

**IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT SHINYANGA SUB-REGISTRY
ECONOMIC CASE NO 2 OF 2021**

THE REPUBLIC

VERSUS

- 1. SIMON JUMA KASHINDYE**
- 2. LAMECK NIKOMBOLWE**

JUDGMENT

04/08/2022 & 16/08/2022

E.B. Luvanda, J

Simon Juma Kashindye (first accused) and Lameck Nikombolwe (second accused) are indicted for illicit trafficking in narcotic drugs contrary to section 15(1)(a) and (3)(iii) of the Drugs Control and Enforcement Act, No. 5 of 2015 as amended by the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017 and Act No. 3 of 2016 read together with paragraph 23 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organised Crimes Control Act, Cap 200 R.E. 2019.

In the particulars of offence, it is alleged that on 15/04/2018 at Isaka Area within Kahama District in Shinyanga Region the accused persons jointly and together trafficked in narcotic drugs namely cannabis sativa commonly bhang

weighing 89.9 kilograms. The accused persons pleaded not guilty to the information.

The issue for determination, is whether the information was proved on the standard.

There is no dispute that on the material day to wit on 15/4/2018 the second accused was driving a car registration number T 872 CVS Toyota Coaster brand (exhibit P5) hired for bereavement, where the first accused was a passenger therein. There is no dispute that on the material date a car exhibit P5 was on return trip/route to Dar es Salaam after completion of burial ceremony at Kahama, where on arriving at a gate of Natural Resources it was stopped. It was the testimony of the arresting officer Patrick Constatino Mminza (PW5) that after a car had stopped, he ordered the second accused to open a boot where he saw two small sulphate bags therein and three sulphate bags under a rear seat. The five sulphate bags containing dry leaves of cannabis sativa (exhibit P4) wrapped by sellotape, were seized by Daniel Denis Mkoma (PW4) via a seizure certificate exhibit P6. On defence, the first accused (DW1) did not deny carrying cargo in that car. The second accused (DW2) purported to have been summoned by the conductor and proceeded to a car after all passengers had boarded. However, DW2 did not say if cargo were loaded in his absence,

although he made a general denial that cargo is an exclusive domain of the conductor. Be as it may, a defence by the first and second accused that some passengers boarded on the way at Phantom Area which according to them was among the query asked by PW4, is untenable. Indeed they did not say if those passengers loaded any cargo therein. A plea by DW1 and DW2 that, after stoppage at a gate of Natural Resources they saw many cargo aside the road, alleged loaded by the militia at the instance of arresting officer as put by DW1, is too remote and a concoct. My undertaking is supported by a fact that, on cross examination DW1 stated that he cannot know if a cargo exhibit P4 is the same loaded by militia at Isaka. But later DW1 changed a story, said that a cargo loaded in a car at Isaka is the same which was tendered in court. On re-examination, DW1 twisted his story again this time saying that he did not recite a cargo loaded thereat (Isaka), including the one tendered in court, adding that he neither put any mark to enable him to recall it. Principally DW1 was contradicting himself, unfocused on his line of defence.

A fact by DW2 that passengers/ladies who were allowed to leave, boycotted or protested on accused's behalf, in view of compelling for them accused to be taken to court, if any offence was committed, but this fact was not asked to PW4, PW5 and PW8.

The explanation by DW2 that there was a prolonged discussion with PW4 regarding a threat for a fine at a rate of SUMATRA that is sum of Tsh 700,000, was not asked to PW4 and PW8. A fact by DW2 that he was solicited corruption of Tsh 200,000 by the arresting officer, was not put to PW4, PW8 and PW5.

A defence by the first accused that he disembarked at the gate by virtue of his title as a head of convoy, is untenable. The evidence of PW5 and Mbaraka Juma (PW8) is to the effects that the first accused disembarked thereat on account of claiming ownership of sulphate bags exhibit P4. More important, a fact that the first accused alighted because was a head of convoy of mourners was not asked to PW5, PW8.

A fact that a car exhibit P5 was damaged on its rear light due to chaos and commotion alleged orchestrated by youths (brats) at Phantom Area, was not asked to PW5, PW8 or PW4.

A question of being asked or solicited corruption by PW5 alleged for carrying passengers on the way, was not put neither to PW5 nor PW8. In **Issa Hassan Uki vs The Republic**, Criminal Appeal No. 129 of 2017, Court of Appeal of Tanzania at Mtwara (unreported), cited by the learned State Attorney, at page 16 the apex Court had this to say,

'It is settled in this jurisdiction that failure to cross-examine a witness on a relevant matter ordinarily connotes acceptance of the veracity of the testimony'

The apex Court referred to the case of **Paul Yusuf Nchia vs National Executive Secretary, Chama cha Mapinduzi & Another**, Civil Appeal No. 85 of 2005 Court of Appeal of Tanzania (unreported), that,

'As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said'

To crown it all, these new facts depicted above introduced by DW1 and DW2 at defence stage, are taken as an afterthought and therefore are disregarded altogether.

Regarding the argument by the defence Counsel that there is no mention of the word cannabis sativa reflected in the information or tetrahydrocannabinol reflected in the chemist report (exhibit P3), in the statute book that is the Drugs Control and Enforcement Act, Cap 95 R.E. 2019, is unmerited. Section 2 of Cap 95 (supra), define cannabis to mean: "any part of the plant of the genus cannabis, excluding the seeds, the mature stock, or fibre produced from the cannabis plant or cannabis resin".

Cannabis plant is defined to mean "a plant of the genus cannabis by whatever name called and includes any part of that plant containing tetrahydrocannabinol".

Cannabis resin is defined to mean "the separated resin where the crude or purified is obtained from the cannabis plant.

It is true that there is no mention of the word *sativa* or *bhang* as reflected in the information. However, the above definition of cannabis plant encompass any other name of the genus cannabis. Meaning that it can be referred by whatever name provided is in the same species or group of the said plant. Therefore to refer to it as cannabis *sativa* or *bhang* as commonly or locally or domestically called, cannot be said that the information does not disclose the essential elements of the offence nor cannot be said that it vitiated the whole information. In respect of the argument that the word tetrahydrocannabinol reflected in report of the Government Analyst that is exhibit 3, alleged is nowhere to be seen in the list of prohibited drugs, is invalid. The same is captured and feature in the definition of the word cannabis plant quoted above.

Regarding the argument of the defence Counsel that the government laboratory analyst report exhibit P3 is not detailed with scientific method she deployed to arrive at her conclusion. This too is unmerited. Exhibit P3 is a

standard form found on the First Schedule to Cap 95, nowhere require the Chemist to state a detailed methodology for her analysis. Even under the provision of section 48A(1) of Cap 95, which is all about reports of government analyst, there is no such requirement for the Chemist to explain in the report methodology used in her analysis. Above all, the provision of section 48A(2) of Cap 95, provide I quote,

'Notwithstanding anything contained in any other law for the time being in force, 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'

Herein there is no evidence to rebut the findings of the Chemist Sane Mayaya Lyochi (PW1), apart from attacking the form. In such a situation, the law dictate for a report to be treated as a conclusive. The cases of **Omary Said @ Athumani vs The Republic**, Criminal Appeal No. 58 of 2022, C.A.T. at Tanga (unreported) and **Repblic vs Maulid Hamis and Another**, Economic Case No. 3 of 2021 (unreported), cited by the defence Counsel, are distinguishable to the facts of this case, as therein the Court was dealing in a situation where drawing and packing samples by the sampling officer in respect of many bundles were lumped together, which is not a case herein. PW1 said

she received all five sulphate bags of cannabis sativa exhibit P4, took sample from each bag and put in separate test tube, then conduct analysis on the spot at the laboratory.

With regard to an argument that there were discrepancies as to who conducted search and at what time, even if it was there but did not distort a central story that PW5 arrested a car exhibit P5 and impounded five sulphate bags of cannabis sativa exhibit P4 which were later formally seized by PW4 via a certificate of seizure exhibit P6. Therefore it cannot be said that those minor discrepancies by whatever means had the effect of denting prosecution case. Equally an argument that the alleged seven passengers in a motor vehicle exhibit P5 were not summoned, is of no avail. The testimony of PW4, PW5 and PW8 is credible and reliable.

I am of the view therefore that the information levelled to the accused persons was proved beyond a shadow of doubt.

Appreciation to Mr. Ahmedi Hatibu and Ms. Tuka learned Prosecuting Officers, Mr. Frank Samwel learned Counsel for the first accused, Mr Paul Kaunda and his team Ms Getruda Faustine and Ms. Gloria Ikanda learned Counsel for the second accused, for their valuable representation during trial.

The accused persons are guilty and are convicted for the offence of illicit trafficking in narcotic drugs contrary to section 15(1)(a) and (3)(iii) of Act No. 5 of 2015 (supra) as amended by Act No. 15 of 2017 (supra) and Act No. 3 of 2016 (supra) read together with paragraph 23 of the First Schedule to and sections 57(1) and 60(2) of Cap 200 R.E. 2019 (supra).



E.B. Luvanda
Judge
16/08/2022