

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

AT MUSOMA - SUB REGISTRY

ECONOMIC CASE NO. 3 OF 2020

REPUBLIC

VERSUS

JOSEPH WAMBURA

JUDGMENT

28th and 30th April, 2021

BANZI, J.:

Joseph Wambura ("the accused person") stands charged with the offence of trafficking in narcotic drugs contrary to Section 15 (1) (a) and (3) (iii) of the Drug Control and Enforcement Act, No. 5 of 2015 ("the Drug Act") as amended, read together with paragraph 23 of the First Schedule to, and sections 57 (1) and 60 (2) the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002], as amended. It is alleged that, on 23rd May, 2018 at Tatwe Village, within Rorya District in Mara Region, the accused person trafficked narcotic drugs namely, *cannabis sativa* weighing 100 kilograms. The accused person proclaimed his innocence throughout this matter.

To establish the case against the accused person, the prosecution side under representation of Mr. Anesius Kainunura, learned Senior State Attorney called in nine (9) witnesses to testify, namely, G.7957 PC Gabriel, (PW1), H.4181 PC Benjamin (PW2), G.9455 D/C Hosea (PW3), G.8320 D/C Musa (PW4), WP 9207 D/C Farida (PW5), Chana Mhembe Chana (PW6), Paul Mtango (PW7), Inspector Elia Peter Jekela (PW8) and Balisco Charles Kapesa (PW9). Besides, they tendered ten (10) exhibits, which were admitted, thus: Exhibit P1, Certificate of Seizure; Exhibit P2(a); Letter from OCCID to Magistrate In-charge of Tarime Primary Court; Exhibit P2(b), Form DCEA 006 Inventory of Seized Exhibit for Disposal; Exhibit P3, Motorcycle makes SanlG with Registration No. T250 BZW; Exhibit P4, Certificate of Photograph Form DCEA 002; Exhibit P5, Government Laboratory Analyst Report; Exhibit P6, Two Still Pictures; Exhibit P7, Certificate Regarding Photographic Prints dated 24/10/2018; Exhibit P8, Letter with Ref. No. WMA/MAR/BD/PR/05/15 titled "Uzito wa Kielelezo" TAR/IR/1982/2018-Kusafirisha Bhangi dated 24/5/2018 and Exhibit P9, Letter with Ref. No. WMA/MAR/BD/PR/05/16 titled "Uzito wa Sampuli TAR/IR/1982/2018-Kusafirisha Bhangi dated 24/5/2018.

On the other hand, the defence side under the services of Mr. Leonard Magwayega, learned Advocate called in two witnesses, the accused person who testified under oath as DW1 and Anna Joseph (DW2). They did not

tender any exhibit. Further, during the preliminary hearing, the accused person through his Advocate raised a defence of *alibi* under section 42 of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2019].

Basically, the body of evidence by the Prosecution presents a case that, on 23rd May, 2018 around 1200 hours, PW1 with his colleagues PW2, PC Ramadhan and PC James were conducting routine patrol within Tatwe Village by using two motorcycles. In the course of patrol, they passed near a certain house where they saw the accused person packing three sacks in a motorcycle. They went closer by and PW2 got off the motorcycle in order to verify what was in the sacks. Upon seeing that, the accused person ran away; PW1 and PW2 pursued him. PW2 managed to catch him at a distance of about 20 paces away. After catching him, they took him back to his house and on arrival, they inspected the sacks by cutting open each sack and found the same with cannabis sativa. The same were wrapped in a paper like sticks commonly known as "*tarifa*". Upon realising that, they called a Village Chairman, Odira Chwachi, who on arrival, they informed him about the arrest and PW1 filled in the certificate of seizure. After duly signing the certificate of seizure, they took the accused person with his motorcycle and three sacks up to Tarime Police Station. On arrival, they handed over the accused person with his motorcycle and three sacks.

