**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**THE CORRUPTION AND ECONOMIC CRIMES DIVISION**

**AT MTWARA - SUB REGISTRY**

**ECONOMIC CASE NO. 3 OF 2019**

**REPUBLIC**

**VERSUS**

**AWADHI AHMAD KALINDIMA**

# JUDGMENT

*18/03/2020 & 08/04/2020*

**BANZI, J.:**

The accused person, Awadhi Ahmad Kalindima stands charged with the offence of trafficking in narcotic drugs contrary to Section 15(1)(a) of the Drug Control and Enforcement Act, No. 5 of 2015 (DCEA), as amended, read together with paragraph 23 of the First Schedule to the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002], as amended. It is alleged that, on 10th December, 2017 at Dinyeke Village, within Tandahimba District in Mtwara Region, the accused person trafficked narcotic drugs namely, *cannabis sativa* weighing 88 kilograms.

At the trial, Messrs. Joseph Maugo and Kauli Makasi, learned Senior State Attorneys represented the Republic ("the Prosecution"), whereas Mr. Alex Msalenge, learned Advocate represented the accused person.

To establish the case against the accused person, the prosecution called in eight witnesses to testify, namely, Elias Mulima (PW1), Inspector Danford Mahundu (PW2), G.4724 D/C Josephat (PW3), Hosea Albert Hosea (PW4), WP 9752 PC Winfrida (PW5), G.7051 D/C Salhina (PW6), Victor Elisei Leonard (PW7) and Nasra Mkadami Mwinshee (PW8). Besides, they tendered six exhibits, which were admitted, thus: Exhibit P1, Government Chemist Analysis Report; Exhibit P2, Six sacks of *Cannabis sativa*; Exhibit P3, Search Order with Certificate of Seizure; Exhibit P4, Form No. DCEA 003, the Certificate of Seizure; Exhibit P5, Form DCEA 001, Forensic Laboratory Submission Form and Exhibit P6, Extra-Judicial statement of the accused person. On the other hand, the accused person testified under oath as a sole witness for the defence and did not tender any exhibit.

In the main, the body of evidence by the Prosecution presents a case that, on 10th December, 2017 at around evening hours, PW2 received information about drugs activities at Dinyeke Village along Ruvuma river. On reliance of that information, he took other police officers including PW3, PW6, D/C Gaudence, D/C Juma, D/C Andrea and CPL Hashim (the driver) and headed to Dinyeke Village. They drove up to a certain point where they left the vehicle behind and walked up to the house of the accused person. They reached there at around 23:00 hours. Upon their arrival at the accused person's house, they knocked the door and the accused person opened. PW2 introduced himself, as his colleagues, explained to the accused person the purpose of them being there and their intention of carrying out a search of the house. The accused person and his wife also introduced themselves. Then, the team of the police officers asked the accused person to assist

looking for a leader or any other independent person to witness the search. The accused person told them that, the chairman of the area lives at the Village centre, far away from there, and there was no neighbour around; so, they should conduct the search without any independent witness. After being told that, the police began searching the house and, in the course managed to find six sacks of leaves suspected to be *cannabis sativa*. After that, PW2 directed PW3 to fill in certificates of seizure (Exhibits P3 and P4). They then signed them save for the accused person and his wife who, allegedly did not know how to read and write and since the police had no stamp pad at the moment, the duo signed the certificates at the Tandahimba Police Station by appending their thumb prints.

After the search and seizure, the police while restraining the accused person and his wife and carrying the sacks together walked back to where the motor vehicle was parked. On reaching there, they put the sacks in the motor vehicle and drove back to Tandahimba Police Station. They arrived there in the morning on 11th December, 2017. PW2 ordered the weighing of sacks in the presence of the accused person and his witness Shirazi Mohamed. They got a total weight of 88 kilograms. He also ordered PW3 to take samples of the suspected leaves in the presence of the accused person. He then ordered the exhibits keeper (PW5) to take the sacks and store them in exhibits room. But before storing the same, they labelled the sacks with Investigation Register (IR) Number, which is TND/IR/950/2017 and exhibits register number, that is, 53/2017.

