

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
AT SONGEA SUB-REGISTRY

ECONOMIC CASE NO. 01 OF 2022

REPUBLIC

VERSUS

KARIMU RASHID KAWALIKA

JUDGEMENT

Date of last Order: 1/11/2022

Date of Judgement: 01/02/2023

MLYAMBINA, J.

The accused person, Karimu Rashid Kawalika stands charged with the offence of trafficking in narcotic drugs contrary to *section 15 (1) (a) of the Drug Control and Enforcement Act, [Cap 95 Revised Edition 2019]* read together with *paragraph 23 of the first schedule to, and section 57 (1) of the Economic and Organised Crimes Control Act [Cap 200 Revised Edition 2019]*. It was alleged that on 13th January, 2020 at Lupapila Area within Songea District in Ruvuma Region, the accused person was found in possession of Sixty Three Kilograms and Sixty Four Grams (63.64) of Narcotic Drugs commonly known as Bhangi.

At the date scheduled for the hearing, Mr. Saraji Iboru learned Principle State Attorney assisted with Ms. Generosa Montano learned

State Attorney appeared for the Republic (The Prosecution), while the accused person was represented by Mr. Melkioni Mpangala learned Advocate. To prove their case, the Republic paraded seven witnesses namely Abdullah Mstapha Kimuya (PW1), Gabriel Jacob Gabriel (PW2), E. 5760 Detective Sergeant Karim (PW3), Juma Mohamed Abdallah (PW4), G 5114 D/C Khalid (PW5), F 5316 Detective Corporal Gabriel (PW6) and G 3264 Corporal Bakari (PW7). They tendered seven (7) exhibits. On the other hand, the accused person testified as a sole witness and he did not tender any exhibit.

Briefly, the evidence adduced before the Court involved both expert and normal witnesses. To start with the expert evidence, PW1 told this Court that on 13th February, 2020 morning hours while at his office of Chief Government Chemists Southern Zone situated at Mtwara, he received a blue nylon bag containing a sulphate bag with dry leaves suspected to be a narcotic drug commonly known as Bhangi. He also received a letter from RCO PF 180 and a form to send exhibit at Laboratory DCEA 001 of 2019. The aim was to make inquiry concerning the dry leaves suspected to be narcotic drugs, identify the weight and the effect to the user.

PW1 measured the leaves. He discovered the leaves measured sixty three kilograms and sixty four grams (63.64). Thereafter, he registered

the sample as SZL/20/2020 (Laboratory Number of Southern Zone and sealed with the Chief Government Seal as GCLA and he signed at the nylon sulphate. He then handled the same to Police Officer known as Khalid. On 21 February, 2020, PW1 took the sample to the Chief Government Chemistry Head Quoter at Dar es Salaam for investigation because Southern Zone by then had not started to conduct investigation. The aim of sending the sample to the Chief Government Chemistry was to find out if the sample were narcotic drugs, its type and its effect to human being. He handled the sample to one Gabriel Gabriel. The sample were labelled with No. 700/2020, the laboratory number at Head Quoter.

Moreover, PW1 told this Court that; he witnessed the preliminary test which was conducted through a method known as "*Deqynois Levine Test*". It was discovered that the dry leaves were narcotic drugs "Bhangi". After he received the confirmatory test from Gabriel, he prepared his report which confirmed the preliminary test results. Thereafter, he sent the report to the Head Quarters and handled the reports to Police Officer one Khalid. PW1 identified the exhibit to be the one he received when he was at Mtwara and sent to the Head Quarters as it has the same mark he put and mentioned before this Court. He prayed to tender the exhibit.

The counsel for the accused objected the exhibit to be admitted to Court on the ground that the witness failed to identify the exhibit because there was no sulphate bag within the exhibit as he claimed. The objection was overruled by the Court on ground that it was not pure point of law but factual which are capable of being addressed during cross examination.

During cross examination, PW1 conceded not to tell the Court the reasons for staying with the sample for nine days, how he stored and transported it to Head Quoter. He did not see the mark he put at Mtwara. no evidence that Gabriel received the sample. He did not bring the register of Mtwara or Dar es Salaam.