According to PW5 who is the custodian of temporary exhibits room, on the same date around evening hours, she received three sacks and motorcycle with registration number T250 BZW makes sanLG (Exhibit P3) from PW1. Upon receiving, she stored the same in temporary exhibits room. On 24th May, 2018 around 0900 hours, PW3 after being assigned case file with investigation register (IR) number TAR/IR/1982/2018 to carry out investigation, he took the accused person together with three sacks and went to Sirari at the Weights and Measures Agency for weighing exercise. After they arrived, the sacks were weighed by PW9 and got a total weight of 100 kilograms. PW9 also drew sample from each sack and weighed the same whereby he got 18.2 grams. Then, the sample was packed and sealed in a khaki envelope. Thereafter, they returned to the station where PW3 stored the envelope in his locker and the three sacks were stored in temporary exhibits room. However, according to the testimony of PW5, in the evening of the same date, she received three sacks together with the envelope containing sample from PW3.

On 24th May, 2018, PW3 applied for disposal order of exhibits but the same was not issued as the Magistrate was not present. On 25th May, 2018, he prepared the charge and arraigned the accused person before the District Court of Tarime. On 28th May, 2018, PW3 applied for disposal order before

PW6, the Resident Magistrate of Tarime Primary Court and according to him, disposal order was not issued on that day until 26th June, 2018. However, PW6 in his testimony insisted that, on 28th May, 2018 he issued the disposal order in the presence of PW3 and accused person. Also, it is the prosecution's evidence that, before the sacks were destroyed on 26th June, 2018, PW4 took still pictures of accused person with the three sacks in the presence of PW6. The three sacks containing substance suspected to be cannabis sativa were destroyed by burning. The pictures taken by PW4 were stored in a CD and on 24th October, 2018, were sent to Forensic Bureau in Dar es Salaam where PW8 analysed and printed them after realising that they were real. He then prepared a certificate (Exhibit P7) to that effect.

On 27th November, 2018, PW5 was instructed to send the sample to Government Chemist Laboratory Authority (GCLA) Lake Zone, Mwanza for analysis. Following the instructions, she prepared the submission form and on the same date, she travelled to Mwanza where she handed over the sample by signing in the submission form. After handing over, she was given laboratory number and left. On arrival at her duty station, she handed over the laboratory number to the OC CID so that they can follow up the result. Nonetheless, the evidence of PW7 is materially different with the evidence of PW5 on when and how the sample was received. According to PW7, on

30th November, 2018, while he was in his office at GCLA Lake Zone Mwanza, he received two envelopes from the OC CID of Tarime District through PW5. The first envelope was nylon transparent containing another khaki envelope with dry leaves suspected to be narcotic drugs. After receiving, PW7 registered the sample by giving laboratory number 1434/2018. Then, he took it to the laboratory where he opened and weighed the sample separately from the packages. He got a total weight of 13 grams. He proceeded to conduct analysis on the sample using Dequesnos-levine Test (Test 6) involving mixing up of reagents 6A, 6B and 6C with the sample in a test tube. After mixing, he put the tube aside for one minute whereby, it changed colour into violet confirming narcotic drugs, namely *cannabis sativa* because it contained the chemical *tetrahydrocannabinol* which is only found in cannabis plant. He then prepared Exhibit P5, signed it and got it approved by Acting Manager, GCLA Lake Zone, T. R. Mwaisaka. On 5th December, 2018, he took the report to the reception for collection. He later testified that, on 28th February, 2020 he handed over the report and remained sample to PW5.

In his defence, the accused person testified under oath and categorically denied to have committed the offence of trafficking in narcotic drugs. He also denied to have been arrested at Tatwe Village. He further

denied to have signed in Exhibits P1, P2(b), P8 and P9 or to be involved in mini proceedings conducted on 28th May, 2018 or 26th June, 2018. DW1 told the Court that, he lives with his wife, DW2 at Tatwe Village within Rorya District in Mara Region. On 23rd May, 2018, he woke up around 0600 hours and went to Korotambe Village to see his wife's grandmother who was sick. According to him, it was about one and a half hours walking distance from Tatwe Village to Korotambe Village. He went alone leaving behind his wife, who was recovering from delivery. On his return, he was arrested at Kijiweni Hamlet within Nyabirongo Village by persons in civilian clothes who introduced themselves as police officers. After the arrest, they took him to Tarime Police Station.

