IN THE HIGH COURT OF UNITED REPBLIC OFTANZANIA

CURRUPTION AND ECONOMIC CRIMES DIVISION

AT MWANZA SUB REGISTRY

ECONOMIC CASE NO. 02 OF 2022

REPUBLIC

VESRUS

1. **MNAWALA S/O HAMISI @ NYANDA.....1ST ACCCUSED**
2. **MUSTAFA S/O HAMISI NYANDA @ TAFU.....2ND ACCCUSED**
3. **MSWADIKI S/O MIKIDADI MTABURU.....3RD ACCCUSED**
4. **HAMISI S/O KITIGANI @ ABU YASIRI.....,....4TH ACCCUSED**
5. **MWANTUMU D/O RAJABU RAMADHANI.....5TH ACCCUSED**
6. **MUSA S/O MURUA SHABANI @ MTENDAJI.....6TH ACCCUSED**
7. **ASIA D/O MUSTAFA JUMA.....7TH ACCCUSED**
8. **ABDALLAH S/O MWINYIHAJI RASHIDI.....8TH ACCCUSED**
9. **ZULUFA D/O IBRAHIM ABDUTWALIBU.....9TH ACCCUSED**
10. **MAYASA D/O RASHID TWAHA.....10TH ACCCUSED**

RULING

26/10/2023 & 27/10/2023

MANYANDA, J.:

In this Economic Crimes Case No. 02 of 2022 the 10 (ten) accused persons namely, Mnawala s/o Hamisi @ Nyanda, Mustafa s/o Hamisi

Nyanda @ Tafu, Mswadiki s/o Mikidadi Mtaburu, Hamisi s/o Kitigani @ Abu Yasiri, Mwantumu d/o Rajabu Ramadhani, Musa Murua Shabani @ Mtendaji, Asia d/o Mustafa Juma, Abdallah s/o Mwinyihaji Rashidi, Zulufa d/o Ibrahim Abdutwalibu and Mayasa d/o Rashid Twaha are charged with seven (7) counts of various offences under the Prevention of Terrorism Act, [Cap 19 R.E 2019 read together with paragraph 24 of the First schedule to and section 57(2) and 60(2) of the Economic and Organized Crime Control Act, [Cap 200 R. E. 2022].

The 9th accused person is also charged with one count of unlawful possession of firearms contrary to section 20(1)(a) and (2) of the Arms and Ammunition Control Act, [Cap. 223 R. E. 2019] read together with Paragraph 31 of the First Schedule to, and Sections 57(1) and 60(2) of the R. E. 2022] and Organized Crimes Control Act [Cap. 200 R. E. 2022] and with another count of unlawful possession of armaments, contrary to section 11 of the Armament Control Act, [246 R. E. 2019] read together with paragraph 32 of the First schedule to, and sections 57(1) and 60(2) of the Economic and Organised Crimes Control Act, [Cap. 200 R. E. 2022].

All accused persons pleaded not guilty and the court entered a plea of not guilty accordingly. Hence the case proceeded to hearing after conclusion of preliminary hearing.

When the case was called on for hearing, during cross examination of PW2, namely, P17, Mr. Sijaona Revocatus, learned Advocate, Counsel for the 7th accused put questions under section 154 of the Evidence Act, [Cap. 6 R. E. 2019], to the witness concerning a statement purportedly recorded by the witness after completing examination of the items sent to him. The witness unequivocally admitted to have recorded a statement identified as P17. Mr. Sijaona, Counsel for the 7th accused person sought to tender the statement (P17) in evidence in order to impeach the credibility of the witness under section 164 of the Evidence Act.

