

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CRIMINAL SESSIONS CASE NO. 13 OF 2021

REPUBLIC

Versus

- 1. KHALID ALMAS MWINYI @ BANYATA**
- 2. RAHMA ALMAS MWINYI @ BABY @ RAHMA ALMAS
IDDI**
- 3. NDUIMANA OGISTE @ JONAS ZEBEDAYO @
MCHUNGAJI @ NDAYISHEMEZE ZEBEDE @
NDAISHIME ZEBEDAYO @ OMARI HASSAN**
- 4. GODFREY PETER SALAMBA**
- 5. CHAMBIE JUMA ALLY**
- 6. ALLAN ELIKANA MAFUE**
- 7. ISMAIL ISSAH MOHAMED @ MACHIPS**
- 8. LEONARD PHILIPO MAKOI**
- 9. AYOUB SELEMAN KIHOLI**
- 10. JOSEPH ALEXANDER LUKOA**
- 11. GAUDENCE JAMES MATEMU**
- 12. ABUU OMARY MKINGIE**
- 13. HABONIMANA AUGUSTIN NYANDWI @ OGISTEE**
- 14. MICHAEL DAUD KWAVAVA**

15. EMMANUEL THOMAS SONDE

16. KELVIN ATHANAS SOKO

17. SAMIA SALEH HUJAT

18. ALMAS SWEDI @ MALCOM

RULING

Date of last Order: 12/08/2022

Date of Ruling: 12/08/2022

MGONYA, J.

In the cause of prayer on admission of the Identification Parade Police form to this court by the Prosecution witness **PW 32 BF** before the court of which is said to have been conducted on 10/01/2018 at Oysterbay Police Station, the prayer encountered objection from the learned Counsel Mr. Lamwai who is representing the 3rd accused person who is said to have been engaged in the said parade.

Mr. Lamwai's objection is based on non adherence of **Police General Order (PGO) No. 232 Regulation 2(d)** which needs the officer who conducted/supervise parade in issue not to have any association to the case investigated. Mr. Lamwai was referring to **PW 32 BF** who is said to have also arrested the 1st Accused herein Mr. Khalid Almas Mwinyi.

The said objection was strongly objected by Prosecution Team citing **Section 60** of the Criminal Procedure Act, Cap. 20 [R. E. 2019] herein to be referred as CPA stating that the section is clear and it has no power over the PGO hence the later regulates the Criminal procedure of this Land while the PGO is only regulations used by the Police Force administratively in the cause of their daily works. Briefly that is the objection before this honorable court.

In determining this objection, I have to say that I have been able to revisit the said **Regulation 232 of the PGO, Section 60 of the CPA** and the **Constitution of the United Republic of Tanzania (1977)** as it is the Mother of all laws.

It is my understanding that the cited PGO are made out of the Police Force and Auxiliary Service Act **Cap. 322 [R.E 2002]** categorically in dealing with some policing matters. For case of reference I would like to quote some introductory words appearing in the 1st page of the PGO as hereunder:

THE POLICE GENERAL ORDERS

INTRODUCTION

PURPOSE OF THE GENERAL ORDERS

"..... This document sets forth the General Orders of the Force. They are issued pursuant to

the authority granted to the Inspector General of Police under Section 7(2) of the Police Force and Auxiliary Services Act Cap. 322 R.E. 2002. The directives contained in these General Orders help/guide the Force personnel in carrying out their duties and responsibilities as members of the Force. Each member is expected to follow the directives set forth in these General Orders, although it is understood that these General Orders cannot regulate conduct in every situation that may arise in the course of policing. Judgment and discretion must be prudently applied. Each directive issued supersedes all conflicting prior policies and orders published by the Force.

.....In this regard, some General Orders have been modified to match with the prevailing reality and to allow flexibility to accommodate the changes that have been referred to above. The revision of these General Orders has also taken into account various Government directives on the administration of the Force in the country.

.....Members of the Force are expected to consult these General Orders when questions arise regarding execution of police work”.

After I have highlighted the purpose of the PGO, particularly the amended one from that of 1961, now let me proceed with the quotation of the said PGO No. 232 Regulation 2(d), which states:

“ID parade shall be conducted as far as possible in accordance with the following rules:

Although the officer in charge of the case may be present, he will take no part in conducting the parade. The officer conducting the parade must be an officer unconnected with the case and, wherever possible, a Gazetted Officer.

Officers below the rank of Assistant Inspector are not permitted to conduct ID parade.”