Upon arrival, they put him in lock up and around 1600 hours, they took him out and informed him his allegation of trafficking in cannabis sativa which he denied. On the same date 23rd May, 2018, he was photographed with three sacks of cannabis sativa outside the station. On 24th May, 2018, PW3 took him together with parcels to Weights and Measures Agency at Sirari where on arrival, they took the parcels and weighed them. Apart from that, he testified that, on 28th May, 2018 and 26th June, 2018, he was in Tarime prison and he has never got out or taken anywhere for inventory or disposal or destruction of exhibit as it was alleged by PW3 and PW6. Both

DW1 and DW2 denied ownership of the motorcycle (Exhibit P3). He insisted to be innocent and thus prayed for his release by order of this Court.

In a nutshell, that was the evidence by the prosecution and defence side. The counsel of both sides made their short final submissions orally. It was the contention of the counsel for defence that, the prosecution has failed to prove the case beyond reasonable doubt as their evidence is full of inconsistencies from the moment of seizure to the issue of chain of custody. He also prayed for Exhibits P1, P2(b), P8 and P9 not to be accorded weight because the same were not signed by the accused person considering the dissimilarity of signature from one document to another and the fact that the independent witness was not called to testify. On the other hand, it was the contention of the counsel for the Republic that, the oral testimonies of PW1 to PW9 and the documentary evidence tendered managed to prove beyond reasonable doubt that, the accused person trafficked 100 kilograms of cannabis sativa. According to him, the chain of custody was proved through the testimonies of PW1, PW3, PW5, PW7 and PW9.

Having considered the evidence on record and the submissions by counsel for both sides, the issues for determination are; **one**, *whether the accused person was found in possession of the three sacks of cannabis sativa* and **two**, *whether the chain of custody was maintained*.

Before determining the issue at hand, it is worthwhile noting here that, 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. This is provided under section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2019]. 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. Section 28 (1) of the Drug Act is among of such exceptions. According to this section, 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 the Drug Act. However, it is settled law that, when the burden shifts to the accused person, the standard of proof is on balance of probabilities. See the case of **Said Hemed v. Republic** [1987] TLR 117. In that regard, and according to the principles underscored above, it is the duty of the prosecution to prove beyond reasonable doubt that the accused persons trafficked the alleged drugs and, particularly by proving that, three sacks of cannabis were seized from the accused person. Likewise, it is the duty of the accused person to prove on balance of probabilities that, the traffic was in accordance with the licence or permit granted under the Drug Act.

Starting with the first issue, throughout the trial, the prosecution side was optimistic that, the three sacks were seized from the accused person in the course of packing the same into his motorcycle (Exhibit P3). The seizure was executed by PW1 the presence of PW2, PC James, PC Ramadhan and independent one Odira Chwachi. On the other hand, it was the contention of the defence that, the sacks in question were not seized from the accused person, and he did not sign in Exhibit P1 or owns Exhibit P3.

In answering the first issue, I have carefully considered the evidence of PW1, PW2 as well as Exhibit P1 and P3 in the light of evidence of DW1. It is on record that, on the fateful day PW1, PW2 together with PC James and PC Ramadhan were conducting patrol within Tatwe Village by using two motorcycles. According to PW1, in the course of patrol, they passed near a certain house where they saw accused person packing three sacks in a motorcycle. They went closer and PW2 got off the motorcycle in order to verify what was in the sacks. Upon seeing that, the accused person ran away whereby, PW1 and PW2 chased him. PW2 managed to catch him at a distance of 20 paces away. After catching him, they took him back to his house and on arrival, they inspected the sacks by cutting each sack and found the same with cannabis sativa. The same were wrapped in a paper like sticks commonly known as "*tarifa*". Upon realising that, they called a

village chairman who on arrival, they informed him about the arrest and PW1 filled in the certificate of seizure, Exhibit P1. According to chief testimony of PW1, Exhibit P1 was signed by the said Chairman and PC James. Likewise, PW2 in his chief testimony stated that, Exhibit P1 was signed by PW1, Chairman and PC James. It can be recalled that, the accused person denied to have been arrested at his house. He also denied to have signed in Exhibit P1. Now, can we say with certainty that, the accused person signed in Exhibit P1?