Mr. Marungu, learned Principal State Attorney, for the Republic, objected arguing that Mr. Sijaona had not followed the procedure. Mr. Marungu argued that initially the Counsel for the 7th accused intended to cross examine the witness under section 154 of the Evidence Act, using a statement allegedly made previously, but later on, chose to apply the provisions of section 164 of the same Evidence Act to impeach the witness's credibility. The Principal State Attorney was of the views that

the procedure under section 154 require the Counsel for the 7th accused person to question the witness on the statement without showing or tendering it while under section 164 the procedure entails leading the witness to have the statement read aloud, show the witness the contradictory part and the statement be tendered in evidence by the witness who is the statement maker. To support his submissions, the Principal State Attorney cited the cases of **Lilian Jesus Fortes vs. Republic,** Criminal Appeal No. 151 of 2018 (unreported).

The Principal State Attorney also cited the case of **William Kasanga vs. Republic**, Criminal Appel No. 90 of 2017 where the Court of Appeal of Tanzania insisted at page 7 that the statement is to be tendered by the witness not the State Attorney, the prosecutor of the case. He concluded that, the defence Counsel ought to choose which of the two provisions he is intending to apply.

In rejoinder Mr. Sijaona, Counsel for the 7th accused person, submitted that he had followed the procedure because he had cross examined the witness, under section 154 without showing the witness the statement, then, after finding contradictions, he chose to apply section 164 of the Evidence Act in order to impeach the witness on the inconsistencies. He argued further that, it is now a procedure to tender

the statement, but since the prosecution has not provided one, then, he chose to tender it himself. He maintained that, that procedure is what was stated in the **Lilian Jesus Fortes's case (supra)** and reiterated his prayer.

I have dispassionately considered the equally urging submissions by Counsel for both parties. Basically, the legal in controversy here is about admissibility of the intended document to be used to impeach the witness. Mr. Sijaona, Counsel for the 7th accused person, was of the view that, the statement is admissible because he has compied with all the requisite procedures. Mr. Marungu, Principal State Attorney for the Prosecution, was of the view that it is inadmissible for non-compliance with the procedural requirement.

In Tanzania the law on impeachment of a witness testimony basing on previous writing is provided under Sections 154 and 164 of the Evidence Act, [Cap. 6 R. E 2019]

The Court of Appeal of Tanzania had an opportunity to interpret those provisions in the case of **Lilian Jesus Fortes vs. Republic (supra)** cited by the Principal State Attorney, the case in which it stated at pages 24 and 25 as follows: -

"we are aware that the purpose of producing in court previous statements of a witness is either to demonstrate consistence on the part of that witness, according to section 166 of the Evidence Act, or impeach him according to sections 154 and 164 of the same Act."

Section 154 of the Evidence Act reads as follows: -

"154. A witness may be cross-examined on previous statements made by him in writing or reduce into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

The Court of Appeal went on elaborating that for impeachment of witnesses by using previous statements, the relevant part of Section 164, is sub-section (1)(c) which provides as follows: -

"164 – (1) the credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

Then it stated the procedure for impeaching a witness by using his previous writing by stating as follows: -

"The procedure for impeaching a witness by using his previous writing therefore, requires the following to be done, in our view; ***first,*** *the previous statement must be read to him.* ***Secondly*** *the attention of the witness must be drawn to those parts which are intended to demonstrate contradictions.* ***Thirdly,*** *the statement should be tendered in evidence. Was the above procedure followed in this case? We are afraid it was not followed because what we see on page 40 to 41 are cross examinations after which a prayer to tender the statement is successfully made."*

In the **Lilian Jesus Fortes vs. Republic (supra),** the Court of Appeal cited with its earlier decision in the case of **Waisiko Ruchere @ Mwita v. Republic**, Criminal Appeal No. 348 of 2013 (unreported) in which the steps for impeaching a witness by using his previous statements were discussed. In **Waisiko Ruchere @ Mwita"s case (supra),** the Court of Appeal said at pages 5 and 6 as follows: -

