

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT BUKOBA - SUB REGISTRY

ECONOMIC CASE NO. 01 OF 2023

REPUBLIC

VERSUS

1. REVOCATUS RESPICIUS ISSAYA

2. ELIZEUS HERMAN MSIKULA

JUDGMENT

3rd and 14th July, 2023

BANZI, J.:

Revocatus Respicius Issaya and Elizeus Herman Msikula (the first and second accused person respectively) stand charged with the offence of trafficking in narcotic drugs contrary to section 15 (1) (a) and (3) (i) of the Drug Control and Enforcement Act [Cap. 95 R.E. 2019] ("the DCEA"), read together with paragraph 23 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2019] ("the EOCCA").

It is alleged in the Information that, on 23rd December, 2021, at Hamgembe Kanoni area, within Bukoba District, in Kagera Region, the accused persons trafficked in narcotic drugs, namely Heroin weighing 367.0

grams. The accused persons pleaded not guilty to the Information and proclaimed their innocence throughout the trial.

At the trial, the Republic was represented by Ms. Tully Helela, Ms. Alice Mutungi, Ms. Elizabeth Twakazi and Messrs. Elias Subi and Jamali Issa, learned State Attorneys. On the other hand, Messrs. Projestus Mulokozi and Ibrahim Mswadick, learned Advocates, represented the first and second accused person respectively. I must sincerely thank learned counsel of both sides and everyone who took part in the proceedings of this case for their tireless efforts towards determination of this case.

In a bid to prove the case against the accused persons, the prosecution side called in nine (9) witnesses and produced six (6) Exhibits, whereas, the first and second accused persons were sole witnesses for the defence. In the main, the evidence of the prosecution reveals that, on 23rd December, 2021, Inspector Bakari Hamisi Mkonda (PW2), an investigation officer at the office of the Regional Crimes Officer was with his colleagues conducting patrol around Bukoba Municipality. In the course of patrol around afternoon hours, PW2 received a tip from an informant about a business of narcotic drugs that was intended to be conducted at Tawaqal Guest House located at Uswahilini street. After receiving such information, they set a trap at that guest house and after a short while, the informant

arrived with the second accused. They arrested the second accused but they found him with nothing relating to the alleged drugs. On inquiry, he informed them that, the alleged drugs were with the first accused who was at Total Petrol Station. They rushed to that said station but they did not find him. They decided to look for him at various places and around 7:30 pm, they managed to arrest him at Kanoni Bridge after being spotted by the second accused person who was with them. Upon being arrested, he was searched and, in his black bag, they retrieved 10 pellets in pink clothed bag and 15 pellets in black nylon bag suspected to be narcotic drugs. The search was conducted in the presence of two independent witnesses, Kelvin John Msangya (PW3) and Hussein Twahili. PW2 seized all pellets, the black bag and one mobile phone make ITEL via certificate of seizure which was signed by PW2, PW3, Hussein Twahili and the first accused. Before they left, PW2 labelled 10 pellets as A, A1 to A9 and 15 pellets as B, B1 to B14.

Thereafter, they took the first accused and seized exhibits up to the station by using police car that was parked near the crime scene. On arriving at police station around 9:00 pm, PW2 handed over all seized exhibits to H.367 D/CPL Nisile (PW5), the custodian of exhibits. After he received and verified, PW5 recorded them in Exhibits Register, attached exhibit label and stored them in the exhibits' room. On 24th December, 2021.

G.3681 D/CPL Emmanuel (PW6), took 25 pellets from PW5 and went to the Weights and Measures Agency (WMA) together with the first accused person. The pellets in question were weighed by Salehe Hariri (PW4) who got a total of 368.25 grams. Thereafter, PW4 took four pellets as samples so that, they would be sent to the Chief Government Chemist (CGC), Lake Zone, Mwanza for analysis. After that, he prepared a report and handed over to PW6 together with exhibits who upon returning, he handed over the pellets to PW5. On 29th December, 2021, the investigator of the case, WP.5939 D/CPL Eva (PW7) took the pellets from PW5 and went to court for photographing. PW7 returned them to PW5 who on 30th December, 2021, he handed over four pellets to F.3043 D/SGT Athuman (PW9). After packing, PW9 stored them at the office of OC CID and on 31st December, he went to CGC Mwanza where he arrived on the same day and handed over the 4 pellets to Paul Mtango (PW1), the senior chemist who analysed them and confirmed to be heroin.

