THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT ARUSHA

ECONOMIC CASE NO. 3 OF 2018

THE REPUBLIC ..... PROSECUTOR

VERSUS

1. JIBRIL OKASH AHMED
2. PAULO BANA @ KAMBO } **.....ACCUSED PERSONS**

JUDGMENT

LUVANDA, J.

The accused person to wit Jibril Okash Ahemd (1st accused) and Paulo Bana @ Kambo (2nd accused) are jointly arraigned for trafficking in narcotic drugs contrary to section 15(1)(b) of the Drugs and Enforcement Act, No. 5 of 2015 read together with Paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act (Cap 200 R.E. 2002) as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The duo accused had entered a plea of not guilty.

Ms. Tarisila Gervas learned State Attorney and Ms. Blandina Msawa learned State Attorney were for the prosecution, on the defence side Mr. Robert

Roghat learned Counsel and Upendo Isaya learned Advocate appeared for the first accused and Mr. Daudi Saimalie learned Advocate was representing the second accused.

Prosecution side summoned five witness to prove the accusation against the accused. The facts of this case are simple and straight forward, that on 26/2/2017 at 11.30 hrs, detectives were tipped off by the informant that there was a motor vehicle make Noah black in colour registration No.T 301 BGJ was on a way from Kilu towards Babati, had carried narcotic drugs – mirungi. The spy made follow up at Kilu road, after a movement of one kilometer, ahead they saw a motor vehicle had parked at Mzee Naree. On approaching it, that Noah turned the ignition on motion, where police officers gave a way and reversed back and started retracing it. That the motor vehicle make Noah proceeded towards Babati town, where it negotiated a corner facing a direction to Gallapo. While still in pursuit of it, on arriving at Safina Conner (Managa street) ahead, there was a Chinese vehicles for road construction, which had parked on the road. On seeing it was a conducive place, the police officers overtook, passed and thwarted it. That they attempted to cause it to standstill by stopping it, but did not obey or heed to the signal, instead attempted to eschew an obstruction, by passing off road on a trench, where they plunged and get trapped. A Noah was switched off, and those who were inside it opened doors, alightened and run away. Police officers, chased them away and managed to apprehend Jibril Okash (1st accused) who had run towards farms, and therefore both the first accused and an arresting police officer had miry. Thereafter a search was conducted inrespect of a motor vehicle Noah T 301

BGJ, where seven covered sisals sacks suspected to contain mirungi were impounded into a boot (rear seats). Following that, a certificate of seizure exhibit P.1 was filled at the scene. The motor vehicle make Noah registration number T 301 BGJ (exhibit 2) including sever sisal sacks were taken to Babati Police Post, and handed over to the exhibit keeper (PW3), as put by PW1 and PW2.

It was the evidence of PW3 that on 27/2/2017 at about 09.00 hrs. he handed over an exhibit of mirungi to the investigator (PW4) who submitted it to the Weights and Measurement Agency and returned it on the same date at 10.45 hrs. That on 1.3.2017 at 10.00 hrs. the investigator took an exhibit of mirungi for propose of submitting it to the chief government chemists, where on the same date returned the exhibit at 12.45 hrs. That on 6/3/2017 at .20.00 hrs. he handed over the exhibit of mirungi to the investigator for submitting it to the magistrate for disposal. The handing over at exhibit room were done through a chain of custody exhibit P.3.

PW4 explained to have submitted an exhibit of mirungi to Nuru Mlowe from Weights and Measurement Agency, who measured and got a total weight of 145.52 kilograms as per a report exhibit P5. Thereafter on 1/3/2017 he handed over the exhibit of mirungi to Joyce Njisya from the office Zone Chief Government Chemists North (through a letter exhibit P6 and form exhibit P4), who measured weight and confirmed 145.52 kilograms and take samples inrespect of all seven sacks and remained 145 kilograms which were taken before the magistrate for disposal, as per the form of inventory seizure property for disposal, exhibit P8. It was the evidence of PW4 that the

first accused had confessed being found in possession of the mirungi as per a cautioned statement exhibit P4.

PW5 (chemists) explained that he conducted analysis of samples of leaves suspected to be mirungi, where the results concluded that those plants are mirungi as per a report exhibit P9.

