. Whether the search and seizure of sulphate bags and arrest of the accused person were lawfully held.
- 3. Whether the dry leaves in the sulphate bags seized from the accused person's house were cannabis sativa weighing 283.18 kilograms.
- 4. Whether the chain of custody was maintained.

Starting with the first issue, the evidence of PW2, PW4 and PW5 is to the effect that, after a search conducted in the accused person's house, 18 sulphate bags containing dry leaves suspected to be cannabis sativa were found and seized therein. The said evidence is supported by the certificate of seizure (Exhibit P4) which was signed by PW2, the local leader (PW5) who acted as an independent witness and the accused person.

In his defence, the accused person has not disputed that sulphate bags containing dry leaves suspected to be cannabis sativa were found in one of the rooms of his house. However, he has categorically denied to have stored the said sulphate bags. According to him, the sulphate bags might have been planted by the police officers when he was with other police officers who were searching in his bedroom.

I am not convinced with the accused person's defence that, the sulphate bags were planted onto his house. This is because his contention that there were footsteps heading to the room where the sulphate bags were found was not put to PW2, PW4 and PW5. Further to this, the accused person admits to have no grudges with the police officers or even the independent witness (PW5) prior to the incident. There is no evidence to suggest that the police officers knew the accused person's house before the incident. In the circumstances, I find no reason why the police officers would leave their patrol duties to fix a person who was not known to them prior to the incident. Thus, I am convinced by the evidence of PW2, PW4 and PW5 which is supported by the certificate of seizure (Exhibit P4) that, the sulphate bags containing dry leaves were retrieved from the accused person.

As regards the number of sulphate bags found and seized from the accused person's house, the evidence of PW2, PW4, PW5 and Exhibit P4 shows that, it was eighteen (18). That fact has not been disputed by the accused person. I am aware of the fact that, upon being cross-examined, PW5 stated that, the sulphate bags were packed in the vehicle without being counted. However, I have considered that PW5 stated in evidence in chief that 18 sulphate bags with substances suspected to be cannabis sativa were found and seized from the accused person' house. Furthermore, the accused person testified that, the said number of sulphate bags was stated by one of the police

officers. It is my considered view that such evidence supports the testimonies of PW2 and PW4 that, the sulphate bags were counted by the police officers who found them to be 18 in number. Besides, the accused person has not disputed to have signed the certificate of seizure (Exhibit P4) in which 18 bags were stated to have been found and seized from his house. In the case of **Song Lei vs The Director of Public Prosecutions**, Criminal Appeal No 16A of 2016 and No. 16 of 2017 (unreported), the Court of Appeal underlined that the signing of the certificate of seizure by the appellant signified acceptance that the narcotic drugs were found in his possession. I therefore, find that, by signing Exhibit P4, the accused person acknowledged that 18 sulphate bags containing substances suspected to be bhangi were found and seized in his house.

On account of the foregoing, the first issue is answered in the affirmative. The prosecution has proved that 18 sulphate bags with dry leaves suspected to be cannabis sativa were found stored in the accused person's house and seized by the police officers.

This gives rise to the second issue, whether the search and seizure of the said sulphate bags and arrest of the accused person were lawfully conducted. Ms. Luhuna urged this Court to find that the search and seizure were not preceded by search warrant as required by section 41(a) of the CPA

and PGO No. 226 Part 11(a). It was also her argument that the search was not conducted under emergency on the ground that, PW2 and PW4 stated that they had a search warrant with them. Referring to the case of **Badiri Mussa Hanongi vs R,** Criminal Appeal No. 118 of 2020 (unreported), she argued that both search and seizure are fatal in the eyes of law.

As rightly submitted by the defence counsel that, it is a general rule set out by section 38 (1) and (3) of CPA read together with paragraphs 1(a), (b), (c), 2(a) and (d) of the Police General Order (PGO) No. 226 that, search and seizure of any item related to commission of an offence must be preceded by issuance of a search warrant. However, the requirement for search warrant is not necessary where the search is premised on emergency circumstances. This is pursuant to section 42 (1) (b) (ii) of the CPA which provides for circumstances of emergency search in the following terms:

- 42.-(1) "A police officer may-(a) N/A; or
- (b) enter upon any land, or into any premises, vessel or vehicle, on or in which he believes on reasonable grounds that anything connected with an offence is situated, and may seize any such thing that he finds in the course of that search, or upon the land or in the premises, vessel or vehicle as the case may be-
- (i) N/A; and
- (ii) "the search or entry is made under circumstances of

such seriousness and urgency as to require and justify immediate search or entry without the authority of an order of a court or of a warrant issued under this Part."