Moreover, according to PW3, after taking the samples of the suspected leaves from each sack, he packed in one envelope and sealed it in the

presence of the accused person. He then labelled it by writing the IR number; after that, he signed the envelope together with the accused person. Then, he handed over both the sacks and the envelope containing the samples to PW5 in the presence of the accused person and his witness one Shirazi Mohamed. Nonetheless, I must hasten to state rightly that, the evidence of PW2 and PW3 is materially different with the testimony of PW5 on how the exhibit was received and drawing of the sample. PW5 was the custodian of exhibits at Tandahimba Police between September, 2017 and August 2018. According to her testimony, on 11th December, 2017, while at her office, PW3 came and told her about the seizure. After that, she went with him to his office where he showed her the sacks. Then she received the sacks from PW3 and labelled the same. After labelling, she transferred them to the exhibits room where it is only the Officer-Commanding-Station (OCS) and herself are allowed access. On 4th January, 2018, PW3 came to draw samples for purposes of submitting the same to Government Chemist for analysis. She informed the OCS and the trio went to exhibits room. In their presence, PW3 drew out the samples from each sack and put the same in a plastic bag.

On 14th December, 2017, the accused person was taken to PW8 to record his extra-judicial statement, which was received as Exhibit P6 after conducting trial within a trial. On 4th January, 2018, PW3 submitted the envelope containing the samples to PW7 through Exhibit P5. After receiving the envelope containing the samples, PW7 opened it in order to satisfy himself of its content, where after he sealed it with a Government Chemist Laboratory Authority (GCLA) seal and registered the same in the samples

register. Then he prepared Form DCEA 001 together with a covering letter ready to be taken to GCLA in Dar es Salaam for analysis. On 5th January, 2018, he handed over the envelope to PW4 via sample register. PW4 stored the same in a special cabinet used to keep exhibits. On 8th January, 2018 he took it together with Form DCEA 001 and travelled to Dar es Salaam where he handed over the same to PW1 for analysis. After receiving, PW1 stored the samples in his cabinet and on 21st March, 2018, he conducted analysis on the samples using a machine called High Performance Liquid Chromatography. The analysis confirmed that, the samples were narcotic drugs, namely *cannabis sativa* because they contained the chemical *tetrahydrocannabinol* which is only found in cannabis plant. He then prepared Exhibit P1, signed it and got it approved by Acting Chief Government Chemist, Benny Mallya.

In his defence, the accused person testified under oath denying to have been found in possession of six sacks of *cannabis sativa*. He further stated that, in the night of 4th December, 2017, while asleep with his wife, five police officers ambushed their house. After entering, they snatched their bed sheet and left them naked. They then, began to beat him up while asking for the whereabouts of *cannabis sativa*. They persisted for a while and then took him without heeding to his request to call other people to independently witness what was then transpiring. They later on took him together with his two bicycles up to their vehicle. After getting there, he saw a baggage of *cannabis* in police motor vehicle. They then forced him into the vehicle and drove off to Tandahimba Police station, where he was incarcerated for four days before he was taken for interrogation. After that, they returned him

back to the cell where he stayed for another three days before taking him to a Justice of Peace. He insisted to be innocent and thus prayed for his release by order of this Court.

In a nutshell, that was the evidence of the Prosecution and defence side. The Prosecution side complied with the order of the Court to file their final submission. However, the defence failed to file their final submission as was ordered by the Court.

In their final submission, the Prosecution side contended that, through the testimonies of the witnesses they called and the exhibits tendered, they have managed to prove their case against the accused person beyond reasonable doubt. According to them, as far as the offence of trafficking in narcotic drugs is concerned, they had two things to prove; one that, the accused person was found in possession of narcotic drugs and two that, the narcotic drugs found with the accused person were *cannabis sativa*. They further submitted that, the evidence of PW2 and PW3 as well as Exhibits P3 and P4 proved beyond reasonable doubt that, the accused person was found in possession of six sacks of narcotic drugs weighing 88 kilograms. In addition, it was also proved through the testimony of the expert, PW1, that the narcotic drugs found with the accused person were *cannabis sativa*. They cited the case of **Makame Junedi Mwinyi v. Serikali ya Mapinduzi Zanzibar (SMZ)** [2000] TLR 455 to buttress their point that, expert evidence is admissible in cases where specialized knowledge is required. They added that, PW1 is credible and witness of truth. On this, they supported their argument by citing the case of **Goodluck Kyando v. Republic** [2006] TLR 363.

Regarding the aspect of chain of custody of the drugs in question, they submitted that, it was well established to the required standard from the evidence of PW3, PW4, PW5 and PW7; as well as Exhibit P5. Therefore, there is no possibility that the said drugs were tempered with in the process up till when they were tendered in Court for admission. In support of this line of argument, they cited the case of **Chukwudi Denis Okechukwu and Three Others v. Republic**, Criminal Appeal No. 507 of 2015 CAT (unreported).