PW1 evidence was supported by PW2 a Chemists at the Office of the Chief Government Chemist Dar es Salaam who agreed to have received Exhibit brought to him by the chemists from their office Southern Zone Office one Abdullilah Kimuya. It was on 12th February, 2020. The sample was kept in the envelop and he was asked to verify if the dry leaves in the envelope was narcotic drugs or not. The sample was registered with No. 700/2020. He conducted a preliminary test in the presence of Mr. Kimuya. They discovered that the sample were narcotic drugs. Thereafter, Mr. Kimuya left. He conducted a confirmatory test in

which he discovered that there was a chemical known as "*tetra hydrocannabino*". He, then prepared a test report, gave it to the head of Department for verification. The sample received from Mtwara was labelled SZL/20/2020, sealed with a mark of GCLA (Government Chemistry Laboratory Authority), was admitted to Court as exhibit P3. They used three types of the chemicals for analysis, to wit: *Duqueos Levine Reagent*, Hydrochloric Acid and Dichloromethane. They discovered that the sample were *cannabis sativa* commonly known as Bhangi which can cause addiction, destroy brain, cause hallucination and lower cognitive ability.

During cross examination, PW2 added that, he did not measure the sample brought by his Co-Officer. He was supposed to measure if it was from Police Officer or any person not from their office. He was assured that the sample was already measured. He re-registered the sample in the register book. The register and the letter he received from Mr. Kimuya was left in the office. He brought no any proof of receiving the document except the letter.

PW3, E 5760 Detective Sergeant Karim was a leader of the Patrol team on a fateful day. Apart from PW3, the team mates were PC. Eli Rehema, PC Sondo, WP Lidya, PC Ramadhani and the one he did not

remember his name. While on their duty, he was called by the OC CID one Kulwa and he was directed to go to Londoni where there was a Natural Resources Gate. He further informed PW3 that there was an informer who could take them to Litapwasi. There were six Police Officer in the Patrol motor vehicle. At the Natural Resources gate, they found the said informer who directed them to follow Namanditi road until they saw a small pool of water and the Officer of Natural Resources known as Juma Mohamed.

Thereafter, they found the Natural Resources Officer with another person sitting down. There was also two motor cycles and one of them had a luggage packed in a sulphate bag. The motor cycle with luggage was registered as MC 396 CKC, red in colour, and make Haojue.

He further told this Court that Juma narrated to him all the incident. He interrogated the suspect. The latter told him that he came from Mitomoni and was heading to Shule ya Tanga. The suspect conceded that the motor cycle belonged to him and the luggage too. They opened the bag a little at the side and proved that it was Bhangi. The suspect was sober. He recorded the seizure certificate for Bhangi and Motorcycle. The said Certificate was admitted to Court as exhibit P4 after the preliminary objection in relation to the said exhibit was overruled by this Court on

ground that the said certificate of seizure was not accompanied by the search warrant because the whole procedure was done in emergency as per *section 42 of the Criminal Procedure Act [Revised Edition 2022]*.

Moreover, PW3 deposed that they recovered Bhangi which was packed in a sulphate bag covered in blue nylon and the motor cycle registered as MC 396 CKC make Haojue, red in colour. The seizure was conducted on 14th January, 2020 at 00:25 hours. The suspect name was Karim Mbalika. He pointed to him in the dock to be the one they arrested. They identified him by using the Car and torch light. They headed to Songea Police Station. At police reception, they identified the accused by using the light which came from two bulbs (tube light and round bulb). He handled over the motorcycle, Bhangi and the accused person to Corporal Isack.

PW3 identified the exhibit as the same one he arrested, seized and handled over to Corporal Isack on 14th January, 2020 at Songea Police Station. The Motorcycle was admitted to Court as Exhibit P5.

On cross examination, PW5 added that; upon seizing the luggage, he did not mark it. He insisted that the luggage was covered with a blue nylon and a sulphate bag. He refused to have prepared a chain of custody in relation to the seized luggage. He handled the luggage to Isack and

left. He insisted that upon reaching at the scene of crime, the accused was already arrested by Juma, a Natural Resources Police Officer. They saw two motorcycles. One with luggage. He did not take statement at the scene but at Police Statement. He insisted to have neither seen the accused riding a motor cycle nor been aware that Juma and his fellow went after the accused. He searched the accused without search warrant. Juma witnessed the search. He reached the scene around 11:30 hours.