On defence, the first accused (DW1) stated that on 26/2/2017 at morning he went to Mkuyuni along Babati–Galapo to seek for job at a road construction. That while there, appeared two motor vehicles which were coming from Babati towards Galapo, where over suddenly applied brake, people alightened where people who alightened from motor vehicle which had parked in front started chasing those who were from the motor vehicle which had parked behind. That there were many people there, but to his surprise they arrested him after they had failed to arrest those who were being chased away. That he was taken where the two motor vehicle had parked, thereafter a police van went there and he was taken to police. That he was detained at police lockup for 16 days, later charged in court. He pleaded being illiterate and denied to have signed any document at police, including exhibit P1 and P4 and P5. He disowned a caution statement exhibit P4. He refuted to have been transporting mirungi.

The second accused (DW 2) he alleged to have been in safari to Morogoro to pick a corpse, on the material date (26.2.2017). He denied to have committed this offence.

Actually the evidence tendered by prosecution implicate the first accused alone. PW1 and PW2 testified to had arrested the first accused at Safina

Corner, where there was an ongoing road construction by a Chinese Company who had parked their motor vehicles on the road. The first accused had attempted to vanish quickly but was surpassed and apprehended by PW2 in the countryside. It was the evidence of PW1 and PW2 that the first accused was driving a motor vehicle make Noah exhibit P2. As after switching off a Noah exhibit P2, the one who was on the passenger door, was the first to alighten and vanished, followed by the first accused who was apprehended as aforesaid. A motor vehicle make Noah exhibit P2, which the first accused was seen driving, was found to had carried seven sacks of mirungi in the boot (rear seats). Even at defence the first accused stated inculpative facts. Basically the first accused admitted to have been at the scene, where he was arrested near motor vehicles which were constructing road. The first accused admitted to had seen two motor vehicles going along together and parked at a scene, one in front and the other parked behind. Thereafter people alightened from the two motor vehicles, where those who had alightened from a motor vehicle parked in front started chasing those were from a motor vehicle which had parked behind. That he was arrested and taken where the two motor vehicles had parked. Where after a while a police car arrived. This story correspond closely to facts narrated by PW1 and PW2 regarding what had transpired at the scene. In **Ally Haji Vs Republic**, Criminal Appeal No. 45 of 2011, CAT at Dar es Salaam (unreported) at page 8, the Court of Appeal cited a case of **Mohamed Haruna @ Mtupeni Vs Republic**, Criminal Appeal No. 259 of 2007 (AT (unreported), I quote,

"...if the accused person in the course of his defence gives evidenced which carries the prosecution case further, the Court will be entitled to take into account such evidence of the accused in deciding on the question of his guilty".

As such it is taken that the first accused admit to have been arrested at the scene on the material date. His excuse that he went there to look for a job, cannot be believed, as he did not explain which kind of a job. Also his explanation that there were many people at a scene, is also unbearable, as he did not explain as to why the police officers spotted and focused him alone out of alleged crowded people.

On cross examination, in particular to PW1, the learned Counsel for the first accused, attempted to introduce a defence that those mirungi were planted by police officers into a motor vehicle exhibit P2, due to corruption, or to had been carried by motor vehicle used by PW1 and PW2 to chase the first accused. Another theory introduced, was that those mirungi were taken from caterpillar on road construction at the scene, or to have been brought by Afande Fussi. Also there was a theory that the first accused was merely herding goats thereat. But it seems the learned Counsel was just putting those various theories to test, as they are scattered and based on assumption or trial and error. More important, the same were dropped at defence, as such they are ignored.

At defence the first accused refuted to have been driving a motor vehicle Noah exhibit P2 abandoned at the scene, but he did not explain a means of transport which ferried him up to the scene, where he allege being there as

a job seeker. His defence of illiteracy, cannot assist him. As a certificate of seizure exhibit P1, shows that the first accused had appended his right thumb print. In the said seizure exhibit P1, the first accused signed to have been searched and found in possession of seven bundles packed into sisal sacks inside containing narcotic drugs suspected to be mirungi.

