IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 74 OF 2016

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

1. **SHARIF S/O MOHAMED @ ATHUMANI ..... 1ST RESPONDENT**
2. **SHAIBU S/O JUMANNE @ MPUNGI @ MREDI ..... 2ND RESPONDENT**
3. **MUSSA S/O JUMA MANGU ..... 3RD RESPONDENT**
4. **JALILA S/O ZUBERI @ SAID ..... 4TH RESPONDENT**
5. **KARIMU S/O ISSA KIHUNDWA ..... 5TH RESPONDENT**
6. **SADICK S/O MOHAMED JABIR @ MSUDANI @ ANUMBI ..... 6TH RESPONDENT**
7. **ALLY S/O MUSSA @ MJESH ..... 7TH RESPONDENT**

(Appeal from the rulings of the High Court of Tanzania, at Moshi)

(Maghimbi, J.)

Dated the 20th & 26th day of January, 2016
in
DC. Criminal Session No. 12 of 2014

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JUDGMENT OF THE COURT

3rd & 5th August, 2016

MASSATI, J. A.:

The respondents are jointly charged with one count of murder contrary to section 196 of the Penal Code, in the High Court at Moshi. Their trial began in full swing on 5/10/2015.

On 20/1/2015, the prosecution called one PF 16876 Insp. SAMWEL HUMPHREY MAIMU as a witness. (PW9). In the substance of his testimony, he identified one motor vehicle with Registration No. T. 800

CKF Silver in colour, make Range Rover, which he found when he visited the scene of crime as one of the investigators from the Regional Crimes Officer's office in Kilimanjaro, which allegedly belonged to the deceased. When he was about to tender the car as an exhibit, the defence objected. After hearing the parties on the objection, the learned trial judge upheld the objection and ruled that the witness was not competent to tender the car as an exhibit.

On 25/1/2016, PW9 went on to testify on how he went on to collect other exhibits. He then went on to identify a register of exhibits which he handed over to one Sgt Hashim, the then Himo Police Ocs. When he was about to tender that register as an exhibit, the defence counsel again objected. Again, after hearing the parties, the learned trial judge delivered her ruling on 26/1/2016 in which she held that the tendering of the exhibits register would not be in conformity with section 246 (2) of the Criminal Procedure Act, Cap 20 R.E. 2002 (The CPA).

The above two rulings did not amuse the Director of Public Prosecutions (the DPP). So, on the 26th day of January, 2016 he filed a notice of appeal to this Court against the ruling dated 20th January, 2016, and on 3rd day of February, 2016 he filed another notice of appeal

to impugn the ruling dated 26th January, 2016. The two grievances constitute the subject matter of the present appeal.

In a memorandum of appeal lodged on 5/7/2016 the DPP raised the following grounds:-

1. *That, the trial court erred in law and fact by ruling that PF 16876 Insp. Samwel Humphrey Maimu (PW9) is incompetent witness to tender an exhibit in question namely a motor vehicle make Range Rover with Registration No. T 800 CKF.*
2. *That, the trial court erred in law and fact by ruling that Exhibit register does not suffice the provision of section 246 (2) of the Criminal Procedure Act, (Cap 20 R. E. 2002), thus it does not qualify to be admitted as exhibit.*

At the hearing of the appeal the appellant was represented by Mr. Abdallah Chavula, assisted by Ms. Stella Majaliwa both learned Senior State Attorneys. The respondents were represented by Mr. Hudson Ndusyeko, Mr. Majura Magafu, Mr. Emmanuel Safari and Mr. Qamara Aloyce, all learned counsel for the first respondent, the second and fifth respondents, for the third respondent, and also holding brief for Mr. John Lundu for the fourth, sixth and seventh respondents respectively.

On the first ground, Mr. Chavula submitted that, contrary to what the trial court held, PW9 was competent to tender the car as an exhibit because he had first hand knowledge on it and could authenticate what the exhibit purported to be. The learned counsel then referred the Court to various paragraphs from the record where the witness is shown to have identified the car. He submitted that, the learned trial judge rejected the exhibit for wrong reasons, and urged this Court to set aside the reasons, and allow this ground.