PW4, Juma Mohamed Abdallah who was the Natural Resources Officer testified to this Court that; on January, 2020 he was working at Londoni Natural Resources Gate. Their duty was to inspect those with forest product(s) such as charcoal, timber and food crops. He was a casual worker employed by Tanzania Forestry Service (TFS). On 13th January, 2020 while at his working place, around 11:00 hours, a motor cycle red in colour make Haujoe, carrying a luggage in sulphate bag and covered with blue nylon came to his working place. They stopped him, thinking that he was carrying a charcoal. Instead, the rider turned back and drove away with a high-speed heading to Lupapila. They decided to chase him. One bodaboda rider carried him. They managed to catch him after falling down at JIPU way heading to Namanditi Stand. He inspected the luggage.

and discovered that it was not charcoal but Bhangi. He discovered it through its smell.

Moreso, he phoned the OC CID who instructed him not to let the suspect go. After 30 minutes, the Police Officer arrived at the London Gate and instructed them to proceed to JIPU which is on the way to Namanditi. At the scene Police Officer known as Karim searched the luggage and discovered it was Bhangi. Also, Police Karim filled the paper and instructed him and the accused to sign. He could not identify the said paper because it was filled during the night. He identified a motorcycle base on the first and last part of the registration number MC 396 CKC make Haojue red in colour. PW4 identified the motorcycle to be the one he ceased while carrying narcotic drugs in a sulphate bag before the Court. The way it was sealed, it had a green line big and small but due to the lapse of time the bag seems to be worn. The motorcycle rider was paid by OC CID.

PW4, further remembered on the other day when he was at Soko Kuu, standing at CRDB ATM, the accused dropped from the motor vehicle make Paso, red colour approached and reminded if he remembered him. He went further and reminded to be the one who arrested him in possession of Bhangi. He asked if he was in league with him. He informed Kulwa who advised him to open an intimidation case against the accused.

Thereafter, the accused through one Police Officer invited him to Prison and he apologised that he has learnt lesson. He managed to identify the accused to be the one in the dock.

Upon cross examination by Mr. Melkioni Mpangala learned Advocate, PW4 said that; he never mentioned neither the motor cycle registration nor the motor cyclist hired to chase the accused. He could not know who added the cover to the luggage.

PW5 G 5114 Khalid with one WP Kulwa went to exhibit room to take the dry leaves suspected to be a narcotic drug commonly known as Bhangi. In exhibit room, they found Corporal Bakari who handled the exhibit in a sulphate bag and covered with blue nylon so that they could take it to Government Chemists Laboratory Authority for inspection. They left Songea Police Station on 13th February, 2020 during night hours and arrived at Mtwara on 13th February, 2020 morning hours. They found a chemist one Abdullilah Kimuja.

PW5 handled the letter for RCO, Form No. DCEA 001, and Form No. PF. 180, a request for exhibit analysis. The chemist opened the exhibit and measured the weight. It was revealed that the exhibit weight was 63 kilograms. He took the sample and sealed the exhibit with the Government Chemist Laboratory Authority seal "GCLA". The chemist returned the

exhibit and Form No. DCEA after signing it to prove that he received the exhibit (exhibit P1).

PW5 further submitted that he departed from Mtwara after being given the exhibit and arrived at Songea on 13th February, 2020 night hours. Together with WP Kulwa, they returned the exhibit to Songea Police Station exhibit keeper one Corporal Bakari. PW5 identified the exhibit based on the bag in which it was packed, the colour of the nylon used to cover the same, a seal of the Government Chemists and Police Seal which is red in colour. He identified it to be the same exhibit which he sent and brought back from Mtwara.

PW6 F 5316 Detective Corporal Gabriel averred that it was the night falling on 14th January, 2020 while at his working place arrived E 5760 Detective Corporal Karim and other Police Officer, they went with a Police Car known as Defender carried Bhangi Sulphate and Motorcycle with registration No. MC 396 CKC make Haojue and the accused. He witnessed the handing over of the sulphate with Bhangi and Motor cycle, with the accused to F 3322 Corporal Isack. The accused introduced himself that he is Karim Rashid Kawalika. On 14th January, 2020 Corporal Isack handled the exhibit to him at 7:00 hours with the accused. He sealed the exhibit

with Police seal which is red in colour. At 12:30 hours, he handed over the exhibit to the exhibit keeper one G 3264 Corporal Bakari for keeping.

Moreover, on 10th March, 2020 PW6 was called by Abdullilah Kimuya to pick the report. On 11th March, 2022, he went at Mtwara and picked the two reports. One was a test report and the second was a letter seeking for exhibit from the Chief Government Chemists Laboratory Authority, Southern Zone to RCO Ruvuma Region. He returned on 14th March, 2022. He kept the document in the file as he was a documents keeper. PW6 managed to identify Bhangi in a sulphate bag covered with a blue nylon and motor cycle with registration No. MC 396 CKC make Haojue, red in colour.

PW7 G 3264 Corporal Bakari was an exhibit keeper. On 14th January, 2020 while at his working station at Police Exhibit keeper, one F 5316 Detective Corporal Gabriel brought to him a motorcycle with registration No. MC 396 CKA, make Haojue, red in colour and one sulphate bag with leaves covered with blue nylon sealed with Police seal written evidence. It was for storage. He inspected the exhibit before registering it into the exhibit register with entry No. 27 of 2020. He was also given a chain of custody form. Then he kept the said exhibit. On 13th February, 2020 WP kulwa and PC Khalid went to take the sulphate of Bangi in respect of

SO/IR/185/2020 to send to the Chief Government Chemists. He also gave a chain of custody for signing. He handled them with the sulphate bag.

Moreover, on the same night, WP Kulwa and PC Khalid returned the sack of bhangi sealed with GCLA white in colour. It was returned for storage through chain of custody and signed through entry No. 60 of 2020. He claimed that; when he received the exhibit, the sacks were intact but at present it seems to be destroyed by rats. The bags he brought to Court are the same he received and kept for 2 years. The movement of the exhibit was proved by the chain of custody. The witness identified the exhibit, motor cycle and the Bhangi in sulphate bag.

On other hand, the accused person (DW1), Karim Rashidi Kawalika has denied to be arrested and involved in one way or another on the issue of trafficking in narcotic drugs as charged. To the contrary, he told this Court that; on 13th January, 2020 he went to his working place at Msamala as usual where he fried chips. He closed his business around 11-night hours. While on his way back home, upon reaching at Mji Mwema Sokoni, he saw a Police Car Parked in front of him. They stopped and started to interrogate him as to where he was coming from and where he was heading to. He was arrested and taken to Songea Police Station. The next

day morning hours they took him to the interrogation room, that is when they informed him on the offence of trafficking Bhangi.

DW1 denied to have been involved in trafficking in Narcotic Drugs commonly known as Bhangi. They tortured him but he continued to maintain his position. On 24th January, 2020, he was taken to Court and the charge of trafficking in Narcotic drugs was read to him. He was released on bail. On 10th March, 2020 the case was withdrawn and he was re-arrested. On 13th March, 2020, he was taken to Court, the charge of trafficking Narcotic drugs was read to him once again but this time he was told that the offence he is facing is unbailable offence.

DW1 continued to deny to be arrested by Juma. He denied to own a motor cycle and cannot ride it. He did not sign certificate of seizure. He prayed for the Court to release him.

When he was cross examined by Saraji Iboru, Principle State Attorney, DW1 added that, he dont know all the prosecution witnesses. He opposed the allegation by one Juma Mohamed that he arrested him and he intimidated him at CRDB ATM.

In a nutshell, the aforementioned was the evidence of the prosecution and defence side. The counsel for the parties had no final submission.

After heedful consideration on record and the evidence adduced from both sides, this Court discovered that the issues to be determined in this case are: *First*, whether or not the accused person one Karimu Rashid Kawalika was found in possession of one sulphate bag which was covered by blue nylon in which there were a dry leaf believed to be cannabis sativa commonly known as Bhangi. *Second*, whether the chain of custody was unbroken and maintained.

Before going to the merit of the case, it is pertinent to note that, in any criminal case as required by the law a fact is said to be proved when the Court gets satisfied by the prosecution side beyond reasonable doubt that the said facts exist. The guiltiness of the accused person must be established beyond reasonable doubt. That duty lay on the shoulders of the prosecution side. In the case of **Godfrey Paulo, Frank Walioba, Nelson Mbwile v. The Republic** [2018] TLR 486, the Court has this to say:

The burden of proof is always on the prosecution side to prove their case beyond reasonable doubt. This means that the Prosecution is duty bound to lead strong evidence as to leave no doubt to Criminal liability of the accused person.