It is clear that the above provision lists the exceptional circumstances under which search and seizure may be carried out without a search warrant. See also the case of **Maluqus Chiboni @ Silvester Chiboni and Simon vs.**R, Criminal Appeal No. 8 of 2021 (unreported), wherein the Court of Appeal held that:

"We are aware of the law governing search warrant and seizure (Part II A (d) of the Criminal Procedure Act, Cap 20 R.E. 2002, particularly section 38 to 42). Section 38 and 40 require, generally, that a warrant be issued to a police officer or other person authorized before such officer or person executes the search. However, under exceptional circumstances, a police officer may conduct a search and seizure without warrant. Such circumstances are listed under section 41 and 42 of Cap 20. Relevant to this case are the provisions of sections 42(1) (b) of Cap 20."

The above position was also stated in the cases of Marceline Koivogui v. Republic, CAT-Criminal Appeal No. 469 of 2017, Joseph Charles Bundala v. Republic, Criminal Appeal No. 15 of 2020; and Director of Public Prosecution v. Doreen John Mlemba; Criminal Appeal No. 359 of 2019 (all unreported).

In the instant case, it is common ground that the search and seizure was carried out without a search warrant. I have then considered that, according to

PW2 and PW4, the information that the accused person was trafficking in narcotic drugs was conveyed to PW2 when the latter was leading a patrol team. In that regard, PW2 was required to take action on the said information without any undue delay. Thus, the circumstances of this case involved urgency and seriousness. There was no room for PW2 and his team to comply with the formalities set forth in sections 38 and 40 of CPA read together with the PGO. I am supported by the case of **Wallenstein Alvares Santillan v. Republic,** Criminal Appeal No. 68 of 2019 (unreported), in which the Court of Appeal had this to say on the facts akin to the case at hand:

"Having reviewed the entire evidence on record, we hold that in the circumstance of the case at hand search was conducted in an emergence situation and therefore the provision of section 38(1) of CPA and 32 (4) of Act No. 5 of 2015 the DCEA would not apply."

Applying the above position of law to this case, I am of the humble view that the search and seizure were lawfully conducted. Considering further that the accused person was found to have stored in one of the rooms of his house, sulphate bags containing dry leaves which were suspected to be cannabis sativa, I hold that the police officers were justified to arrest him without warrant. Therefore, the second issue is answered in the affirmative.

I now move on to the third issue, whether the dry leaves in the sulphate bags retrieved from the accused person's house were cannabis sativa weighing

283.18 kilograms. It is settled law in this jurisdiction that, the mandate of weighing and analysing substances believed to be narcotic drugs is vested in the GCLA. I am supported, among others, by the case of **Omary Said**@Athumani vs R, Criminal Appeal No. 58 of 2022, CAT at Tanga (unreported) in which the Court of Appeal underscored that:

"...it is the law that, the weighing and analysis of substances suspected to be narcotic drugs is within the domain of the CGC."

The Court of Appeal went on citing its decision in **Charo Said Kimillu vs. R,** Criminal Appeal No. 111 of 2015 (unreported), where it was stated:

"Narcotic drugs or psychotropic substances should be submitted to the Government Chemist laboratory Agency for weighing and analysis before tendering it as evidence in court".

Further to the foregoing, it is provided for under section 48A of the DCEA that, after making test and analysis of a sample of any narcotic drugs, the Government Chemist analyst should record his finding in a signed report and issue the said report to the person who submitted the sample or exhibit.

In the case at hand, the certificate of seizure (Exhibit P4) shows that the bags seized from the accused person's house contained cannabis sativa weighing 319 kilograms. However, PW2 was firm that he just estimated the weight of sulphate bags. Indeed, PW4, PW5 and the accused person himself

did not state whether the dry leaves in the sulphate bags were weighed at the crime scene. Considering further that the weighing of narcotic drugs is within domain of the GCLA, the weight stated in Exhibit P4 cannot be considered by this Court.

I have considered that, PW4 stated to have labeled each sulphate bags with case number NAC/IR/607/2021 and dispatched them to the GCLA. According to the exhibit submission form (Exhibit P2), the analysis sought by the police was related, *inter alia*, to weight and type of exhibit/narcotic drug.

In his testimony, PW1 stated that the dry leaves in 18 sulphate bags weighed 283.18 kilograms. It was his further evidence that the preliminary and confirmatory tests confirmed that the substances in 18 sulphate bags were cannabis sativa. His finding was recorded in the Government Chemist Report (Exhibit P1) which was admitted without being objected by the defence. In his evidence, the accused person did not raise doubt in the evidence of PW1.