On 27th January, 2022, PW1 handed over 4 pellets and report to PW9 who returned to Bukoba where he handed them to PW5. Months later, upon receiving instructions from prosecution office concerning all pellets to be sent for analysis, on 15th June, 2022, PW7 took 25 pellets from PW5, packed them and handed over to Balele Mashamba Kulwa (PW8) who on 16th June, 2022,

travelled to Mwanza where he submitted them to PW1 on 17th June, 2022. PW1 analysed them and confirmed to be narcotic drugs namely, heroin. After that, he prepared a report and on 6th July, 2022, PW1 handed over the pellets and report to PW8 who on 13th July, 2022 returned to Bukoba where he handed over the pellets to PW7. Then PW7 handed them over to PW5 who stored them until he brought the same before this court on 26th June, 2023.

In their defence, both accused persons denied to be found with or being engaged in the business of narcotic drugs. They also denied to be arrested at the crime scene and to know each other prior to the date when they were arraigned to court. The first accused who testified under oath as DW1 stated that, he was arrested on 23rd December, 2021 at Kemondo area within Bukoba rural by police officers including PW2 on allegation of the offence of theft alleged to be committed at M-Pesa shop owned by Samson Nkanga @ Mwarabu. The genesis of his arrest emanated on 19th December, 2021 when a certain person approached him asking for shop that provides M-Pesa services and he directed that person to Samson Nkanga @ Mwarabu. However, in a while, Samson followed DW1 with the view of knowing the whereabouts of the said person who is alleged to steal money from him. On 20th December, 2021, Samson approached him insisting that, he knew the whereabouts of the said thief. On 23rd December, 2021, he was surprised to

be arrested on the allegation of stealing from the said Samos Nkanga @ Mwarabu. After being arrested, he was taken to Bukoba Central Police Station where he stayed for more than 28 days without being interviewed until 21st January, 2022, when he was arraigned to Bukoba District Court with the second accused person and Auson John, whom he never knew before. They were charged with the offence of trafficking narcotic drugs. He denied to have been arrested with narcotic drugs or dealing with narcotic drugs. He denied also to have been taken to WMA for witnessing the weighing of narcotic drugs and denied to sign the document concerning weighing of exhibit P6.

In respect of the second accused, he testified under oath as DW2 and denied to be involved in trafficking or selling narcotic drugs. Also, he denied to lead PW2 and his colleagues on the arrest of the first accused person. According to his testimony, he claimed to be arrested on 26th December, 2021 around 6:20 pm at Katoma barrier while he was on his way to Dar es Salaam from Karagwe where he went to take avocados by using a motor vehicle with registration number T748 DBP make Scania semi-trailer. Upon being stopped at the barrier, he was asked about transit permit and after showing them, he was questioned about the whereabouts of two male persons he was alleged to take aboard at Kyaka area. He denied to have

carried them as the vehicle is not permitted to carry passengers as a result, the police officers, one Emmanuel (PW6) and Frank searched the vehicle and after finding nothing, they took his transit permit, mobile phone, cash money for fuel, Tshs.1,800,000/= and bank card of CRDB with account number 0152474090100. Thereafter, he was ordered to take the motor vehicle to Bukoba Police station. Upon arrival at the station, he was put under restraint. He also claimed to be tortured by PW6 and Frank in an attempt to procure his explanation concerning the whereabouts of the two men he was alleged to take aboard from Kyaka. At the end, both accused persons prayed to be acquitted.

Basically, that was the evidence of the prosecution and defence. I appreciate the efforts by learned counsel for both parties for filing their final submissions which will be referred when need arises. Having carefully considered the evidence on record and submissions by both sides, the main issue before the Court for determination is *whether the prosecution side has managed to prove the case against the accused persons beyond reasonable doubt*. However, determination of this issue depends on two specific issues, **one**, *whether 25 pellets were seized from the accused persons* and **two**, *whether chain of custody was maintained*.

It is vital to underscore that, according to section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2022], 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. That is to say, the guilt of the accused person must be established beyond reasonable doubt. Generally, and always, such duty lies upon the prosecution except where any statute or other law provides otherwise. See also the case of **Paschal Yoya @ Maganga v. Republic** (Criminal Appeal No. 248 of 2017) [2021] TZCA 36 TanzLII which underscores the duty and burden of proof in criminal cases. Nonetheless, section 28 (1) of the DCEA is among the exception to the general rule of prosecution's duty to prove the case against the accused beyond reasonable doubt. 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 DCEA. However, it is trite 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.