Resisting this ground, Mr. Majura Magafu, submitting on behalf of all the other counsel for the respondents, said that the collection, preservation and tendering of exhibits in court is governed by Police General Order No. 229. and the relevant paragraphs were 2 (b) and (3). According to those rules neither PW1, who was in custody of the scene of crime, nor PW9 who only visited the scene of crime, were competent to tender the car as an exhibit, because, according to the record the exhibit was finally handed over to the Regional Crimes Officer (RCO) who eventually took custody of the exhibit. Besides, at the time of testifying, both PW9 and the then RCO had been transferred from their respective stations. As there was no explanation on how and who brought the car to the court and how PW9 came into the picture, the chain of custody was broken. On the law on the chain of custody, the learned counsel

referred us to several decisions of this Court including **PAULO MADUKA AND 4 OTHERS vs R.**, Criminal Appeal No. 110 of 2007 (unreported). So, in his view, the first ground of appeal was devoid of substance and should be dismissed.

In the second ground of appeal, the DPP is challenging the trial court for not admitting the Exhibits Register as an exhibit through PW9, on the ground of not complying with section 246 (2) of the CPA.

In his submission, Mr. Chavula told the court that it was wrong for the trial court to have considered section 246 (2) of the CPA in isolation. It should also have considered it along with sections 245 (1) and (6) and 246 (1) of the CPA. He went on to argue that had the trial court done so, and considered that, the substance of PW9's statement was read to the accused persons at the committal proceedings, the learned trial judge would have found that section 246 (2) of the CPA was complied with.

On his part, Mr. Magafu learned counsel, submitted that section 246 (2) of the CPA, does not refer to **statements** alone, but also to **documents**. So it was not enough for the committal court to have only read PW9's statements, to the accused persons, but also any **documents** that would go along or as part of the witness's statement. As the contents of the exhibits register were not read to the

respondents, at the committal court the trial court rightly excluded PW9 from tendering the exhibits register as part of his evidence, he argued. He went on to argue that if the prosecution intended to produce the register as an additional evidence, they could still do so, after giving notice under section 289 (1) of the CPA. Otherwise, the exhibits register had no room as a prosecution exhibit at that stage. He therefore prayed for the dismissal of this ground too.

In his rejoinder, Mr. Chavula submitted that in the spirit of section 246 (2) of the CPA, both the statement and the substance of the said witness were read to the respondents. So the law was complied with. He therefore prayed that this ground of appeal be allowed, and the decision of the trial court be set aside.

This appeal is really on the question of admissibility of evidence. The basic prerequisites of admissibility of evidence in a court of law are relevance, materiality, and competence. The general rule is that, unless it is barred by any rule or statute any evidence which is relevant, material and competent is admissible. On the contrary, any evidence which is irrelevant is inadmissible. (See **CROSS & TAPPER on EVIDENCE** by Colin Tapper. 9th ed. P. 55).

Briefly, evidence is relevant if it tends to make any fact that it is offered to prove, or disprove, either more or less probable. Evidence is material if it is offered to prove a fact that is at issue in the case, and lastly, evidence is competent if it meets certain requirements of reliability. Reliability may be established by first adducing foundation evidence. So when evidence is objected to for want of foundation, it means its competence, is called into question. Under section 140 of the Tanzania Evidence Act, Cap 6 R.E. 2002 (the Evidence Act) it is the trial court which has the discretion to decide on the admissibility of any evidence, guided by the various provisions of the Evidence Act and other relevant statutes, such as the Criminal Procedure Act, Cap 20 R. E. 2002 (the CPA) in criminal trials.

It is also relevant to point out that, there are four types of evidence, that is to say, real, demonstrative, documentary and testimonial. The general rules of admissibility of relevance, materiality, and competence, apply to all those types of evidence. In the present appeal two types of evidence come to the fore, namely, real and documentary.

Real evidence is a thing whose characteristics are relevant and material. It is a thing that is directly involved in some event in the case.

To be admissible, such evidence must be relevant, material and competent. Its competence is established by showing that it really is what it is claimed to be. This process is called authentication.

Real evidence may be authenticated in three ways; by identification of a unique object, by identification of an object that has been made unique, or by establishing a chain of custody. Chain of custody requires that the whereabouts of the evidence, at all times since the evidence was seized be established by competent testimony. In such case evidence must establish that the object has not changed or been altered between the events and the trial. If there is anytime between the day of the incident and the day of trial during which the location of the item cannot be accounted for, the chain is broken. (See **PAULO MADUKA & OTHERS vs R.** (*supra*).

But admissibility of evidence is not only determined by the relevance, materiality and competence of the particular evidence. It is also a function of the competency of the witness who seeks to tender it in evidence.

As we understand it, the competency of witnesses may be classified into two; general, and specific. Section 127 (1) of the Evidence Act governs general competency of witnesses, which is that:-

"Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him, or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body, or mind) or any other similar cause."

The rest of Chapter V of the Evidence Act provides for exceptions to the general rule.