As I said earlier, both PW1 and PW2 in their chief testimony did not mention the accused person as among the persons who signed in Exhibit P1 after the same was prepared by PW1. The record shows that, while they were led by learned counsel for Republic on who signed in Exhibit P1, their answers did not include the accused person as among the persons who signed it. The fact about the accused person signing in Exhibit P1 emerged in cross examination. Now can it be said that both witnesses missed that fact when they had opportunity to reveal so in their chief examination but they remembered it during cross examination? Or can it be said that, the accused person actually did not sign the same that is why they did not say so? This uncertainty could have been cleared by independent witness, Odira Chwachi who according to PW1 and PW2, witnessed the seizure in question and

signed in Exhibit P1. But this witness was not called to testify although he was listed from the committal proceedings to preliminary hearing.

I am aware that, in proving any fact, it is the strength of the evidence that matters and not the number of witnesses as provided under section 143 of the Evidence Act. Equally, it is vital to underscore that, the general rule is that the prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an adverse inference to the prosecution. See for example; **Azizi Abdalah v. Republic** [1991] TLR 71 and **Riziki Method @ Myumbo v. Republic**, Criminal Appeal No. 80 of 2008 CAT (unreported).

In the case at hand, the said Odira Chwachi was, to my considered view, a material witness, and would be independent. This witness was listed as one of the prosecution witnesses but the prosecution opted not to call him without sufficient reason being shown. The materiality of his testimony comes from the fact that, he witnessed the seizure and signed in Exhibit P1 to confirm that, the sacks in question were seized from the accused person. This witness was also material to confirm that it was the accused person who actually signed in Exhibit P1 and to corroborate the evidence of PW1 and

PW2 who from the first instance did not reveal that fact. Therefore, failure to call him without given any reason at all, casts strong doubt on prosecution evidence if at all the sacks in question were seized from the accused person. In addition, I have thoroughly examined Exhibit P1 alongside with Exhibits P2(b), P8 and P9 all purported to be signed by the accused person. It is very unfortunate that, it does not need a handwriting expert to see dissimilarity of the signatures on these four exhibits. The unlikeness is so obvious to be noticed by an ordinary person who just knows how to read and write. Likewise, this casts doubt if at all the accused person did actually signed in Exhibit P1 or other three exhibits.

Furthermore, the prosecution evidence shows that, the accused was arrested after being seen packing the sacks into his motorcycle (Exhibit P3). After completion of seizure exercise, PW1 and his colleagues took the accused person, the sacks and Exhibit P3 up to police station. Although there is a claim that Exhibit P3 belongs to the accused person, but the accused person in his defence, disassociated himself from owning the same. Nonetheless, PW3 as an investigator did not bring any evidence to verify who is the owner of the motorcycle in question, be it the accused person or any other person. Worse enough, the motorcycle in question is not featured anywhere in the certificate of seizure, Exhibit P1. In other words, it was not

seized alongside the three sacks. This in itself and in the absence of testimony of independent witness raises strong doubt on prosecution evidence if at all the sacks in question along with the motorcycle were seized from the accused person.

It must be recalled that, the accused person in this case raised a defence of *alibi* claiming that, on the date and time of incident, he was not at Tatwe Village. He brought one witness who claimed that, on 23rd May, 2018, the accused person left home around 0600 hours to Korotambe Village and he has never returned. It is the position of the law that, the accused person has no duty to prove his *alibi* to be true. He only needed to raise the slightest doubt on the prosecution case that he was not at the scene of crime. See the case of **Abas Matatala v. Republic**, Criminal Appeal No. 331 of 2008 CAT (unreported).