"Citing Sarkar's LAW OF EVIDENCE VOL 2, at page 2090 Mr. Mutalemwa submitted that the judge erred in not adhering to the principle that when impeaching the credit of a witness by proof of a previous contradictory statement his attention must first be drawn to it and the same opportunity should be given to the witness of explaining the discrepancy or inconsistency in court..... ***with respect, we agree with Mr. Mutalemwa that***

impeachment proceedings have to be conducted in the manner he described and supported by Sarkar *(supra)."*(emphasis added)

I grappled with a situation akin to this one in the case of **Republic vs. Albert Joel Kidaga,** Economic Case No. 01 of 2022 of the High Court of Tanzania, Corruption and Economic Crimes Division sitting at Kigoma, where the defence Counsel sought to tender a previous writing but recorded by a different witness other than the one who was testifying, for purposes of impeaching his credibility, I stated as follows: -

> *"It is all not in dispute that PW9 is at the stage of cross examination. The guiding principles for questioning a witness at cross examination by referring them to writings or statements previously made is provided under sections 154 and 164 (c) of the Evidence Act.*
>
> *These provisions require a witness to be cross examined on writing or statement he made previously before his/her testimony in court.*
>
> *Section 154 reads;*
>
> > *'154 A witness may be cross-examined on previous statements* ***made by him*** *in writing or reduced into writing and relevant to matters: - question, without such writing*

being shown to him or being proved but if it is intended to contradict him by the writing his attention must before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him'.

On the other hand, section 164 reads;

"164 (1) The credit of a witness may be impeached in the following ways

a) NA

b) NA

c) by proof of former statements inconsistent with any part of his evidence which is able to be contradicted".

As it can be seen section 164 (1) provides for use of former statements intended to be contracted section 154 provides that those statements are those statements made by the witness or reduced into writing."

Again, at a later stage in the same case, this time the same defence Counsel sought to tender a previous writing purportedly written by the witness who was in the witness dock, I stated as follows: -

"I have listened to both parties' counsel. Practically I agree with the State Attorney that a procedure for

impeaching a witness was well spelt by the CAT in the said case of ***Lilian Jesus Fortes vs Republic (supra)*** *in which the CAT referred to its previous decision in the case of* ***Waisiko Ruchere @ Mwita vs Republic,*** *Criminal Appeal No. 348 of 2013 (unreported) and stated the main steps for impeaching a witness using a previous recorded statement. It stated the main procedure as being.*

a) reading of the previous statement;

b) drawing the attention of the witness to the parts intended to

contradict; and

c) tendering of the statement as evidence.

In my understanding the steps towards achieving the three main procedures there are other minor steps but equally important.

They are: -

1. *A prayer by the defence of intention to move the court for impeachment of the witness under section 164 of the Evidence Act;*
2. *Proof of the statement or writing alleged to have been made by the witness, proof which may be by: -*
    a. *Not only asking him if he did make any statement that was reduced in writing, but by showing the writing intended to contradict him, depending on the circumstances of the*

case, it is here that the original one or a typed one may be supplied by the party in possession;

b. *In case the witness does not recognize or denies to have made it, the Counsel may lead evidence proving that the witness in fact made the writing, if proof fails, the move ends there;*

3. *Then, there follows reading of the statement whereas it may be read by the witness himself, if is capable, or by the court, if incapable.*
4. *Drawing to the attention of the witness the parts intended to contradict him.*
5. *Proof of the contradictions by comparison between the writing and the evidence as recorded by the court by affording opportunity to the witness to give explanations on the observed differences;*
6. *In case the contradiction is successfully exhibited, not mere omission, the statement has to be admitted in evidence in favour of the cross-examining party, the effect of the contradictions or inconsistencies will be subject to scrutiny in the final decision after considering the whole evidence presented by both parties in the case."*

In yet another case, that of **Republic vs. Mbenga Seif Kasamwa @ Abuu Masudi @ Abuu Rajabu and 2 Others,** Criminal