Likewise, the first accused had appended a thumb print into a report confirming a weight of those mirungi (exhibit P5). In which the weights and measurements agency certified it is weight being 145.52 kilograms. Again in an inventory of seized property for disposal of exhibit Form No. DCEA 006 exhibit P8, the first accused had appended his thumb print. According to PW4, in exhibit P5 measurement was done in the presence of the first accused and exhibit P8, disposal proceedings were executed before the magistrate in the presence of the first accused.

The plants which were disposed before the magistrate via exhibit P8, samples were taken and analyzed by the chief government chemists. According to PW5 (chemists), explained to have analyzed those sample of plants through eye and seeing saw like at the edge of leaves, in microscope it was seen minutes saw and a last test involved testing on chemical composition of mirungi, which involved three chemicals including glacial broke, copper sulphate and sodium hydrochloride which it is result gave a purple colour. Therefore concluded that those plants were narcotic drugs of mirungi a type of cathinone and cathine as per a report form No. DCE 009 exhibit P.9.

There was minor discrepancy in exhibit P9, regarding weight of sample taken and analyzed. PW4 and PW5 said the sample taken had a weight of 52 grams, but exhibit P9 show it is weight is 145.52 kilograms, which is the actual weight of the whole exhibit of mirungi seized. According to PW5 stated that probably it was a typing error, as Joyce Njisya had measured weight of a whole exhibit of mirungi at Babati Police, which fact was also deposed by PW4. As such I take it as a minor discrepancy which does not distort the whole report. In the premises, the report exhibit P9 sail through and is ruled to be a competent report, with reference to the subject matter of plants or leaves submitted for analysis. My verdict is based on a fact that, there is no evidence to suggest that the sample taken, were not analyzed at all or had a different results.

There was also inconsistence of prosecution witnesses regarding time of arrest, search and receiving exhibits at police. On cross examination by defence counsel, PW1 said a motor vehicle was arrested at 11.45 hrs, and search was conducted at 13.00 hrs. PW2 said the first accused was arrested just after 11.00 hrs. and a certificate of seizure was recorded few minutes after arresting the first accused. PW3 (exhibit keeper) on examination in chef, said he received the exhibit at 13.00 hrs, on cross examination he put that he received exhibit at 13.30 hrs. But I take them as minor details which did not affect the substance of prosecution evidence on it is merits.

There was a concern raised by defence counsel, regarding a certificate of seizure exhibit P1, that there was no independent witness who had signed as provided for under section 38(3) Cap 20 R.E 2002, also cited a case of

David Athanas @ Makasi and another Vs Republic, Criminal Appeal No. 168/2017 CAT at Dodoma, (unreported) at page 8. Secondly that after conducting search, the executing officer ought to issue a receipt in terms of section 48(2)(c) (vii) of The Drugs Control and Enforcement Act No.5 of 2015, also section 38(3) Cap 20 (supra).

Regarding the first limb of a concern, it is true that section 38(3) Cap 20 (supra) provided for a requirement of the signature of witness to search. But the law does not make it absolute, as the wording to the proviso says and the signature of witnesses to the search, if any.

In the case at hand, both PW1 and PW2 arresting officers, put that there was no any other person at the scene including passerby. That there were no residential houses at the scene.

Again in the case of **David Athanas @ Mkasi** (Supra), at pages 8 to 9, the Court of Appeal faulted a certificate of seizure, on the ground that it was not signed at the place where the search was conducted and also considered an aspect that there was no independent witness present. But the Court of Appeal did not say rightaway that in absence of independent witness alone, a certificate of seizure should not be accorded weight.

More important a certificate of seizure exhibit P1 was issued under Form No. DCEA 003 found in Third Schedule of Act No. 5 of 2015 (supra). It is to be not that seizure is provided for under section 48(2)(c)(v) of Act No. 5/2015. The said provision is silence as to the requirement of independence witness to a search, although in Form No. DCEA 003 there is a space for appending

names and signature of a witnesses. But even in the form does not mention independent witness.

Indeed, in **David Athanas @ Makasi** (supra) the Court of Appeal was talking specifically in reference to the provision of section 38(3) of Cap 20 (supra).

On a second limb of concern by defence Counsel, that the executing officer on search, ought to issue receipt. Of course section 38(3) cap 20 (supra) including it is counterpart section 48(2)(c)(vii) of Act No. 5/2015, provide for a requirement of issuing a receipt acknowledging the thing seized.

