IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT TANGA SUB-REGISTRY

ECONOMIC CASE NO. 1 OF 2021

THE REPUBLIC

Versus

KOMBO ABDARAHMANI @ KOMBO

JUDGMENT

25/03/2022 & 29/03/2022
E.B. LUVANDA, J.

The accused person above named is arraigned for trafficking in narcotic drugs contrary to section 15(1)(a) of the Drugs Control and Enforcement Act, No. 5 of 2015 as amended, read together with paragraph 23 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002.

It is alleged in the particulars of offence that on 17/09/2018 at Umba Barabara ya 20 area, within the district and region of Tanga, the accused person was found trafficking 64.5 kilograms of khat (catha edulis) commonly *mirungi*. The accused person denied the information.

The question for determination is whether the prosecution have proved their case on the standard.

Ally Baraka Mtae (PW5) who is a retired Inspector of Police, stated that on 12/12/2018 at 16.00 hours he received information from the informant that there is a car unloading khat at a certain house at Umba Street, Barabara ya 20. He proceeded thereat accompanied by PC Elia, PC Nyamsagali (PW3), DC Stewart, WP Mwanaidi and PC Magesa via a police car PT 2002 driven by PC Paulo. On arriving there, PW3 and PC Sterwart looked for the suburb chairperson one Neema Ali (PW1). They then conducted a search in the house of the accused, where in the second room on the left they saw a plastic dish which had khat wrapped by nylon bag in a form of small bunches of nine to ten leaves, at the same place saw a sulphate bag containing leaves wrapped by khaki paper or khaki gazette. In the same room on the ceiling PW3 found another sulphate bag which contained khat wrapped by khaki bag commonly gazette. They proceeded to the first room on the right side, they saw bunches of khat in front of, under and rear a cupboard, where they collected and put inside a sulphate bag which was nearby there. Thereafter they took the whole cargo assembled to the corridor-cum-sitting room, counted where they got 79 bundles and 102 bunches which were wrapped in the plastic bag and thereby seized via a certificate of seizure exhibit P3.

After seizure, PW5 handed over to Sgt Juma (PW6), it was on 17/09/2018. According to PW6 he received three sulphate bags containing fresh leaves suspected to be khat and some were in a dish, where 79 bundles were contained in one sulphate bag and 102 bunches were contained in two sulphate bags, 51 each. On 18/09/2018 PW6 handed over those exhibits to the investigator D.Sgt Kheri (PW7), the later packed and sealed those three sulphate bags by a red sealing wax, which was witnessed by independent witness one Yohana Julius Kiondo (PW2). Thereafter PW7 submitted those exhibits to the chemist the late Ernest J. Isaka via submission form DCEA 001 exhibit P4. The chemist measured weight got 64.5 kilograms, took sample and later conducted analysis as per a report form DCEA 009 exhibit P6, as also reflected in the statement of the late Ernest J. Isaka exhibit P5. Thereafter, PW7 handed over back to PW6. On 20/09/2018 PW7 recorded the inventory form DCEA 006 exhibit P2, for disposal which were done by fiat of Honorable Kamugisha Resident Magistrate in-Charge Tanga.

Nevertheless, the alleged disposal proceedings were tainted by procedural irregularities and illegality. For one thing the learned Resident Magistrate in-Charge did not issue a certificate of destruction. This offend the provision of regulation 14(5) of The Drugs Control and Enforcement (General)

Regulation, 2016, Government Notice No. 173 of 2016, which provide, I quote,

> *'Upon destruction of the seized narcotic drug or psychotropic substance, in accordance with regulation (4), the Judge or* ***Magistrate in attendance shall, if satisfied that the destruction of all seized substance is complete, fill in a certificate of destruction prescribed in form I of the Second Schedule to these Regulations****'* bold added

The above proviso is coached on mandatory terms. And none compliance is fatal and render the disposal proceedings incomplete. Essentially issuance of a certificate of destruction is an absolute proof that the particular exhibits were indeed disposed of.

For another thing, the manner an inventory exhibit P2 was crafted and filled it cannot be said was substantially the same or in conformity with the prescribed form 006 to the Second Schedule of Act No. 15 of 2017. This is because crucial information and details prescribed in form 006 Second Schedule, were arbitrary eliminated and excluded in exhibit P2. Instance the fourth column which contain description of article (example: mark, form: powder, solid liquid, crystal, etc.; colour: white, brown et.), sixth column

pertaining to quantity (example: 10 pellets, 20 parcels), seventh column mode of packing (example: wrappers, container, box, etc) were all amended and expunged in exhibit P2. It is to be noted that the manner form 006 is structured is in such a way that it geared to retain and capture all descriptions featured on a seized drugs. In that way, it could make the provision of subsection 7 (infra), to be meaningful and realistic.