Furthermore, on the issue of discrepancies on the testimonies of their witnesses, it was argued that all prosecution witnesses were credible and plausible, as they were consistent on their answers during cross examination. They submitted further that, in cases where there were inconsistencies in their testimonies, those were just minor ones and do not go to the root of the case. To support this view, they cited again the case of **Chukwudi Denis Okechukwu and Three Others v. Republic** (*supra*). In conclusion, they argued that, the accused person's defence failed to cast doubts on the prosecution's case. According to them, it even cemented their case because the accused person admitted the whole series of events from his arrest and only denied to be found with the drugs in question. On this, they cited the case of **Ally Mpapilo Kailu v. Republic** [1980] TLR 170 to back up their argument. Therefore, it was their prayer that the court should find the accused person guilty and therefore convict him accordingly.

Having considered the evidence on record and the submission by the counsel for the Prosecution as expressed above, the issues for determination are; **one**, *whether or not the accused person was found in possession of the*

*six sacks of cannabis sativa* and **two**, *whether the chain of custody was maintained.*

It is vital to underscore here that, according to Section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2002], in criminal matters, a fact is said to be proved when the court is satisfied by the prosecution beyond reasonable doubt that such fact exists. That is to say, the guilt of the accused person must be established beyond reasonable doubt. Generally, and always, such duty lies with the prosecution except where any statute or other law provides otherwise. One of such exceptions is Section 28 (1) of the DCEA, as amended, which provides as follows:

> *"In prosecution for an offence of possessing, dealing in, trafficking, selling, cultivating, purchasing, using or financing of any narcotic or psychotropic substance, the burden of proof that the narcotic or psychotropic substance, was possessed, dealt in, trafficked, sold, cultivated, purchased, used or financed pursuant to the terms of a licence, permit or authority granted under this Act or any other written law shall lie on the person charged."*

It is clear from the extract above that, in drugs cases, the accused person has the duty to prove that the possession, dealing in, trafficking, selling, cultivation, purchasing, using or financing is in accordance with the licence or permit granted under DCEA. However, when the burden shifts to the accused person, the standard of proof is not as higher as that of the prosecution, as it was stated by the Court of Appeal of Tanzania in the case of **Said Hemed v. Republic** [1987] TLR 117 thus:

*"In criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance or probabilities."*

In that regard, and according to the principles underscored above, it is still the duty of the prosecution to prove beyond reasonable doubt that the accused person trafficked the alleged drugs and, particularly by proving the existence of narcotic drugs at the accused person's house. Such duty does not end there, they must also prove that what was seized from the accused, is the same which was tested by the Government Chemist and finally tendered in court. On the other hand, it is the duty of the accused person to prove on balance of probabilities that, the traffic was in accordance with a licence or permit granted under DCEA.

In answering the first issue, I have carefully considered the evidence of PW2, PW3 as well as Exhibits P3, P4 and P6. It is on record that, PW2, PW3 together with other police officers left Tandahimba Police Station around 21:00 hours and headed to the crime scene. After reaching at a certain place, they left behind their vehicle and started to walk towards the crime scene. Upon arrival, they knocked the door and the accused person opened. PW2 introduced himself, as his colleagues. The accused person and his wife also introduced themselves. Then, they were asked to look for a leader or any other person to independently witness the search, but he told them that, the chairman lives far away and there were no neighbour around there; so, they should conduct the search without any independent witness. After being told that, they began to search and managed to find six sacks of leaves suspected to be *cannabis sativa*. After that, PW2 ordered PW3 to fill

in certificates of seizure (Exhibits P3 and P4). Then they signed save for the accused person and his wife who did not know how to read and write and since they had no stamp pad at the moment, the duo came to sign at Police Station by appending their thumb prints.

Although the evidence of PW2 and PW3 is supported by Exhibits P3 and P4, however these two Exhibits are problematic in two senses; first that, the same were not signed by the accused person at the crime scene to acknowledge that, six sacks were actually found in his possession and second that, the same were not witnessed independently. Regarding the signing at police station, I find support from the decision of the Court of Appeal in the case of **David Athanas @ Makasi and Another v. Republic**, Criminal Appeal No. 168 of 2017 (unreported). In that case, it was stated that;

> *"Since the certificate of seizure was not signed at Chinangali, the place where the search was conducted and considering that there was no independent witness present as required by law, the said certificate cannot be accorded weight."*

It is obvious from the excerpt above that; certificate of seizure must be signed at the place where the search was conducted. That is to say, for certificate of seizure to be valid and accorded weight, it must be filled and signed by relevant persons at the place where the search was conducted and not otherwise. In the present matter, the evidence of PW2 and PW3 shows that, the accused person signed the certificates of seizure at Tandahimba Police Station. The reasons given by PW2 and PW3 was that, the accused person did not know how to read and write and they had no stamp pad at that moment. Their explanation might be true but it casts

strong doubt on prosecution evidence whether the accused person was actually found in possession of the sacks in question. Being illiterate cannot be used as an excuse for a crucial document like certificate of seizure to be signed elsewhere apart from the place where search was conducted and more especially when there is no independent witness.

