

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)
AT DODOMA**

ECONOMIC CRIME REVISION NO. 2 OF 2021

(Originating from Economic Case No. 2 of 2021 in the District Court of Iramba at
Kiomboi)

THE REPUBLIC

VERSUS

- 1. HALIMA AJALI MPITA**
- 2. STEPHEN PUNDILE**
- 3. ZAKIA MAULID ITUJA**
- 4. NICHOLAUS MARO**

RULING

21/10/2021 & 19/11/2021

MASAJU, J

The Accused persons, Halima Mpita, Stephen Pundile, Zakia Maulid Ituja and Nicholas Maro, together and severally have been indicted for ABUSE OF POSITION (one count) USE OF DOCUMENTS TO MISLEAD PRINCIPAL (four counts), EMBEZZLEMENT AND MISAPPROPRIATION (one count) and OCCASSIONING LOSS TO A SPECIFIED AUTHORITY in Economic Crime Case No. 2 of 2021 before the District Court of Iramba at Kiomboi.

According to the record of proceedings of the trial court, on the 30th day of September 2021, when one Fidel Mathias Budodi Kubigwa Luhemeja (PW3) was testifying the prosecution prayed, without giving reason, that the said prosecution witness be given prosecution exhibits (Ex-P6, Ex-P8, Ex-P9, Ex- P12, & Ex-P14). The Defence raised objection against the prayer arguing that since the witness was not a maker of the said documentary exhibit and he was not the one who had tendered it for admission before the court and given the fact that the Prosecution had not given any reasons for the prayer thereof, the prayer should be not granted. But later on during heated argument between the Prosecution and Defence for, and against the prayer, the Prosecution submitted that her prayer was made under Section 168 of the Evidence Act, so that the witness could refresh his memory.

The trial court in her Ruling sustained the objections so raised by the Defence reasoning in the two Rulings, severally, thus;

"Court: Ruling

Objection sustained that the prosecution side could had addressed this court that they want to rely on the document as the witness to refresh his memory. The prosecution has to ask all question relating to document the witness intended to refresh before the same given to him

Sgd:

MAKWAY C.C-RM

30/9/2021"

"RULING

Court: objection sustained on the following reasons:

- *The prosecution side has prayed Ex-P12.Ex-P8, Ex-P14 and Ex-P9 to be given to Pw3 without explaining the purposes. It was not clear whether it was for refreshment of his memory, description or identification, so that to give the other side and the court to know what is intending to do with those documents.*
- *The prosecution side failed to explain the relationship between the documents prayed and PW3 to whom intended to use the same, in his evidence, since the same documents has already admitted and marked so as form part of the proceedings.*
- *PW3 is not the one who made, tendered or to have knowledge of its existence of the documents prayed before this court to enable him to refresh his memory.*
- *If the prosecution's prayer was that the documents are for the purposes of identification could had said so by explaining the necessity of one document after another and not to ask all documents at once as they did*

Sgd:

MAKWAYA C.C-RM

30/9/2021"

These two Rulings by the trial court has attracted anxiety on the part of the Prosecution that the Rulings make it too difficult for its remaining prosecution witnesses to refer and expound further on the said prosecution documentary exhibits so much that the trial court's original

record has to be brought to the Court for consideration under Section 372 of the Criminal Procedure Act, [Cap 20 RE 2019].

The said Section reads thus;

"372. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court".

The record of proceedings of the trial court on the 30th day of September, 2021, in part reads thus;

"Ex-P8 this is a Local purchase Order (Agreement) between Nicholus Marwa from Igunga to sale 1655 timbers of 2x4 valued each Tsh. 20,000/= Total of 33,100,000 Dated on 25/09/2013

Mr. Anthony for Defence:

Objection that quotation that who signed the document does not reflect the knowledge of the witness and it was asked during cross-examination.

Mr. Chilongozi for Republic

No any law denied the witness to testify using documents in hand. The defence council should had make this honourable court to know. The law of evidence does not bar refreshment section 168 of TEA.

Mr. Anthony for defence

The bases of my objection is under section 150 of the TEA. Because the witness will rely on the document in his hand to answer the question. On the other hand section 168 (2) cannot be read in isolation with sub (1) of the same section.

Court: Ruling

Objection sustained that the prosecution side could had addressed this court that they want to rely on the document as the witness to refresh his memory. The prosecution has to ask all question relating to the document the witness intended to refresh before the same given to him.

Sgd:

MAKWAYA C.C-RM

30/9/2021"

It is categorically clear that the Prosecution advised the trial court that its action was premised under section 168 of the Evidence Act, [Cap 6 RE 2019] so that the witness could refresh his memory on the document when testifying in the court. The Defence argued that its objection was based under section 150 of the Evidence Act, [Cap 6 RE 2019] but also alluded to section 168 (2) of the Evidence Act, [Cap 6 RE 2019] stating that the same ca not be read in isolation with section 168 (1) of the Act.

That being the case, the objection by the Defence under section 150 of the Evidence Act, [Cap 6 RE 2019] against the prosecution witnesses' action of using the document, which had been admitted in evidence as

prosecution exhibit for refreshment of his memory as he testified was misconceived because the said section of the law relied upon by the Defence in raising the objection is about a different matter altogether, that is to say, the meaning of "*leading question*" thus,

"150. Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question"

Section 168 of the Evidence Act, [Cap 6 RE 2019] relied upon by the Prosecution in its prayer for its witness to use the document to refresh his memory as he testified reads thus;

" 168 (1) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the court considers it likely that the transaction was at the time fresh in his memory.

(2) A witness may, while under examination, refresh his memory by referring to any writing made by any other person and read by the witness within the time referred to in subsection (1), if when he read it he knew it to be correct"

As a matter of fact, from the record of proceedings dated the 30th day of September, 2021, both parties made reference to section 168 of the Evidence Act, [Cap 6 RE 2019]. Indeed, the Defence did not take issue with

the said section of the law as so relied upon by the Prosecution but just stated that section 168 (2) thereof cannot be read in isolation with section 168 (1) of the Act.

The trial court also alluded to the said section of the law in its two Rulings. The trial court knew that the prosecution witness intended to use the documentary exhibit in order to refresh his memory as he testified before the court save that the Prosecution hadn't so formally prayed before the court.

The law as it is under sections 168 and 169 of the Evidence Act, [Cap 6 RE 2019] is that a witness of either party to a case has the right to refresh his memory on a documentary exhibit that has been admitted in evidence whether or not he authored it so as to enable him answer questions put to him from a well informed point of view as he testifies before the court. This procedural right, is not intended to facilitate leading questions, in terms of sections 150-152 of the Evidence Act, [Cap 6 RE 2019]. According to section 172 of the Evidence Act, [Cap 6 RE 2019] any writing referred to in section 168 or 169 thereof shall be produced and shown to the adverse party if he requires it and that party may, if he so desires, cross-examine the witness thereupon.

That being the position of law, the trial court's two Rulings given on the 30th day of September, 2021 denying the prosecution witness, Fidel Mathias Budondi Kubigwa Luhemeja (PW3), to be given prosecution documentary exhibits (EX P6, EX P8, EX P9, EX P12 and EX P14 so as to refresh his memory as he testified, upon the misconceived objection raised

by the Defence, was apparently illegal in terms of sections 168 and 169 of the Evidence Act, [Cap 6 RE 2019].

Thus, pursuant to the Court's revisionary powers under section 372 of the Criminal Procedure Act, [Cap 20 RE 2019] the said two trial court's impugned Rulings dated the 30th day of September, 2021 are hereby severally and respectively nullified, quashed and set aside accordingly. The parties' prayers, if any, on their use of documentary evidence (writings) in order to refresh their memories as they testify before the courts should be considered in terms of sections 168, 169 and 172 of the Evidence Act, [Cap 6 RE 2019] accordingly.

The original record is hereby remitted back to the trial court for the expedited trial of the economic crime case accordingly.




GEORGE M. MASAJU

JUDGE

19/11/2021