The above depicted information with illustration, are capitalized under the provision of section 36(2) of The Drugs Control and Enforcement Act, Cap 95 R.E. 2019, I quote,

> *'Where any narcotic drug or psychotropic substance has been seized the officer seizing such drug or psychotropic substance or precursor chemicals or substances used in the process of manufacturing of drugs or other substances proved to have drug related effects* ***shall prepare an inventory of such narcotic drug or psychotropic substance containing such details relating to-***
>
> *(a)* ***Their description, quantity, mode of packing, marks, numbers;***
>
> *(b) Such other identifying particulars of the narcotic drugs or psychotropic substances or precursor chemicals or substances used in the*

process of manufacturing of drugs or other substances proved to have drug related effects;

(c) ...NA...;

(d) ...NA...; and

(e) Other particulars as such officer may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act' bolded for emphasis

Sub section (3), provide

'Any officer seizing such narcotic drug, psychotropic substance, precursor chemicals or other substances proved to have drug related effects shall make an application to any magistrate having jurisdiction under this Act, for the purpose of-

(a) ***Certifying the correctness of the inventory so prepared;***

(b) Taking, in the presence of such magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) ...NA... bold added

It is to be noted that the said certification by the magistrate is made pursuant to the provision of regulation 14(5) (supra).

One may ask why is it mandatory to strictly abide to the above procedures on the part of seizing officer and investigation generally, the logic is simple, subsection (5) of section 36 (supra) give an answer, as hereunder,

> *(5)Notwithstanding anything contained in the Evidence Act, or the Criminal Procedure Act,* ***every court trying an offence under this Act, shall treat the inventory,*** *the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under subsection (3) and* ***certified by a magistrate court as primary evidence in respect of such offence.'*** Bold added

Herein crucial information and descriptions as to the identity of impugned khat were omitted in exhibit P2. A certificate of destruction is missing, is not there. Indeed in the inventory exhibit P2 the learned resident magistrate in-charge endorsed *"iteketezwe"*. This wording does not portray a message if at all the magistrate had witnessed the actual destruction, rather suggest that he merely warranted for khat to be destroyed afterward. Had a certificate of destruction being in place could have cured this vague and ambiguity statement. Therefore, a plea by the OCCID SP Jumanne Njoka (PW4) that exhibit P2 was prepared in accordance with Act No. 5 of 2015 on explanation that this incident occurred in 2018 prior the revised edition of

2019, is untenable. This is because a comprehensive inventory form DCEA was introduced by The Drugs Control and Enforcement (Amendment) Act, No.15 of 2017 which come into force on 1st December, 2017. Equally a destruction certificate was invented by The Drugs Control and Enforcement (General) Regulation, 2016, Government Notice No. 173 published on 13/5/2016 which is an effective date. Therefore, there was no excuse for none compliance.

Above all, basins and sulphate bags does not feature anywhere in the certificate of seizure exhibit P3. While PW5, PW3 and PW1 mentioned three sulphate bags and two basins as among items where those loose leaves, 79 bundles and 102 bunches were contained or packed, but exhibit P3 is silent. In exhibit P3 three sulphate bags and basins were not mentioned as among seized items or packaging material. As I have said above, even in exhibit P2 those items are missing completely. As such it create doubts to the testimony of PW5, PW3 and PW1 who stated that some loose leaves were seen in the basins, some bunches and bundles were inside a sulphate bag and some bundles were seen packed in the sulphate retrieved from ceiling in the second room left side.

There were contradictions among PW1, PW3 and PW5: PW3 and PW5 said at the sitting room or first room on the right side, leaves of khat wrapped in small khaki bags were seen in the basin, while PW1 said were scattered on the floor/ground near cupboard. PW1 said she saw loose leaves of khat, PW3 and PW5 said khat were in terms of wrappers of bunches and bundles. PW3 and PW5 mentioned wrappers of nylon bag, while PW1 was silent regarding seeing bunches and bundles of leaves wrapped in nylon bag.

All these discrepancies could have been cured and taken care by the inventory properly recorded in accordance with the procedure, filled and certified by the seizing officer thereafter endorsed and certified by the magistrate.

In view of the preceding discussion, it cannot be said that the prosecution managed to prove the information beyond a shadow of doubt. This is because the depicted contradictions, discrepancies and none compliance to the procedures among the prosecution witnesses were so material which goes to the very root of the matter denting the whole exercise of search, seizure and destruction. This is because exhibit P2 has been faulted, meaning there is no any primary evidence to prove the seized khat. The

exercise of disposal was incomplete for want of certificate of destruction. PW1, PW3 and PW5 differed on material details.

That said, the retracted caution statement of the accused person (exhibit P7) cannot bailout the prosecution case which cannot sail through either. In the case of **Michael Luhiye vs Republic** (1994) TLR 181, it was held as follows,

> ***'It is always desirable to look for corroboration in support of a retracted confession before acting on it*** *but a court may convict on retracted confession even without corroboration'* bold added

Appreciation to Mr. Paul Kusekwa learned State Attorney for the republic and Mr. Eric Akaro learned Advocate for the accused person who have been there throughout the trial, including presenting their final submissions.

Therefore, the information of trafficking in narcotic drugs contrary to section 15(1)(a) of the Drugs Control and Enforcement Act, Cap 95 R.E. 2019 read together with paragraph 23 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002, is dismissed. The accused person is acquitted.

E.B. Luvanda
Judge
29.03.2022

Date: 29.03.2022

Coram: E.B. Luvanda, J

For the republic: Mr. Paul Kusekwa SA

For the accused: Mr. Eric Akaro Advocate

B/C: Debora

Court: Judgment delivered through virtual hearing, being on criminal session at the High Court Moshi District Registry.

E.B. Luvanda
Judge
29/03.2022