In the light of the above analysis, I am satisfied that the prosecution has established that the dry leaves in the sulphate bags seized in the accused person's house were cannabis sativa weighing 283.18 kilograms.

Fourth for consideration is the issue whether the chain of custody of Exhibit P3 was maintained. This issue resolves the question whether PW1 analyzed the substances in the sulphate bags seized from the accused person.

According to the settled law, in cases involving exhibits which move from one point to another, evidence on chain of custody is necessary. The prosecution is expected to bring evidence showing how the exhibit seized from the accused person was handled before being tendered court. In the case of Paulo Maduka and Four Others vs. R, Criminal Appeal No. 110 of 2007 CAT (unreported), it was emphasized that there should be proper documentation of the paper trail from the time of seizure up to the stage the exhibit is tendered in court as evidence. However, as rightly submitted by the learned State Attorney, it is now settled position of law that documentation is not the only way of exhibiting chain of custody. The authorities in place are to the effect that, direct oral testimony is sufficient to prove chain of custody. See for instance, the cases of Charo Said Kimillu (Supra), Chacha Jeremia Murimi and 3 Others vs R, Criminal Appeal No. 551 of 2015, Marceline Koivoqui vs. R. Criminal Appeal No. 469 of 2017 and Chukwudi Denis Okechukwu and 3 Others vs. R, Criminal Appeal No. 507 (all unreported). The last two cases involved narcotic drugs as in the case at hand.

It is on record that, on 25/06/2021, 18 sulphate bags containing cannabis sativa (Exhibit P3) were seized from the accused person by a team of officers, which included PW2 and PW4, in presence of an independent witness (PW5). As shown herein, Exhibit P3 collectively were seized vide the certificate of seizure (Exhibit P4) which was signed by PW2, PW5 and the accused

person. It is in evidence that, upon seizure, Exhibit P3 collectively were in control of PW2 throughout their journey to Nachingwea police post. After arriving at the police post, PW2 handed the exhibits to PW4 who in turn handed them to the exhibit keeper (PW3) on the same day. On receiving the exhibits, PW3 registered them in the exhibit register. He kept them until 4/07/2021 when he handed the same exhibits back to PW4 who packed, labeled and sealed them exhibit with the police seal. PW5 kept the exhibit until 06/07/2021 when he took them to the GCLA and handed the same to PW1 vide Exhibit P2. After conducting the preliminary test, PW1 repacked the exhibits and sealed them with the seal of GCLA. He also signed on the said seal before handing the exhibits to PW4 on the same day. Upon receiving Exhibit P3, PW4 took back them to Nachingwea Police post. He handed over them to PW3 who kept them in exhibit room until they were brought and tendered in evidence before this Court.

In their respective testimonies, PW2, PW4 and PW5 identified Exhibit P3 collectively as the sulphate bags containing dry leaves which were seized from the accused person's house. Likewise, the accused person did not dispute that the sulphate bags tendered in evidence were indeed found in one of the rooms of his house. On his part, PW3 indentified Exhibit P3 as the sulphate bags he received from PW4, registered in exhibit register and stored in exhibit room. Lastly, PW1 identified them as the same exhibits which he received from

From the foregoing, apart from Exhibits P1, P2 and P4, it is the evidence adduced by the prosecution witnesses has shown handling of Exhibit P3 collectively from the time they were seized from the accused person's house up to the time when they were tendered and admitted in evidence. The fact that there is no documentation does not affect the authenticity of Exhibit P3 collectively and their chain of custody. On that account, I hold that, based on the oral account of PW1, PW2, PW3 and PW4 and Exhibits P1, P2 and P4, the substances seized from the accused person's house are the same substances which were analyzed by PW1 and admitted in evidence as Exhibit P3 collectively. It follows therefore, that the chain of custody was duly maintained.

The defence counsel has raised an issue of contradiction in the evidence of witnesses called by the prosecution. The trite position is that, normal discrepancies are expected to feature in the evidence of witnesses due to normal errors of observation including, errors in memory based on lapse of time. [See the case of **Maramo Slaa Hofu & 3 Others vs. R**, Criminal Appeal No. 246 of 2011 (unreported)). It is also a settled law stated in a number of cases including, **Athumani James vs. R**, Criminal Appeal No. 69 of 2017 (unreported), that, contradictions in the testimony of witnesses which will affect the prosecution case are those which go to the root of the case and not

their proper context with a view to determining their gravity. For the discrepancies to form basis for finding the witness not credible, they must be serious and related to the question that is being resolved. I am bolstered by the case of **Slaa Marmo Hofu** (*supra*) where it was held that:

"It is therefore true that the existence of contradictions, inconsistencies in the evidence of a witness is a basis for a finding of lack of credibility; but the discrepancies must be serious, and must concern matters that are relevant to the issues being adjudicated, to warrant an adverse finding."