Therefore, in the considered view of this Court, the above-mentioned flaws cast strong doubt on the prosecution's evidence if at all the three sacks in question were actually seized from the accused person. In view thereof, the first issue is answered negatively.

Be it as it may, assuming that the first issue would be answered positively, 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 person, is the same which was 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) which 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.

However, documentation is not the only way of establishing chain of custody. The jurisprudence on this area has been developed cautiously over time. In several cases such as **Chacha Jeremiah Murimi and Three Others v. Republic**, Criminal Appeal No.551 of 2015 [2019] TZCA 52 at www.tanzlii.org and **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 [2018] TZCA 361 at www.tanzlii.org demarcation was drawn between handling of exhibits which cannot change hands easily and those

which can change hands easily. The position of the law is 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 can change hands quickly, such as narcotic drugs and the like, the most accurate method to establish chain of custody is documentation. However, with this jurisprudence, even in the latter type of exhibits, oral testimony is sufficient to establish the chain of custody. See the cases of **Charo Said Kimilu and Another v. Republic**, Criminal Appeal No. 111 of 2015 CAT (unreported), **Chukwudi Denis Okechukwu and Three Others v. Republic**, Criminal Appeal No. 507 of 2015 [2018] TZCA 255 at www.tanzlii.org and **Marceline Koivogui v. Republic**, Criminal Appeal No. 469 of 2017 [2020] TZCA 252 at www.tanzlii.org all involving narcotic drugs.

In the instant matter, apart from Exhibits P1, the prosecution relies on oral testimony to establish the chain of custody. It can be recalled that, the substance in the sacks was disposed of way back when the case was still before the Committal Court. Exhibit P2(b) was tendered in evidence in lieu of the purported cannabis sativa.

According to the evidence of PW1 and PW2, on arrival at Tarime Police Station, they handed over the three sacks, motorcycle and accused person. However, neither PW1 nor PW2 mentioned the name of the person to whom

they handed over the sacks in question. On the other hand, PW5 claimed to have received the sacks in question from PW1 and stored the same until 24th May, 2018, when she handed over to PW3 who later in the evening, returned the same together with sealed envelope containing sample. Nevertheless, PW3 in his testimony stated that, after weighing exercise, he took sealed envelope containing sample and stored the same in his locker while the three sacks were stored in temporary exhibits room. On 28th May, 2018, PW5 handed over the three sacks to PW3 and returned them on the same date. PW5 kept on storing the sacks until 26th June, 2018 when she handed over to PW3 for destruction. According to PW6, on 28th May, 2018 upon being shown the accused person together with the sacks in question, he issued an order of disposal of exhibits and on 26th June, 2016 he witnessed the photographing exercise as well as destruction of the sacks containing cannabis sativa. To the contrary, PW3 insisted that, nothing proceeded on 28th May, 2018 before PW6 and no disposal order was issued on that day. According to him, disposal order was issued on 26th June, 2018.

On the other hand, the accused person denied to be present and involved in any mini proceedings conducted by PW6 of 28th May, 2018. He also denied to be present on 26th June, 2018 when the destruction of exhibit was preceded by taking of still pictures. According to him, the still pictures

were taken on 23rd May, 2018. There is no dispute that after the accused person was arraigned before Tarime District Court on 25th May, 2018 he was taken to Tarime Prison as his offence is unbailable. PW3 admitted that, there was no removal order for release of the accused person from Tarime Prison on 28th May, 2018 and 26th June, 2018. I had opportunity of perusing the record on committal proceedings and there is nothing to suggest that the removal order was issued on 28th May, 2018 and 26th June, 2018. Explanation by PW3 that, the accused person was released from prison basing on good relationship between the OC CID and Officer In-charge of Prison is not only the unknown procedure in the eyes of law but also very implausible. The still picture, Exhibit P6, are also questionable as to when they were taken considering the fact that, there is no proof that the same were taken on 26th June, 2018. This in itself casts strong doubt if at all the accused person was present and heard before PW6 issued the disposal order of the sacks in question. It also casts doubt if the accused person was present during the destruction of the exhibit in question considering the fact that, no certificate of destruction was prepared as prescribed under Form II of the Second Schedule to the Drug Control and Enforcement (General) Regulations, GN No. 173 of 2016 and eventually tendered to substantiate

the destruction. Thus, disposal of exhibit was marred with irregularities which vitiates the entire process.