Apart from that, Exhibit P6 is inconsistent with the evidence of PW2 and PW3 in respect of number of sacks retrieved at the accused person's house. According to it, the police found 35 sacks whereby, they took six and hid the rest in the bush. On the following day, they went to look for them but did not find. Nonetheless, looking closely at Exhibit P6, the same is not a confession in terms of Section 3 (1) (c) of the Evidence Act [Cap. 6 R.E. 2002] as the accused person did not admit the ingredients of the offence against him. Moreover, it was admitted after being retracted; and hence, it requires corroboration before acting on it. Since it requires corroboration, it cannot be used to corroborate the evidence of PW2 and PW3. See the case of **Mkubwa Said Omar v S.M.Z.** [1992] TLR 365.

Basing on the position of the law above, it is clear that the certificates of seizure, Exhibits P3 and P4 have no evidential value, and they cannot be used to support the evidence of PW2 and PW3 to prove that the accused person was actually found in possession of six sacks of *cannabis sativa*. In that view, the first issue is negatively answered.

Be it as it may, assuming that the first issue would be positively answered, yet still, there is another controversy in respect of chain of custody which is the gist of the second issue.

It is settled that, in cases involving movement of exhibits from one point to another, the evidence concerning chain of custody is of utmost importance. As a matter of principle, it is well settled that as far as the issue of chain of custody is concerned, it is crucial to follow carefully the handling of what was seized from the accused, is the same which was tested by the Government Chemist and finally tendered in court. There is a mammoth of authorities giving guidance on chain of custody including the landmark case of **Paulo Maduka and Four Others v. Republic**, Criminal Appeal No. 110 of 2007, CAT (unreported). This case insisted on the proper documentation of the paper trail from the time of seizure up to the stage the exhibit is tendered in court as evidence. Among other things, it was held that;

> *"...The idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime-rather than, for instance, having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected, its very transfer from one person to another must be documented and that it be provable that nobody else could have assessed it."*

However, in the case of **Chacha Jeremiah Murimi and Three Others v. Republic**, Criminal Appeal No. 551 of 2015 CAT (unreported) it was held and I quote;

> *"There should be assurance that the exhibit seized from the suspect is the same which has been analysed by the Chief Government Chemist. The movement of the exhibit from one*

*person to another should be handled with great care to eliminate any possibility that there may have been tampering of the exhibit. The chances of tampering in the Government laboratory analysis should also be eliminated.* ***Generally, there should be no vital missing link in handling the exhibit from the time it was seized in the hands of the suspect to the time of chemical analysis, until finally received as evidence in court after being satisfied that there was no meddling or tampering done in the whole process.*** *"*(Emphasis supplied).

The Court went on to hold that;

*"**In establishing chain of custody, we are convinced that the most accurate method is on documentation as stated in Paulo Maduka and Others vs. R., Criminal Appeal No. 110 of 2007** and followed by Makoye Samwel @ Kashinje and Kashindye Bundala, Criminal Appeal No. 32 of 2014 cases (both unreported).* ***However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation****. Other factors have to be looked at depending on the prevailing circumstances in every particular case. For instance,* ***in cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in Paulo Maduka (supra) would be relaxed****."*(Emphasis supplied).

It is apparent from the extract above that, for exhibits which cannot change hands easily, oral testimony on handling the exhibit suffices to establish the chain of custody. On the other hand, for exhibits that change hands quickly, such as narcotic drugs and the like, the most accurate method to establish chain of custody is documentation. However, depending on particular circumstances of each case, even in the latter type of exhibits, oral testimony is sufficient to establish the chain of custody. (See the case of **Charo Said Kimilu and Another v. Republic**, Criminal Appeal No. 111 of 2015 CAT (unreported). But, in order to rely on oral testimony to establish chain of custody, it is the considered view of this Court that, such testimony must be unbreakably clear, reliable, cogent and watertight.

In the matter at hand, apart from Exhibits P5, there is no any documentation showing the handing over of Exhibit P2 after it was seized from the accused person until tendered in court. In that regard, the prosecution relies on oral testimony to establish that the substance that was seized is the very one which was examined by the Government Chemist and tendered in evidence.