Sessions Case No. 04 of 2023 of the High Court of Tanzania at Tanga, I encountered a similar issue where the defence Counsel sought to impeach the credibility of a witness by cross examining him using a previously writing by that witness and objection as to the procedure was raised. I had this to say: -

> *"What did 'Sakar' say about impeachment of witness using previous writing?*
>
> *At page 3549, According to 'Sakar' section 155 of the Indian Evidence Act is subjected to the procedures under Section 145 of the same law. The former and later are in 'pari materia' to sections 154 and 164 of the Evidence Act of Tanzania Sarkar in his book* ***Sarkar Law of Evidence*** *Malayasia Edition, states at page 3550 as follows: -*
>
> > *'The reason in section 145 applies with equal force to contradictions under section 155. For instance, if a witness is intended to be discredited by the evidence of another person as to who is alleged to have made a former inconsistent statement, it should first be asked in his cross examination whether or not he made such statement to on a particular occasion. This course would furnish the witness with an opportunity to admit the statement or to offer explanations.'"*

Then Sakar referred to an India case of **Gopichand vs. R.** 112460 where it was stated that the mode of proof for purpose of contradiction is provided in section 145 which controls section 155 and I had this to state in **Mbenga Seif Kasamwa's case (supra)**: -

> *"On the same analogous reasoning, the procedure in section 154 controls the application of section 164 of the Evidence Act of Tanzania"*

Moreover Section 145 of the Indian Evidence Act, according to Sarkar at page 3550; if the former statement was in writing or was reduced to writing, section 145 of the Indian Evidence requires attention of the witness be called to those parts of which are used for purpose of contradicting him, then I said in **Mbenga Seif Kasamwa's case (supra)** as follows: -

> *At page 3478 when interpreting section 145 of the Malaysian Evidence Act, also 'pari materia' to section 154 of the Evidence Act of Tanzania Sarkar said that 'this procedure should only be resorted to if the apparent discrepancy is material to the issue"*

Sarkar cited an India case of **Rammi vs State** of MP 1999 (70 JT) 247 where it was stated as follows: -

> *'For the purpose of contradicting a witness, it is not sufficient to show that there were some minor variations*

between the present statement of the witness and his former statement .....it is a judge who should compare the statements of the witness recorded ..... if the sessions Judge finds that the statements of the witness in his court differ materially from those previously made by the same witness, it is his duty to examine them as to discrepancies."

According to Sarkar, at page 3465, omission is distinguishable from contradictions as per the Indian Case of **Ramash Kumar vs. State of Raysthan** (2009) CrLJ 550 at page 553 where the witness's statement before the court stated inflicted lethal knife blow on the stomach of the deceased and other accused persons also inflicted knife blow but in previous statement did not name the accused, it was held that it was a simple 'omission' and not contradiction. Omission therefore, entails what a witness stated in court but was not stated in the previous writing and vice versa.

Deducting from the quotations I made from Sakar, I stated in **Mbenga Seif Kasamwa's case (supra)** as follows: -

From the extracts I have quoted from the Sarkar Law of Evidence, which was cited with approval by the Court of Appeal in the case of ***Waisiko Ruchere @ Mwita vs. Republic (supra)*** *the following can be deducted:*

A previous statement made by a witness may be used to impeach the credit of a witness under section 164 of the Evidence Act, but the procedure laid down under section 154 of the same Act must be followed: -

One, the witness is cross examined to find out if he did ever make any statement previously. The court must be satisfied first that there is a fact in the previous statement with material contradictory, not minor or mere omissions as they don't amount to contradictions, the court must do the comparison;

Two the attention of the witness must be drawn on those parts it is intended to be contradicted;

Three, the witness must be given enough opportunity for him or her to explain the differences;

Four, if the court is satisfied that there is indeed contradictions between the evidence in court and the previous writing, an endorsement to that effect be made and the statement or parts so contradicted be admitted in evidence.