However seemingly to me that there is a lacuna in the law, as in the Third Schedule of Act No. 5 of 2015 there is no form capitalized as receipt. The only form which is relevant here is Form No. DCEA 003 – certificate of seizure. Nevertheless, the same is hanging, in the context that search and seizure is covered under paragraph (c) of subsection (2) of section 48 of Act No.5/2015. But all forms set out in the Third Schedule are made u/s 48(2)(a) and (b) only of Act No.5/2019, on which paragraph (a) pertain to arrest of suspect and paragraph (b) is all about investigation of offence. More important taking or seizure of anything from the arrested person which are connected to any substance with drugs, is covered under roman (v) of paragraph (c) to subsection (2) of section 48 Act No. 5/2017. But the said proviso is silence as to which form should be used for taking or seizing. To my opinion a certificate of seizure Form No. DCEA 003 which is set out in the Third Schedule, which is levitating on air, cannot be useless. And in view of vividly lacuna, aforesaid I think this is a fit case to fill a lacuna. I therefore

rule that a certificate of seizure Form No. DCEA 003 set out in the Third Schedule of Act No.5/2015 is applicable to the proviso of roman (v) of paragraph (c) to subsection (2) of section 48 Act No. 5/2015.

That said, a certificate of seizure exhibit P1, is taken to have meet the requirement of law, as it is not a law that a certificate of seizure cannot become operative unless a receipt is issued.

Another piece of evidence is a caution statement (exhibit P4) where it was alleged the first accused confessed and mentioned the second accused, as the one who instructed the first accused to drive a motor vehicle make Noah (exhibit P2) which was hired by one Ramagu (who escaped police officer and vanished at a scene – Safina Corner), to load and carry a luggage from Mbulu. Nevertheless, the said caution statement (exhibit P4) cannot be acted upon, on the following reasons. For one thing, the first accused was detained at police lockup for more than fortyeight hours as stipulated under section 48(2)(c)(iii) of Act No.5 of 2015 (supra). PW4 on cross examination by defence Counsel for first accused, stated that the first accused was detained at police for more than eleven days and vowed that it was not necessary to obtain an extension of time. Actually that amounted to contravention of the provision of the law above stated.

For another thing, time for commencement and completion of an interview was cancelled and altered by way of rewriting. The explanation by PW4 is that he altered after revealing that a wall clock he read and relied upon was not working properly. On cross examination by defence Counsel for the first accused, PW4 stated that he noted the error after getting outside of an

interview room, on seeing sunlight. But when asked by Court, PW4 changed a story that he noted a sunlight through peeping through a window of an interview room, where he revealed that it suggest it was an obvious still a broad day light. At any rate, either answer is incorrect and defeat both common sense and logic. I say so, as the first original time for commencement of interview which was cancelled, read 18.00hrs. and a first time for completion of interview which was altered read 16.00 hrs. In this regard, may be if PW4 wished this court to believe that the said wall clock alleged not working properly, was moving anticlockwise. Secondly a difference of three hours between the original time for commencement to wit 18.00 hrs. and the second grafted time for commencement to wit 14.40 hrs, is too exorbitant which cannot be cured by such a simple answer that he was assisted by sunlight.

For another thing, the alternation on both time for commencement and completion, suggests were inserted by using a different pen, which creates more doubts.

As much the time for commencement and completion of an interview was amended in a manner which is susceptible to doubts and so far the first accused was detained beyond the prescribed period. This render the caution statement incredible and therefore cannot be accorded any weight.

So far, there is no any other piece of evidence which incriminated the second accused, he is therefore found not guilty.

The second accused is acquitted. The first accused is found guilty, for an offence of trafficking in narcotic drugs contrary to section 15(1)(b) of the

Drugs and Enforcement Act, No. 5 of 2015 read together with Paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act (Cap 200 R.E. 2002) as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. And is accordingly convicted.

E.B. LUVANDA
JUDGE
4/7/2019

Sentence:

I have heard the argument for both side in particular mitigating factors. However, as submitted by the defence Counsel, the sentence for this offence is prescribed by the law. That said ,the first accused is sentenced to life imprisonment.

HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION

E.B. LUVANDA
JUDGE
4/7/2019