Apart from that, there is another controversy in respect of the sample submitted to PW7 for analysis. According to PW3, on 24th May, 2018 after returning from weighing exercise, he stored the sample in his locker. But PW5 claims to receive the same from PW3 alongside with the three sacks. PW3 also testified that, the sample was sent to the Chief Government Chemist by PW5 after he handed over to her. However, he did not state when he handed over to her since he claimed to have stored the same in his locker after weighing exercise. On the other hand, PW5 claimed to have stored them after being handed over by PW3 on 24th May, 2018 after weighing exercise.

Moreover, PW5 in her testimony stated that, on 27th November, 2018, following the instructions from the OC CID, she submitted the sample to Chief Government Chemist in Mwanza through sample submission form which she signed to confirm the handing over. After submitting the sample, she was given Lab Number which she did not recall, whereby, on the same date, she returned back to her duty station and handed it over to the OC CID so that they can follow up the result. Surprisingly, PW7 claimed to have received the sample from PW5 on 30th November, 2018. In addition, while

PW3, PW5 and PW9 all claimed that the sample was in one khaki envelope, PW7 claimed to receive two envelopes; khaki envelope within another nylon transparent envelope. From the evidence of PW5 and PW7, it is obvious that, there is contradiction on when the sample was sent to PW7. If the sample was sent on 27th November, 2018 as claimed by PW5, then it was not the same received by PW7 on 30th November, 2018 and finally analysed him, this is due to the fact that, PW7 claimed to receive the sample within two envelopes; transparent and khaki. In the considered view of this Court, such contradiction is not minor and it goes to the root of the matter concerning the chain of custody.

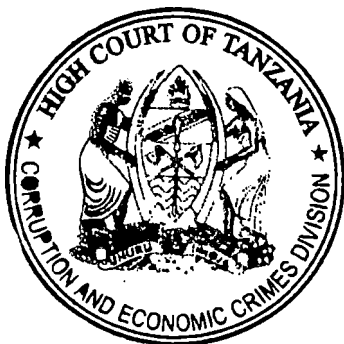
Be it as it may, assuming that the sample was sent on 27th November, 2018, or 30th November, 2018, yet still, the same was submitted after the lapse of six months after seizure. Neither PW3 nor PW5 accounted for the period of six months from when the sample had been drawn, to when it was sent to the 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.

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 evidence stated above, 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, assuming that the first issue would be positively answered, yet still, this case would have been flopped because the chain of custody was not properly maintained. In that regard, the second issue is also negatively answered.

Having said so, and for the reasons stated above, it is the finding of this Court 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 in narcotic drugs and is hereby set free.

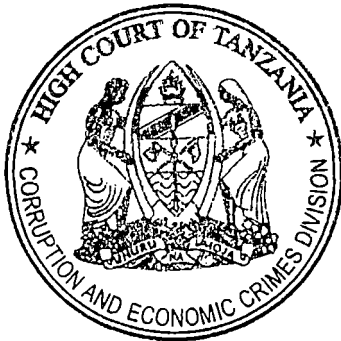
It is so ordered.



I. K. BANZI
JUDGE
30/04/2021

ORDER

Exhibit P3, to be forfeited to the Government of the United Republic of Tanzania.



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I. K. BANZI
JUDGE
30/04/2021

Right of Appeal against the acquittal and order is fully explained.



A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a series of loops and a horizontal line at the end.

I. K. BANZI
JUDGE
30/04/2021