Now, joining what I held in **Albert Joel Kadaga's case (supra)** and in the case of **Mbenga Seif Kasamwa @ Abuu Masudi @ Abuu Rajabu and 2 Others (supra), Lilian Jesus Fortes (supra), Waisiko Ruchere @ Mwita (supra)** and the **Sakar Law of Evidence Book,** I can state that a witness may be cross examined under section

154 of the Evidence Act without such writing being shown to him or proved; This is so because contradictions and inconsistencies based on previous writings may be established without necessarily tendering of the document. The rationale is that, evidence amassed in cross examination is as good evidence as that in examination in chief or re-examination in chief.

However, if it becomes an intent by the concerned party to contradict the witness using the previous writing, then, that move for impeachment of credibility of a witness takes a shape of "an inquiry" because section 164 may be invoked by the adverse party as well as the party calling the witness for purposes of declaring him a hostile witness. Then, the procedure entails the following nitty-gritty steps as per **Albert Joel Kadaga's case (supra)**, that is to say: -

i. A prayer by the defence of intention to move the court for impeachment of the witness under section 164 of the Evidence Act;
ii. Proof of the statement or writing alleged to have been made by the witness, proof of which may be by: -
    a. Not only asking him if he did make any statement that was reduced in writing, but by showing the writing intended to contradict him, depending on the circumstances of the case,

it is here that the original one or a typed one may be supplied by the party in possession;

b. In case the witness does not recognize or denies to have made it, the Counsel may lead whatever available relevant evidence, including handwriting examination, proving that the witness in fact made the writing, if proof fails, the move ends there;

iii. Then, there follows reading of the statement whereas it may be read by the witness himself, if is capable, or by the court, if incapable.

iv. Drawing to the attention of the witness the parts intended to contradict him.

v. Proof of the contradictions by comparison between the writing and the evidence as recorded by the court by affording opportunity to the witness to give explanations on the observed differences;

vi. In case the contradiction is successfully exhibited, not mere omission, the statement has to be admitted in evidence in favour of the cross-examining party, the document has to be tendered by the witness as he becomes a compellable witness to tender the same, not the Counsel per the authority in the case of **William Kasanga (supra),** in order to have evidential probative value, the statement must to be admitted in evidence in favour of the cross-examining party because depositions are not evidence unless they are admitted in evidence per the authority in the case of **Charle Daki s/o Daki vs. Republic,** (1959) 1 EA 931

vii. the effect of the contradictions or inconsistencies will be subject to scrutiny in the final decision after considering the whole evidence presented by both parties in the case.

I may add one thing that, unlike the witnesses in this case, the witnesses in those cases I encountered were not protected by order of this Court. In the instant case, it is a statement with pseudo name that is to be used to contradict a witness, the same may be hand written or typed, provided it is proved to have been written or recorded by the witness.

To this end, as far as the procedure is concerned, I agree with the Defence Counsel that the procedure for impeaching a witness under section 154 of the Evidence Act, he had so far taken is correct and proper in law but not proper for invocation of section 164 as I will demonstrate hereunder.

In the case at hand, while PW2 says made a statement on 30/05/2017, Counsel for the 7th accused contend that PW2 made it on a different date. Therefore, it was important to have the impugned writing shown to the said witness before tendering. The Counsel for the 7th accused ought to have made an application for invoking the provisions of section 164 by following the procedures elaborated in **Albert Joel**

Kadaga's case (supra) reproduced hereinabove by having the document shown to the witness.

Tendering of the document before proof that it was made by the witness by showing it to him is pre-mature. Moreso, the learned Advocate cannot tender the document, rather, it is the witness who is being cross examined. The objection is sustained, the document is inadmissible in evidence at this stage for want of sufficient proof by the maker.

The Counsel for the 7th accused person is at liberty to invoke the provisions of section 164 of the Evidence Act, by following the procedures as explained above, if he so wishes. It is so ordered.

Dated at Mwanza this 27th day of October, 2023

F.K. MANYANDA

JUDGE