Out of the above quoted regulation, I have decided to focus on the words **“The officer conducting the parade must be an officer unconnected with the case”** I also think this is the part which was also focused by Mr. Lamwai. From the above, I am interested with the word **UNCONNECTED** with the case.

From PW 32 BF testimony before this court, he clearly stated that he is the one who arrested the 1st Accused person herein. I have to ask myself as to how the witness was connected to the case through the arrest of a suspect to the case. To my understanding, the connection must have been more than that, possibly by investigating the case to make him to be in a position to know most of the facts to the case which might bias him towards the person in a parade that is conducted. The connection of arrest to one does not bring the witness to any special and detailed position to know the case to the extent of conflicting with the Accused's rights. That is my explanation to the said regulation.

Now coming to the law of procedure in Criminal matters of this Land. The same is regulated by the **Criminal Procedure Act, Cap. 20 [R. E. 2019]**. Mr. Mlekano, the learned Principal State Attorney was of the view that **section 60** of the CPA has clearly directed on who can conduct Identification Parades. The same states;

"Any Police officer in charge of a Police station or any police officer investigating an offence may hold an identification parade for the purpose of

ascertaining whether the witness can identify a person suspected of commission of an offence”

From the wording of the above section, I am satisfied and I have understood that **any police officer incharge of a police station or any police officer investigating on offence any hold an ID Parade.** This is clear and contrary to the wording of the PGO of which as I have earlier introduced is just for the purpose of assisting the Police Force Officers in conducting their Police duties.

This is the reason of why the PGO is enacted by the Orders/Directives of the Inspector General Police by powers, granted to him under **section 7 (2) of the Police Force and Auxiliary Service Act.**

As I have gone through the CPA, which is an **Act to provide for the procedure to be followed in the investigation of Crimes and the conduct of Criminal trials** as it has been well introduced by the introductory part of the Act, I came across **Section 62** of the same, which states:

“The Minister shall make Regulations providing for the procedure to be followed in the conduct of identification parades”

According to my knowledge, the Regulations are yet to be enacted. According to the law, the same are supposed to be made by the “**Minister Responsible for Legal Affairs**” as well stated under **section 2** of the Act.

In the event therefore where the Act provides for the conduct of ID parades, then **section 60 of CPA supersedes Regulation No. 232 of PGO.**

From the above then, I am satisfied that section 60 of CPA is to take charge in the conduct of the ID Parades while we are waiting for the said Regulations by the Minister responsible for Legal Affairs. This does not mean that the PGO regulations does not have place, but still they will serve the Police Officers directives in performing the ID parades as before. However, my emphasis is that, the PGO concerns or rather guides the Police Force Personnel in carrying out their daily duties and responsibilities as Members of the Force.

As I have highlighted on the PGO and CPA, let me now proceed with the Mother of all Laws i.e the **CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA (1977)** particularly to **Article 107 A (2)(e)** of the same of which I prefer to quote it in KISWAHILI so as many of us can understand. The same states:

"Katika Kutoa Maamuzi na Mashauri (Madai na ya Jinai) kwa kuzingatia Sheria, Mahakama zitafuata Kanuni zifuatazo; yaani.

(e) Kutenda Haki bila ya kufungwa kupita kiasi na masharti ya Kiufundi kukwamisha haki kutendeka."

I don't have to explain more on the above stated Article as the words and the meaning of the same speaks by itself.

On this, I have also to emphasize that Rules of Procedure are handmade of Justice and I take this to mean that they should facilitate rather than implead decisions on **substantive issues**. This principle has been laid downs in number of cases both in High Court and in the Highest Court of the Land. i.e the Court of Appeal of Tanzania.

My above direction has been reached after I have gauged the offence before the Court, the efforts taken to arrest the culprits be it identified or not, the efforts to obtain a witness who probably was an eye witness or not one hand and on the other hand is the accused who is probably not known before by the Police officers who conducted ID parade so one can say they have been biased with him. I believe that all those who conducted the ID parade after availed the Accused with his rights even to exchange his attire, had nothing to offend him

to nullify the said exercise which to my point of view was conducted fairly despite of the fear that there might be some elements to offend the accused, of which I don't buy, then it is my conclusion that **the ID parade was conducted fairly to fit the purpose of investigation towards the fair decision.**

In the event therefore, the **ID parade Form prayed to be admitted for evidence is accordingly considered for admission as evidence in this case respectively.**

Objection raised is hereby overruled.

It is so ordered.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya".

L. E. MGONYA

JUDGE

12/8/2022