Now, the question which I am called upon to answer is whether the contradictions in evidence in this case are so material as to go to the root of the matter thereby affecting the prosecution case.

One of the contradictions pointed by Ms. Luhuna is related to the room in which Exhibit P3 were found and seized. PW2 and PW3 testified that Exhibit P3 collectively were found in the second room, while PW5 told the court that the said exhibits were found and seized in the third room. It is my opinion that, the said contradiction does not go to the root of the case, on the issue whether Exhibit P3 collectively were found or stored in the accused person's house. This is so when it is taken into account that, the accused person has admitted that sulphate bags with substances suspected to be bhangi were found in the third room of his house. He only disputed to have stored said exhibits

According to Ms. Luhuna, other contradiction is on how the total number of sulphate bags was obtained. It was her contention that, PW2 and PW4 stated that the sulphate bags were counted at the crime scene, whilst PW5 asserted that the sulphate bags were not counted at the crime scene. I have dealt with and resolved the alleged contradiction in the course of addressing the first issue and held that they did not contradict each other.

In alternative, it is true that PW2 and PW4 testified that Exhibits P3 were counted at the crime scene. As for PW5, he recalled that the sulphate bags were 18. He also told the court that 18 sulphate bags were found in the accused person's house. It is my considered opinion that, such evidence implied that PW5 was aware of the number Exhibit P3 found at the crime scene. However, when he was cross-examined by the defence counsel, PW5 stated that the sulphate bags (Exhibit P3) were not counted at the crime scene. In the circumstances, the contradiction, if any, is in the evidence of PW5 himself. Given that such contradiction give rise to the issue of number of sulphate bags which contained bhang and hence, the weight of bhagi subject to this case, PW5 may be considered as not reliable witness. However, even if his evidence is expunged, I am of the view that, the remaining evidence of PW1, PW3 and PW4 proved that 18 sulphate bags were found at the crime scene. There is no evidence to show that the remaining witnesses were not credible. As hinted herein, the accused person's testimony that one of the police officers stated that the number of sulphate bags was 18 supports evidence of PW1 and PW4 that, the sulphate bags were counted by the police officers.

Having analyzed the evidence of both parties, I am convinced that the prosecution has proved the case preferred against the accused person. On the adversary side, the defence was not able to raise doubt in the prosecution case as shown in the course of addressing the issues pertaining to this case.

Ultimately, I find the accused person guilty of the offence which he stands charged. In consequence, I convict him of the offence of trafficking in narcotic drugs contrary to section 15 (1) (a) of the DCEA read together with paragraph 23 of the First Schedule and sections 57 (1) and 60 (2) of the EOCCA.

Dated this 14th November, 2023.

Or C

S.E. KISANYA **JUDGE** 14/11/2023

Court: Judgment delivered through virtual court system this 14th day of November, 2023 in the presence of Mr. Jagard Jilala, learned State Attorney for the Republic, the accused person and Mr. Rainery Songea holding brief of Ms. Rahma Luhuna, learned advocate for the accused person.

Pr

S.E. KISANYA **JUDGE** 14/11/2023

SENTENCE

I have considered the submissions from the learned counsel for both parties. It is not disputed that the accused person has no criminal record and thus, a first offender. I have considered other mitigation factors that, the accused person has four wives and twenty children who depend on him; the accused person has been in custody from June, 2021; and the fact that the accused person is 54 years.

However, it is common ground that the accused person is convicted of trafficking in narcotic drugs in which the amount of narcotic drugs involved is punishable to life imprisonment. Reading from the proviso of section 60(2) of the Economic and Organized Crime Control Act, Cap. 200, R.E. 2019 together with section 15(1)(a) and (3)(iii) of the Drug Control and Enforcement Act, Cap. 95, R.E. 2019, it is clear that this Court has no option than to impose the sentence of life imprisonment set out by the law.

In the circumstances, I hereby sentence the accused person to serve life imprisonment.

It is so ordered.



S.E. KISANYA **JUDGE** 14/11/2023 **Court:** Sentence pronounced this 14th day of November, 2023 in the presence of the parties.



S.E. KISANYA **JUDGE** 14/11/2023

Court: Right of appeal against the conviction and sentence is duly explained to the accused person.

OPF



S.E. KISANYA **JUDGE** 14/11/2023

Order: Exhibit P3 collectively be destroyed in accordance with the Drug Control and Enforcement Act, Cap 95, R.E. 2019 and its Regulations.



S.E. KISANYA **JUDGE** 14/11/2023

OP