According to the prosecution's evidence, after reaching at Tandahimba Police Station, PW3 weighed the sacks in the presence of the accused person and his witness Shirazi Mohamed. Then he drew samples from each sack and packed in the envelope. He then sealed and signed on the envelope together with the accused person. After that, he handed over the sacks to PW5 and took the samples in the envelope for purposes of submitting to the Government Chemist. He did not disclose where he stored the samples from the 11th December, 2017 to 4th January, 2018 when he submitted to PW7.

However, during cross examination, PW3 claimed to hand over the sacks and samples in the envelope to PW5. Surprisingly, the evidence of PW3 is inconsistency with the evidence of PW5. According to PW5, the handing over on 11th December, 2017 was of six sacks of leaves suspected to be *cannabis sativa*. PW5 said nothing about receiving the envelope containing samples from PW3 on that date. According to her, it was on 4th January, 2018 when PW3 drew samples from each sack in the presence of the OCS and herself. After that, he packed samples and sealed in the evidence bag for purposes of submitting to the Government Chemist. According to her, the evidence bag was in a form of plastic sachet.

From the evidence of PW3 and PW5, it is obvious that, there are contradictions on when and where sample was drawn and stored. If the sample was drawn on 4th January, 2018 as claimed by PW5 and packed in plastic sachet, then it was not the same received by PW7 on 4th January, 2018 and finally analysed PW1. This is due to the fact that, both PW7 and PW1 claimed to receive the sample in a khaki envelope. Nevertheless, if the sample was drawn on 11th December, 2017, but not received by PW5 for purposes of storage, there is doubt on the whereabouts of sample from 11th December, 2017 to 4th January, 2018. PW3 failed to account for the period of about twenty-four (24) days from when the sample had been drawn, to when it was sent to the Government Chemist for analysis. Such failure, cannot eliminate the possibility of the sample being tempered with. In the case of **Director of Public Prosecutions v. Shirazi Mohamed Sharif** [2006] TLR 427, the Court of Appeal held that, the chain of custody of the drugs had not been established after the prosecution failed to account for a

period of five days, from when they had been seized, to when they were sent for analysis.

I am much aware that, not every discrepancy or contradiction in the prosecution's evidence will cause their case to flop. It is the duty of this Court to examine the contradictions and decide whether they are only minor, or whether they go to the root of the matter as it was stated in the case of **Mohamed Said Matula v. Republic** [1995] TLR 3. In the matter at hand, the contradictions go to chain of custody which is the cornerstone in proving the case against the accused person in cases like this. Thus, it is the considered view of this court that, the contradictions are not minor and go to the root of the matter.

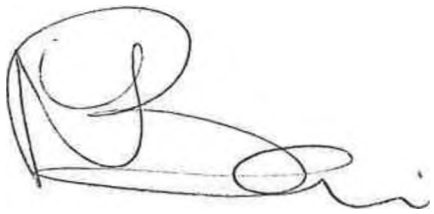
Apart from these contradictions, there is missing link of chain of custody in respect of Exhibit P2 from the time PW5 was transferred to another station to when it was brought before this Court. PW5 in her testimony stated that, she had been the custodian of exhibits at Tandahimba Police Station from September 2017; but as from August, 2018 she was transferred to Kigamboni Police Station in Dar es Salaam. PW2 who tendered Exhibit P2 in Court in his examination in chief, did not disclose who handed him over. However, in cross examination, he said to have received it from WP Alice. He did not disclose if the said Alice was the custodian who succeeded PW5 from August, 2018. Worse enough, the said Alice was not called in Court to testify on how Exhibit P2 was stored until it was brought before this court.

In the case of **Zainabu Nassoro @ Zena v. Republic**, Criminal Appeal No. 348 of 2015 CAT (unreported) the Court of Appeal underlined

the rationale of ascertaining the chain of custody, which is to show to a reasonable possibility that the item that is finally exhibited in court, has not been tampered with along its way to the court. See also the case of **Chukwudi Denis Okechukwu and Three Others v. Republic** (*supra*). It was the prosecution's duty to establish that the substance that was seized is the very one which was examined by the Government Chemist and tendered in evidence. Considering the contradictions stated above and in the absence of testimony of WP Alice, it cannot be said that oral evidence brought in court established an unbreakable chain of custody of those drugs. On the bases of the foregoing reasons, I am of the position that the chain of custody was not properly maintained, hence it was broken. In that regard, the second issue is negatively answered.

Having said so, and for the reasons stated above, it is my firm view that, the prosecution has failed to prove their case beyond reasonable doubt. In the upshot, the accused person is accordingly acquitted of the charged offence of trafficking narcotic drugs and is hereby set free.

It is so ordered.

**I. K. BANZI**
**JUDGE**
**08/04/2020**