But in any trial, it is not enough to have a competent witness. So, the second class of witness competency is that the witness must be able to give relevant, material and competent evidence. In other words he or she must be a material witness. In our view, a material witness is a person who has information or knowledge of the subject matter which is significant enough to affect the outcome of a trial. (See **the Free dictionary or legal dictionary**).

In the first ground of appeal, the real evidence in question is a car and the issue is whether PW 9 was competent to produce it as an exhibit? When it came to tendering is as an exhibit, PW9 attempted to use one of the methods of authentication of the object by trying to show

that the car was the one in question. In his submission in this Court, Mr. Chavula also tried to impress us that PW9 managed to identify the car as the one that it purported to be. However, the problem with this type of authentication is that the court must be satisfied with the authentication. This was exactly what happened in this case. When PW9 went out to identify the car, the court noted that:-

> *"However, the witness could not manage to open the bonnet of the car to identify the chassis no. that he alleged to have taken at the scene of crime."*

Indeed, this was one of the reasons which the learned trial judge adduced in disqualifying PW9 from being a competent witness to tender the car as an exhibit. Said the trial court in its ruling:-

> *"Furthermore, while identifying the car when the court moved outside where the exhibit was parked; PW9 failed to open the bonnet of the car to show us where the unique chassis no of the exhibit is, while he testified to have inspected the exhibit and record the chassis no at the scene of*

crime but he could not be able open up the booth

to show where the alleged chassis no is."

The alternative method was by establishing a chain of custody. Mr. Magafu had submitted, we believe, quite correctly, that when the police investigate a criminal case, the relevant regulations controlling chain of custody is the PGO No 229. As there was no dispute that the real evidence (the car) in this case was handed over to the RCO, and as there was no dispute that PW9 had since been transferred from Kilimanjaro Region, and since it could not be explained how the car reached the court, it is difficult not to hold that the chain of custody of the car, had not been established. In her ruling the learned trial judge observed that what broke the otherwise established chain of custody of the car, was the witness's transfer to Himo which raised the possibility of there being another person who was in custody of the exhibit.

In the event, we find that the prosecution attempts to have PW9 authenticate the car before admitting it in evidence as an exhibit did not impress the learned trial judge. Having reviewed the circumstances and the law, we are satisfied that PW9 did not establish fully his familiarity with the car, sufficiently as a foundation for his ability to authenticate

that particular exhibit. We are thus unable to fault the trial judge on her having so found. We therefore dismiss the first ground of appeal.

The issue in the second ground of appeal is the admissibility of documentary evidence. Like any other type of evidence, documentary evidence would also be admissible if it were relevant, material and competent, unless its admission is barred by some other statute or rules of evidence.

The exhibits register sought to be tendered by PW9 is certainly relevant and material, but the question that arose is whether there was sufficient statutory backing or foundation for it to be produced. It was the competency of the evidence which was called in question.

In her short ruling, the learned trial judge excluded the exhibits register, because the said exhibit was not listed as an exhibit during committal proceedings in terms of section 246 (2) of the CPA.

It appears to us that there is no dispute that the admissibility of the exhibits register was subject to compliance with the provisions of section 246 (2) of the CPA. What is in dispute is whether the demands of the provision have been complied with. Mr. Chavula has argued that the provision has been complied if read together with sections 245 (1) and section 246 (1) of the CPA.

We have looked at the provisions referred to us by Mr. Chavula. Section 245 (1) gives powers to a subordinate court to summon an accused person for the purposes of dealing with him after his arrest, for an offence triable by the High Court. Section 246 (1) of the CPA empowers the subordinate court to summon an accused for the purposes of committing him after information has been filed. But section 246 (2) provides:-

> *"Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the* ***statements*** *or* ***document*** *containing the substance of the evidence of the evidence of witnesses whom the Director of Public Prosecutions intends to all at the trial."*
>
> (Emphasis supplied).

Our understanding of this provision is that, it is not enough for a witness to merely allude to a document in his witness statement, but that the contents of that document must also be made known to the accused person(s). If this is not complied with the witness cannot later

produce that document as an exhibit in court. The issue is not on the authenticity of the document but on non-compliance with the law. We therefore agree that unless it is tendered as additional evidence in terms of section 289 (1) of the CPA, it was not receivable at that stage.

Given the above exposition, we conclude that this appeal has been lodged without sufficient reasons. We accordingly dismiss it and order that the case be remitted to the trial court for it to proceed with the trial from where it has left.

Order accordingly.

DATED at **ARUSHA** this 4th day of August, 2016.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL