

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL SESSION CASE NO. 103 OF 2018
THE REPUBLIC
VERSUS

MIRIAM D/O STEVEN MRITA.....1ST ACCUSED
REVOCATUS S/O EVARIST MUYELLA@ RAY.....2ND ACCUSED

RULING

08th March, 2022 & 09th March, 2022.

E.E. KAKOLAKI, J.

In this case in which **MIRIAM D/O STEVEN MRITA** and **REVOCATUS S/O EVARIST MUYELLA@ RAY** are jointly and together facing the charge of **Murder**; Contrary to Section 196 of the Penal Code [Cap. 16 R.E 2002 now 2019], the prosecution through its sixth witness is seeking to tender in court as exhibit, an original mini video tape containing oral interview with 1st accused person. The said mini video tape is alleged to have been recorded on 08/08/2016 by Insp. Aristides Eustalius Kasigwa (PW6) an expert from the Forensic Bureau Commission of the Tanzania Police Force, in an oral

interview conducted by Insp. Latifa to the 1st accused person. The prayer by PW6 to have the said exhibit admitted in court as evidence was vehemently resisted by Mr. Peter Kibatala and Nehemiah Nkoko, both learned counsels for the 1st and 2nd accused persons respectively. The Republic enjoyed representation of Mr. Genes Tesha and Ms. Gloria Mwenda both learned Senior State Attorneys and Ms. Caroline Matemu, learned State Attorney.

Five points of objection were advanced by Mr. Kibatala and supported by Mr. Nkoko in their urge to resist admission of the exhibit sought to be tendered which undisputedly is an electronically obtained document. In his first ground of objection Mr. Kibatala contended that, the document is inadmissible as there is non-compliance of the provisions of section 18(2)(a)-(b) and 18(3)(a)-(c) of the Electronic Transaction Act, 2015 (ETA). He argued the law puts it mandatory that, reliability of the manner in which integrity of the data messages were generated, stored or communicated and maintained must be established before the electronic document is admitted in which in this case no evidence was adduced to that effect. In the second ground he contended, the witness (PW6) is incompetent to tender the said electronically recorded video tape for being obtained under control and auspices of the DPP, who sought to tender it in court, contrary to the

requirement of section 18(3)(c) of ETA. He insisted, PW6 is disqualified as being a police officer who as per the interpretation of section 9(1)(c) of the National Prosecution Services Act, his criminal investigation duties are coordinated and supervised by the DPP, he could not have skipped to work under DPP's control and instructions on how to record the video tape. In the third ground he argued, there is no mandatory certificate or affidavit of authentication of the document sought to be tendered as it was held in the case of **Bank of Africa Tanzania Ltd Vs. OM-Agro Resources Ltd and 8 Others**, Commercial Case No. 139 of 2019 (HC-unreported). Further to that he argued, the said certificate or affidavit ought to be listed and read in court during the committal proceeding as per the requirement of section 246(2) of the Criminal Procedure Act, [Cap. 20 R.E 2019] but that requirement was not complied with. On the fourth ground he contended, the original mini video tape sought to be tendered as document was not listed and read as document to be relied on as evidence during committal proceeding as per the requirement of section 246(2) of the CPA. Mr. Kibatata reinforced his argument by inviting the court to be guided by the principle in the case of **Onesmo Nangole Vs. Dr. Steven Lemomo Kiruswa and 2 Others**, Civil Appeal No. 117 of 2017 (CAT-unreported) where the Court of

Appeal held even electronic evidence is a document and therefore in this matter ought to have been listed and read in court. He added, the anomaly would have been cured by invoking the application of section 289(1) of the CPA providing for additional witness but the prosecution also failed to exhaust that remedy. And lastly he said, the document is irrelevant to this case for being illegally introduced to this case hence it is in violation of the provision of section 7 of Evidence Act, which requires only evidence relevant to the fact in issue to be admitted in court. In light of the above submission Mr. Kibatala urged this court not to admit the said original mini video tape sought to be tendered. On the other hand Mr. Nkoko for the 2nd accused while blessing Mr. Kibatala's submission added that, non-compliance of section 289(1) of CPA is fatal as it was held in the case of **Mohamed Jabir Vs. R**, Criminal Appeal No. 357 of 2017 (CAT-unreported). On non-compliance of section 18 of ETA as submitted by Mr. Kibatala he said, the section is recognized by section 64A of Evidence Act which provides for admissibility and weight to be attached to electronic evidence. He added, PW6 in this case did not even specify whether the device used to record the document sought to be tendered was a stand camera or mobile camera apart

from saying it was SONY. Thus quality and authenticity of the document is not guaranteed.

In rebuttal Mr. Tesha discounted Mr. Kibatala's submission as misplaced one as the document or exhibit is sought to be tendered under section 40A of the Evidence Act the section which allows tendering of video and audios. According to him the submission by Mr. Kibatala and Mr. Nkoko that the applicable laws are sections 18 of ETA and 64A of Evidence Act is misplaced. As to the submission by Mr. Kibatala that PW6 recorded the video tape under control of the DPP he countered, that was not true as the witness recorded under it under section 57(5) of the CPA, which manifestly implies was performing his duties under supervision of the DCI and not under DPP's control as contended. As regard the third ground of the requirement of Certificate of Authenticity it was his response that requirement covers civil cases only and does not apply to criminal cases like the present one. Further he argued, PW6 who is seeking to tender the electronic evidence is a gazetted officer something which exempts him from the requirement of submitting the certificate or affidavit with regard to authenticity of the document sought to be tendered. As to the forth ground on non-listing and reading of mini video tape during committal proceedings Mr. Tesha

submitted, PW6's statement was listed and read over in court during committal proceedings where the contents of the document sought to be tendered were mentioned. He added, during committal proceedings it was mentioned that, the prosecution will tender physical exhibit the video tape inclusive and further that during preliminary hearing the said exhibit was mentioned too. Thus to him section 246(2) of the CPA was complied with. As regard to compliance with section 18 of ETA he contended, PW6 told the court on how he prepared the device, recorded and reproduced the copies into two DVD after the interview and its storage until the same was produced in court. According to him, the exhibit is authentic and highly reliable for being extracted from the camera and stored in the storage device sought to be tendered in court thus the document is admissible. He therefore invited the court to overrule the objection and admit the document.

In his brief rejoinder Mr. Kibatala almost reiterated his submission in chief and added, the document sought to be tendered is not authentic as the court was not told whether the camera was working properly. So the mere fact that it was sealed does not guarantee its origination is corrupted product can be sealed as well. As to the compliance of section 246(2) of the CPA he insisted the document was neither listed nor read during the committal

proceedings. With regard to the requirement of certification he rejoined there is no law denoting that certification applies only to civil cases and not criminal ones. Concerning the submission that, the video was recorded under section 57(5) of the CPA, he said even if it has to be so believed, still there was non-compliance of the law too as the copy of recorded video was not supplied to the 1st accused and no certification was done as poof of recording of her oral interview leave alone failure to served copy of the said certificate to accused as per the requirement of section 57(5)(c) and (d) of the CPA. With regard to application of section 40A of Evidence Act in the record sought to be tendered Mr. Kibatala rejoined that, it refers to the evidence obtain by police under cover and not one under the circumstances of this case, as the proper section for admission of evidence at dispute is section 64A of the Evidence Act. He thus maintained his prayer that, the document should not be admitted.

From the above contesting arguments by both counsels, the crux of the matter seeking attention of this court is whether the original mini video tape sought to be tendered by PW6 is admissible or not. For the purposes of smooth determination of the issue, I find it pleasing to me to consider and determine first the fourth ground of objection as raised by Mr. Kibatala on

non-compliance of section 246(2) of CPA, whereby its claimed the said original mini video tape, being electronic document was not listed and read to the accused person during committal proceedings. As alluded to the contention by Mr. Kibatala is resisted by Mr. Tesha who argues, the law was complied with as during committal proceedings at page 43 of typed proceedings the court and accused were informed that, prosecution will tender physical exhibits and that, the sought to be tendered exhibit is one of those physical exhibits. He added the same exhibit was mentioned during preliminary hearing as well as its contents/substance in the witness statement of PW6 which was listed and read in court during committal proceedings. It is trite law, and section 246(2) of the CPA makes it mandatory that, any statement or document containing the substance of the evidence of witnesses whom the DPP intends to call at the trial has to be listed and read over to the accused person during committal stage failure of which renders the statement or document inadmissible. The said Section 246(2) of the CPA, reads:

*(2) 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 documents containing***

the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial. (Emphasis supplied)

Now does the original mini video tape constitute a document within the meaning of the above referred section taking into consideration the fact that it is an electronic evidence. Section 3(1) of the Evidence Act, [Cap. 6 R.E 2019] defines the document as hereunder and I quote:

*"document" means any writing, handwriting, typewriting, printing, Photostat, photography, **computer data and every recording upon any tangible thing**, any form of communication or representation including in **electronic form**, by letters, figures, marks or symbols or more than one of these means, which may be used for the purpose of recording any matter provided that recording is reasonably permanent and readable; (Emphasis added)*

From the above definition the document includes computer data and every recording in any tangible thing, which may be used for the purpose of recording any matter provided that the recording is reasonably permanent and readable. It is therefore clear to me that, every recording in any tangible thing or device constitutes a document. In the case of **Onesmo Nangole** (supra) the Court of Appeal when confronted with issue as to what constitute

a document under electronic evidence after consulting the provision of section 64A of Evidence Act on admissibility and weight to be attached to electronic evidence had this to say:

"The said amendments in the Evidence Act, recognize a flash disk and mobile phone as tangible devices which can capture record, store electronic data on documentary account of memorable past events. Such as electronic data is permanent, readable and is admissible in evidence constituting electronic documentation."

The Court went on to observe when said:

*"...we are settled in our minds that a **flash disk and tecno mobile phone are documents and tangible exhibits** containing memorable account of what was presented in the evidence during trial..." (Emphasis added)*

Applying the above definition of document which are electronically generated or stored to the facts of this case, I am satisfied that even the original mini video tape falls within the meaning of document. Having so found I now go back to issue at hand as to whether it out to be listed and read over to the accused person in compliance with section 246(2) of the CPA. While I am in agreement with Mr. Tesha that, PW6's statement was listed and read during committal proceedings, I find that compliance was not legally sufficient to

cover the mini video tape for being a document which also needed to be listed and read to the accused person as per the requirement of section 246(2) of the CPA. The need to list the document and have it read during the committal proceeding is mandatory as it guarantees the accused person of the right to fair hearing for not being taken by surprise with the evidence during his trial. He needs to be fully acquainted with the substance of the evidence sought to be used by the prosecution against him so that he can properly marshal his defence during the trial. When confronted with scenario akin to the present one where documentary exhibits were not listed and read during committal proceeding, the Court of Appeal in the case of **Masamba Musiba @ Musiba Masai Masamba Vs. R**, Criminal Appeal No. 138 of 2019, held the requirement was guaranteeing the right of fair hearing to the appellant and therefore non-compliance of the requirement highly prejudiced him and proceeded to expunge them. In so doing had this say:

*"It is borne out of the record of appeal that **Exhibits PI, P2, P3 and P4 were not listed during committal proceedings as among the intended exhibits to be relied upon by the prosecution in the appellant's trial.** Worse still they were also not listed in the preliminary hearing of the case. **The spirit behind such requirement is to***

guarantee an accused person facing a homicide case a fair trial by affording him the opportunity to know and understand in advance the case for the prosecution for him to mount a meaningful defence. Since the documents were introduced during the trial of the case obviously the 16 appellant was highly prejudiced hence the exhibits are liable to be expunged.” (Emphasis supplied)

Again as intimated earlier on, Mr. Tesha convincingly argued the prosecution complied with the provision of section 246(2) of the CPA as during the committal proceeding mentioned that will be tendering physical exhibits which includes mini video tape and the same exhibit was listed during preliminary hearing. With due respect, I disagree with Mr. Tesha proposition that, as I have already held herein above, the mini video tape sought to be tendered in court is document within under Evidence Act, thus cannot be treated as physical exhibit under any stretch of imagination for containing evidence in electronic form. With regard to the assertion of listing it in the list of prosecution exhibits to be relied upon during the preliminary hearing, the proceedings of 18/03/2019 indicates the exhibit mentioned relating to one at contest is "CD Video record". I hesitate to conclude that it referred to the exhibit at issue now as "original mini video tape" is distinct from "CD Video record" as the latter can be reproduced from the former while the

former cannot. More or less similar situation was encountered by the Court of Appeal in its very recent decision in the case of **Simon Mashauri Awaki @ Dawi Vs. R**, Criminal Appeal No. 62 of 2020, delivered on 23/02/2022, where the record showed that, the certificate of handing over was read in court without indicating which one amongst the two was exactly read. In resolving the query the Court said it could not conclude that the same was read and observed thus:

"...we agree with both learned counsel that since it is not certain as to which handing over certificate was read out during committal, it is not safe to conclude that any of the certificates was read out to the accused at the committal to enable the appellant to know the nature of evidence against him. This offended the provision of section 246 (2) of the Criminal Procedure Act, Cap 20 R.E 2019 (the CPA) which stipulates what is mandatorily required to be done during committal as follows:

"Sec. 246(2) 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 documents containing the substance of the evidence of witnesses whom the

Director of Public Prosecutions intends to call at the trial" [emphasis added].

Therefore, the pointed exhibits were wrongly admitted at the trial and we accordingly expunge them all." (Emphasis added)

In this case like in the above cited case, since it is not clear to the court that, the mentioned "CD Video record" meant "original mini video tape" I have no difficulties in holding that the exhibit sought to be tendered by PW6 was not mentioned too during preliminary hearing. I am of further finding that, since there was non-compliance with the provisions of section 246(2) of the CPA by the prosecution, which guarantees the 1st accused person of her right to fair hearing, to allow admission of the said original mini video tape in my profound view, is highly prejudicial to the 1st accused person. I so opine as that is tantamount to denying the accused person of her right and opportunity to know in advance the prosecution case for her to mount a meaningful defence bearing in mind that, she is facing a serious offence of murder attracting capital punishment upon conviction. While upholding this point of preliminary objection, I also find it sufficient enough to resolve parties conflicting arguments as to whether the "original mini video tape" sought to be tendered in court by prosecution should be admitted in court

as exhibit or not. Thus I will not further consider and determine the remained grounds of objection.

That said and done, it is the finding of this court that, the sought to be tendered document which is the *"original mini video tape"* purporting to contain oral interview statements of Miriam Steven Mrita recorded on 8/08/2016 by PW6 is inadmissible in evidence as exhibit for want of compliance with the provisions of section 246(2) of the CPA.

It is so ordered.

DATED at Dar es salaam this 09th day of March, 2022.



E. E. KAKOLAKI
JUDGE
09/03/2022.

Ruling delivered at Dar es Salaam in court this 09th March, 2022 in the presence of both accused persons in person, Mr. Genes Tesha and Gloria Mwenda learned Senior State Attorneys for the Republic, Mr. Peter Kibatata and Mr. Nehemiah Nkoko, for the 1st and 2nd accused persons respectively.



E. E. KAKOLAKI

JUDGE

09/03/2022