However, the law is not that rigid. There are circumstances in which the burden of proof might shift to the accused person. But, when the burden shift to the accused the standard of proof lessen. That means, the proof is not that of beyond reasonable doubt as it was upon the prosecution side. In the case of **Said Hemed v. The Republic** [1987] TLR 117, the Court of Appeal held *inter alia* that:

In Criminal case the standard of proof is beyond reasonable doubt. Where the onus shift to the accused it is on a balance of probabilities.

The exception provided above is not a Court creature but requirement of the law under the provisions of *section 3 (2) (a) of the Law of Evidence [Cap 6 Revised Edition 2022]*. For easy of reference, *section 3 (2) (a)* provides:

3.-(2) a fact is said to be proved when-

(a) in criminal matters, *except where any statute or other law provides otherwise*, the Court is satisfied by the prosecution beyond reasonable doubt that the facts exists. [Emphasis added]

One among the laws in which the burden of proof can shift to the accused person is; *Drug Control and Enforcement Act [Cap 95 Revised*

Edition 2019]. Section 28 (1) of the Drug Control and Enforcement Act (supra) provides that:

In the 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 well understood that, in drugs cases the accused person has a duty to prove that his/her possession of the drug he was found with warranted under licence or permit granted under *the Drug Control and Enforcement Act (supra)*. This happen mostly when the accused conceded to be found with the drugs. In a contrary as it is in the case at hand when the accused denied the charge laid against him, the prosecution are still duty bound to prove their case beyond reasonable doubt that it was the accused person (s) who trafficked in narcotic drugs. That observed, I will hereinafter determine the issues in seriatim.

To start with the first issue; *whether or not the accused person one Karimu Rashid Kawalika was found in possession of one sulphate bag of*

cannabis sativa commonly known as Bhangi which was covered by a blue nylon. It is in record that, PW4 one Juma Mohamed told this Court that, it was on 13th January, 2020 at his working place around 11:00 pm he saw a motorcyclist carrying a luggage covered with a blue nylon approaching a Natural Resources Gate. When they stopped him, he turned back and left in a high speed. He boarded a motorcycle from a motorcyclist and run after the suspect thinking that he was carrying a charcoal.

PW4 inspected the accused luggage and discovered that the dry leaves packed in the accused person luggage was a narcotic commonly known as Bhangi. His assertion was supported by PW3 who rearrested and inspected the accused before he filled the certificate of seizure. The latter was signed by PW4, the accused person and himself. PW4 and PW3 discovery was proved by PW2 the government chemists who conducted the analysis of the dry leaves claimed to be recovered from the accused and proved before this Court that the dry leaves were indeed narcotic drugs because they contained a chemical known as "*tetra hydro cannabino.*"

Although the evidence of PW3 and PW4 is supported by Exhibit P4, the said certificate was not witnessed independently and no any

explanation is given by the prosecution to clear the doubt. This was held by the Court of Appeal in the case of **David Athanas @Makasi and Another v. The Republic**, Criminal Appeal No. 168 of 2017 (unreported). Thus:

...considering that there was no independent witness present as required by the law, the said certificate cannot be accorded weight.

Apart from absence of the independent witness, there is discrepancies between the evidence of PW3 and PW4 on who was with PW4 when he was chasing and arresting the suspect. PW4 averred that he boarded a motorcycle who gave him a ride until they arrested the suspect. Also, the same motorcyclist drove him to Songea Police Station where OC CID paid him while PW4 testified to have found two Natural Resources Officers including Juma and the suspect. He did not mention the motorcyclist at all. Unfortunately, those two people, be a motorcyclist or a Natural Resources Officer was not brought to Court to testify because he was the one who witnessed the whole incident. Though it is a cardinal law that, no particular number of the witnesses is required to prove any fact as per *section 143 of the Evidence Act (supra)*, yet the law demand the key witnesses to be lined up to Court. This was the position in the case of **Faraji Augustino Chambo v. The Republic**, Criminal Appeal

No. 346 of 2015, Court of Appeal at Dar es Salaam, **Lazaro Kalonga v. Republic**, Criminal Appeal No. 348 of 2008, Court of Appeal of Tanzania at Iringa (both unreported), where the Court has this to say:

The general and well-known rules are that the prosecution is under a *prima facie* duty to all 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 sufficiency reason being shown, the Court may draw an inference to the prosecution.

Taking into consideration that the suspect was arrested during mid night, apart from PW4 there was no any person apart from a motor cycle rider who drove PW4 when chasing the suspect. It did not end up there, it was PW4 submission that the same motorcyclist drove him to Songea Police Station. It is likely that he is living within the proximity and no any explanation to the contrary as to why he was not called to clarify the doubt if the accused was the one, they chased and arrested with a luggage of Narcotic drug (Bhangi).

Also, the suspect was the one riding PW4. He was the one facing the suspect motor cycle. Therefore, he would be able to clear a doubt if the Registration number of the accused motor cycle mentioned by PW4 to be MC 396 CKC is the one admitted to Court. It must further be taken

into consideration that there is more than one motor cycle with the same alphabet but different number of the same make. Therefore, it is the findings of this Court that failure to call that witness is fatal.

More so, it is in evidence that the prosecution identified the accused by using the light coming from the Car light and a torch. Equally at police reception they identified the accused by using the light which came from two bulbs (tube light and round bulb). It is not stated with proof the strength of the car and torch light to eliminate mistaken identity of the accused person. In the case of **Waziri Amani v. The Republic** [1980] TLR 250, the Court held *inter alia* that:

...No Court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolute watertight.

In the **Waziri Amani's case**, the Court went further to state the crucial circumstances to be taken care before relying on the visual identification evidence. These includes; the distance between the identifying witness and the accused, the time spent by the identifying witness observing the accused committing the crime, the brightness of the light if it was during the night hours and the familiarity of the Accused

and the identifying witness. In the instant case, the prosecution did not even tell the Court how bright was the light of the car and of the torch when arresting the accused.

At this juncture, the certificate of seizure, Exhibit P4 have no evidential value, and it cannot be used to support the contradictory evidence of either PW3 or PW4 to prove that it was the accused who was arrested in possession of a sack of Narcotic drug commonly known as Bhangi. Therefore, it is the finding of this Court that, the prosecution failed to prove their case beyond reasonable doubt. There are a lot of discrepancies between the witnesses who alleged to be the one who arrested the accused. The said discrepancies goes to the root of the case. That observed, the first issue is answered negatively.

Without prejudice to the aforementioned submission, in cases which involves the movement of the exhibit from one place to another, the evidence concerning chain of custody is of utmost importance. The idea of recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime and not a falsefully allegation aimed to make someone guilty without any justification. This was the position in the land mark case of **Paulo Maduka and 4 Others v. The Republic**, Criminal Appeal No. 110 of 2007, Court of Appeal of Tanzania at Dodoma.

I went through a chain of custody which was admitted to Court as exhibit P7 and noted that the chain of custody of the exhibit seized on 14th January, 2020 by E 5760 Detective Sergeant Karim (PW3) signed by PW4 one Juma Mohamed and the accused person known as Karimu Rashid Kawalika is in contradiction with the evidence testified before this Court.

PW2 testified to have received the sample for examination from one Abdullilah, a Chemists from Southern Zone (Mtwara) and returned to him the sample and test report. But in chain of custody admitted to Court as exhibit P7 shows the sample ended at The Chief Government Chemists Laboratory Authority at Southern Zone and brought back to Songea for custody. It is in record that during that time the Chief Government Chemist Laboratory, Southern Zone was yet to conduct the investigation.

In **Paul Maduka's** case, the Court insisted the documentation to be the most accurate method of establishing a chain of custody and added other ways such as oral which may suffice especially on the exhibit which cannot change the hands easily. But narcotic drugs change hands easily. If it is necessary to use the oral chain of custody, the Court has to warn itself and make sure that the said oral chain of custody is unbreakably clear, reliable, cogent and watertight. This was the decision in the case of

Charo Said Kimilu and Another v. The Republic, Criminal Appeal No. 111 of 2015, Court of Appeal of Tanzania at Tanga.

In the case at hand, this Court is hesitant to rely on either an oral chain of custody as it is not unbreakably clear, not reliable, not cogent and not water tight as it was referred in the case of **Charo Said Kilimu (supra)**. Among other discrepancies, there was no any explanation on how and who was involved in transferring the luggage from Songea to Mtwara and back.

PW1 failed to explain as to why he kept the sample for almost ten days before it was received by PW2 for examination, how he stored it to avoid any temperament of the sample. Such failure cannot eliminate the possibility of the sample being tempered. The same position was maintained in the case of **Director of Public Prosecution v. Shirazi Mohamed Sharif** [2006] TLR 427. The Court of Appeal of Tanzania sitting at Mwanza in the case of **Chacha Jeremiah Murimi and 3 Others v. The Republic**, Criminal Appeal No. 551 of 2015 at page 23 held that:

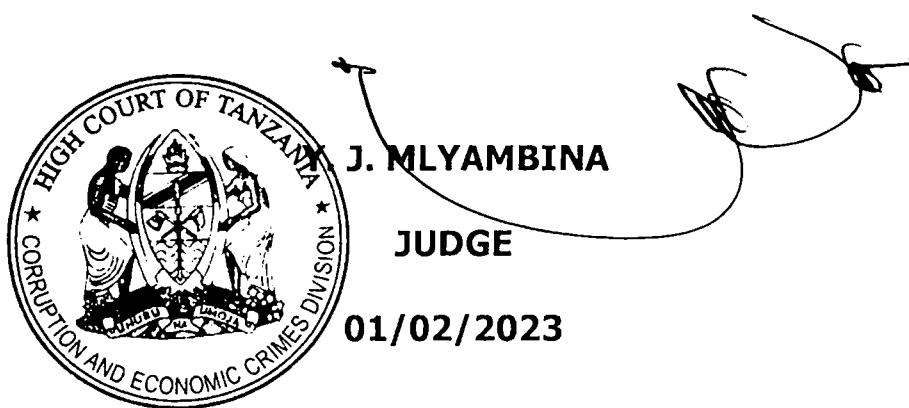
Generally, there should be no vital missing link in handling the exhibit from the time it was seized in the hands of the suspect to the time of chemical analysis, until finally received as evidence in Court after being

satisfied that there was no meddling or tampering done in the whole process.

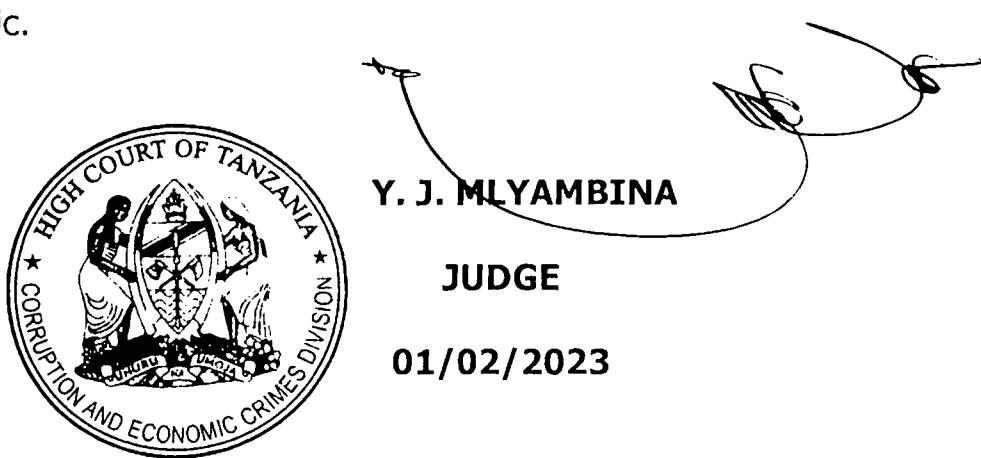
Worse, the said chain of custody originates from incompetent certificate of seizure. It is the elementary principle of law that nothing illegal can bear legal fruits.

From the above stated reasons, it is the finding of this Court that the prosecution has failed to prove their case beyond reasonable doubt as required by the law. In the premises, the accused herein is accordingly acquitted of the charge laid against him for the offence of trafficking in Narcotic drugs *contrary to section 15 (1) (a) of the Drug Control and Enforcement Act, [Cap 95 Revised Edition 2019] read together with paragraph 23 of the first schedule to, and section 57 (1) of the Economic and Organised Crimes Control Act [Cap 200 Revised Edition 2019]*. The accused be released unless he is held with other legal justification.

Order accordingly.



Judgement pronounced and dated 1st day of February, 2023 in the presence of the accused person, Mr. Makame Sengo, Advocate for the accused and learned Senior State Attorney Kauli George Makasi for the Republic.



ORDER

I order that Motorcycle with Registration No. MC 396 CKC, red in colour, and make Haojue (Exhibit P5) which is instrumentality of crime shall be forfeited to the Government of the United Republic of Tanzania. The prosecution is advised to deal with Exhibit P2 as per *section 49A of the Drugs Control and Enforcement Act [Cap 95 Revised Edition 2019]*.

Order accordingly.