Starting with the first specific issue, in one hand, the prosecution side alleges that, the first and second accused person trafficked 25 pellets of heroin weighing 367 grams, whereas, on the other hand, the first and second

accused person denied to be arrested at the crime scene in possession of those 25 pellets of heroin. As a matter of law and principle, it is the prosecution's duty to prove beyond reasonable doubt that the first and second accused person trafficked 367 grams of heroin by proving that 25 pellets were actually seized from them. In answering this issue, I will consider the testimonies of PW2, PW3 as well as Exhibits P4. A close look at the testimony of PW2 reveals that, he managed to arrest the first accused person with a black bag containing pink clothed bag with 10 pellets and black nylon bag wrapped with cream sole tape containing 15 pellets. He arrested him after being led by the second accused person whom he arrested in the afternoon. PW2 seized the pellets in question through Exhibit P4 in the presence of PW3, the owner of shoe shop located near the crime scene. Exhibit P4 was signed by the first accused, PW2 and PW3.

According to PW2, the second accused remained in their vehicle which was parked 5 to 6 metres away from the crime scene. However, PW2 did not explain why the second accused remained in the motor vehicle while he was alleged to be in one mission with the first accused. By leaving him in the vehicle, he excluded him from the said 25 pellets which he seized from the first accused person. Moreover, the presence of the second accused at the crime scene is also doubtful because, according to PW3, he saw only one

accused and he did not recall if there was any police vehicle near the crime scene. Apart from that, according to PW3, after they completed everything, PW2 made a call for their motor vehicle and when it arrived, they left. If at all the motor vehicle was 5 to 6 metres away from the crime scene, it could be easier for PW3 to see it as according to him, there was ample light at the crime scene. Likewise, it defeats common sense and logic for PW2 to make a call for motor vehicle which was right there at the crime scene. Although the second accused raised the defence of *alibi* in contravention of section 42 (1) (2) of the EOCCA as he neither issued notice during the preliminary hearing nor furnished its particulars before closure of prosecution case, but as I said earlier, his presence at the crime scene is doubtful. The evidence of PW2 and PW3 is tainted with doubts over the presence of the second accused at the crime scene. Even if he could be in the vehicle near the crime scene, yet still, failure to involve him in search and seizure without explanation from PW2, excludes him from the said seizure of 25 pellets from the first accused person.

Concerning the first accused person, his presence at the crime scene has been proved by PW2 and PW3 who testified about seizure of 25 pellets from his black bag. Also, the fact that he signed in the certificate of seizure indicates that, he acknowledged the pellets in question were actually seized

from him as it was stated in the case of **Song Lei v. The Director of Public Prosecutions and Others** (Consolidated Criminal Appeals No. 16A of 2016 & 16 of 2017) [2019] TZCA 265 TanzLII. His *alibi* does not create doubt over his presence at the crime scene and the fact that, 25 pellets were seized from him. My finding is backed up with the following reasons. First and foremost, his *alibi* flawed the law because he neither gave notice during the preliminary hearing nor did he provide its particulars before closure of prosecution case as required under section 42 (1) (2) of the EOCCA. Secondly, if his *alibi* was genuine, it was expected to be revealed in the course of testimony of seizing officer, PW2 and independent witness, PW3. However, the two witnesses were not cross-examined on this vital point concerning the first accused not to be at the crime scene on the material date and time which as a matter of law connotes acceptance of truth of these witnesses. This alone is a clear indication that, his so-called *alibi* is nothing but an afterthought and I accord no weight to his defence. As a result, I completely reject it. Basing on foregoing reasons, it is the finding of this court that, the said 25 pellets were seized from the first accused and thus, the first specific issue is answered affirmatively against the first accused only.

So far as the second specific issue is concerned, 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, is the same which was analysed and finally tendered in court. 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. This close follow up is meant to ensure that, there was no meddling or tampering done in the whole process.

In one hand, the cases of **Paulo Maduka and Four Others v. Republic**, Criminal Appeal No.110 of 2007 CAT (unreported) and **Zainabu Nassoro @ Zena v. Republic** Criminal Appeal No. 348 of 2015 CAT (unreported) 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. On the other, following the development of the jurisprudence on this area, through the case of **Chacha Jeremiah Murimi and Three Others v. Republic**, Criminal Appeal No.551 of 2015 [2019] TZCA 52 TanzLII, followed by **Issa Hassan Uki v. Republic** (Criminal Appeal No. 129 of 2017) [2018] TZCA 361 TanzLII and **Anania Clavery Betela v. Republic** (Criminal Appeal No. 355 of 2017) [2020] TZCA 245 TanzLII,

demarcation is drawn between handling of exhibits which cannot change hands easily and those which can change hands easily. In the former type of exhibits, oral testimony suffices to establish the chain of custody and in the latter, the most accurate method to establish chain of custody is documentation. However, as the jurisprudence is still in progress, even for exhibits which can change hands easily, oral testimony is held to be 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 TanzLII, **Marceline Koivogui v. Republic** (Criminal Appeal No. 469 of 2017 [2020] TZCA 252 TanzLII and **Abas Kondo Gede v. Republic** (Criminal Appeal No. 472 of 2017) [2020] TZCA 391 TanzLII which involved narcotic drugs.

In the matter at hand, there is no documentation showing movement of 25 pellets save for certificate of seizure (exhibit P4) and forensic laboratory submission form (Exhibit P2). An attempt by prosecution to produce chain of custody record form did not succeed because its production required compliance of section 289 of the Criminal Procedure Act [Cap. 20 R.E. 2022] which was not done. In that regard, the prosecution relied on oral account of PW1, PW2, PW4, PW5, PW6, PW7, PW8 and PW9.

It is the prosecution evidence that, 25 pellets were seized on 23rd December, 2021 around 7:30 pm by PW2 who on the same date at 9:00 pm, he handed over to PW5, custodian of exhibits. After recording the same in exhibits register, he stored them until 24th December, 2021 when he handed over to PW6 who went to WMA where he handed over to PW4. PW4 weighed them and selected 4 pellets as samples for analysis. Then he handed over to PW6 who upon returning to the station, he handed over back to PW5. PW5 stored them until 29th December, 2021 when he handed over to PW7 who went to court for taking still pictures and returned them to PW5. On 30th December, 2021 around evening hours, PW5 handed over 4 pellets to PW9 who packed them and stored in the office of the OC CID. On 31st December, 2021, PW9 left for CGC Mwanza where on arrival, he handed over to PW1. PW1 analysed the said 4 pellets and stayed with them until 27th January, 2022 when he handed over to PW9 who returned to Bukoba and handed over to PW5.

On 15th June, 2022, PW7 after receiving instructions to send all pellets for analysis, she went to PW5 who handed her over 25 pellets. After receiving, PW7 opened the sealed package of 4 pellets which were already analysed and mixed them with the remained pellets. Thereafter, she packed in khaki envelope and put in nylon evidence bag. Then she sealed and

handed over to PW8 who on 16th June, 2022 travelled to Mwanza and on 17th June, 2022 in the afternoon, he handed over to PW1. After analysis, PW1 prepared the report and on 6th July, 2022, he handed over to PW8 who on 13th July, 2022 handed over to PW7. On the same date, PW7 handed over to PW5 for custody until 26th June, 2023 when he handed over to PW7 who brought them to this Court.

Looking closely at the testimony of PW9, it is observed that, this witness received the pellets on 30th December, 2021 in the evening and after packing, he claimed to store the same at the office of the OC CID until 31st December, 2021 in the morning when he took them and travelled to Mwanza where he handed over to PW1. Although in his chief testimony he did not disclose the exact place where he stored the pellets within the office of OC CID but when he was cross-examined by Mr. Mulokozi, PW9 had this to say:

*"After packing, I locked at the drawer of OC CID. In the morning, **it was OC CID SSP Mwamafupa who took from his drawer and handed over to me.**" (Emphasis supplied).*

It is obvious from the extract above that, the pellets in question were stored in the drawer within the office of the OC CID and it was the OC CID himself who took them out of the drawer and handed over to PW9.

Apparently, there is missing link of chain of custody because the said 4 pellets were passed in the hands of the OC CID but unfortunately, he was not called to testify in order to prove the safety and security of his drawer in his office considering the fact that, PW9 when he was cross-examined by Mr. Mswadick, he admitted not to know number of keys of the said drawer. There is no explanation from the prosecution on the reason that made PW9 to store the pellets in question at the drawer of the OC CID instead of exhibits room as required by internal police procedures. Under the prevailed circumstances, the possibility that there may have been tampering with the contents of the 4 pellets when they were stored at the drawer in the office of the OC CID cannot be ruled out.

Apart from that, there is unexplained delay when PW8 was handed over 25 pellets to submit to CGC Mwanza. PW8 stated to received 25 pellets on 15th June, 2022 around 6:00 pm and on 16th June, 2022, he travelled to Mwanza where he arrived late and submitted the pellets at CGC on 17th June, 2022 at 1:50 pm. In his chief testimony, this witness did not explain where he stored the pellets before he travelled to Mwanza. Likewise, he did not explain where he stored them from the moment he arrived in Mwanza on 16th June, 2022 until he handed over to PW1 on 17th June, 2022 at 1:50pm. If he had genuine explanation on the whereabouts of the pellets in question

before he submitted to PW1, it was expected to be revealed in his chief testimony but he did not say anything. Surprisingly, during cross-examination, he came up with explanation that, on the night of 15th June, 2022, he took the pellets with him to his respective home. This strange behaviour of PW8 did not end there because, he further admitted to take the pellets in question to his home place at Kisesa after he arrived in Mwanza and stayed with it until 17th June, 2022 at 1:50 pm when he submitted to CGC. What PW8 did is against internal police procedures on keeping the exhibits considering the fact that, during cross-examination, PW9 admitted that, it is against the procedure for police officer to take exhibit to his house. Apart from that, despite the fact that, what PW8 did, is against the internal police procedure but, if his explanation was genuine, it was expected to be revealed from his chief testimony. Moreover, he did not explain the surrounding circumstances at his house in order to eliminate possibility of tampering with the contents of the pellets in question. Therefore, from the moment he decided to take the pellets to his house, the chain of custody was broken because, it is doubtful if the substance alleged to be seized from the first accused is the same that was submitted to CGC for analysis.

Furthermore, the strange behaviour of PW8 continued when he stayed with the pellets from 6th to 13th July, 2022 claiming to be permitted by his

superior as he was waiting for other exhibits to collect from CGC. This is yet another missing link on the chain of custody of the pellets in question. Just like before, in his chief testimony, PW8 did not explain where he kept those pellets for over six days after he received from PW1. However, during cross-examination, he claimed to keep them at their home at Kisesa, Mwanza. Once again, he did not explain the surrounding circumstances at their home in order to eliminate possibility of tampering with the contents of the pellets in question. So, it cannot be safely vouched that, the exhibit was throughout under control of PW8 for all those days he kept at his home place. In that regard, the possibility of tampering with the contents of the pellets in question cannot be ruled out. Thus, it is doubtful if the substance that had been analysed by PW1 is the same one which was tendered before this Court. In the case of **The Director of Public Prosecutions v. Shirazi Mohamed Sharif** [2006] TLR 427, the chain of custody was held to be broken as the whereabouts of drugs in question was not accounted for five days. See also the cases of **Moses Muhagama Laurance v. The Government of Zanzibar**, Criminal Appeal No. 17 of 2002 CAT at Zanzibar (unreported) and **Mussa Ramadhani Binde & Others v. Republic** (Criminal Appeal No. 347 of 2020) [2022] TZCA 235 TanzLII with similar

circumstances involving missing link on exhibit whose whereabouts was unexplained for certain days.

For the foregoing reasons, it cannot be said that oral evidence brought in court established an unbreakable chain of custody of the drugs in question. The possibility of contents of the pellets to be tampered with cannot be ruled out considering the fact that, none among the witnesses described the contents of the pellets during his or her testimony. In their submission, learned State Attorney argued that, the chain of custody was not broken because exhibit P3 was properly identified by all witnesses by its mark and seal. However, this argument cannot change the possibility of tampering with the contents of the pellets because of the missing link which I have just explained. Thus, I am of the position that, the chain of custody was not properly maintained, hence it was broken. In that regard, the second specific issue is negatively answered. Although the first issue was concluded positively, but since the chain of custody was indeed compromised, as it is not certain if the contents of pellets alleged to be found with the first accused person were the same that were analysed by PW1 and finally tendered before this court, I cannot conclude that, the case against the accused persons was proved beyond reasonable doubt. For the main issue to be

concluded affirmatively, both specific issues ought to be concluded affirmatively.

That being said and done, it is the finding of this Court that, the prosecution side has failed to prove their case beyond reasonable doubt. Consequently, I find the first and second accused person not guilty and I hereby acquit them from the charged offence of trafficking in narcotic drugs. They are hereby set free. It is so ordered.



I. K. BANZI
JUDGE
14/07/2023

Delivered this 14th day of July, 2023 in the presence of Ms. Alice Mutungi and Ms. Elizabeth Twakazi, learned State Attorneys for Republic, Messrs. Projestus Mulokozi and Ibrahim Mswadick, learned counsel for both accused persons and the first and second accused. Right of appeal duly explained.



I. K. BANZI
JUDGE
14/07/2023

ORDER

Exhibit P3 is hereby confiscated to the government of the United Republic of Tanzania and the same to be destroyed in accordance with the provisions of the Drug Control and Enforcement Act [Cap. 95 R.E. 2019] with its Regulations.



A handwritten signature in blue ink, appearing to be "I. K. Banzi". The signature is fluid and cursive, with a long horizontal stroke at the end.

**I. K. BANZI
JUDGE
14/07/2023**