IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

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

02/06/2023 & 05/06/2023

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

Amidist testimony of PW1 namely, P18, sought to tender in evidence two firearms, make AK 47 commonly known as SMG with Serial Numbers BE 351380 and another UC 82951998.

Mr. Sijaona Revocatus, learned Advocate, for the 7th accused person and Mr. Victor Karumuna, learned Advocate, for the 8th accused person, raised objection to admission of the two exhibits mentioned above on two grounds as follows: -

1. There has been no chain of custody established to give a trail from the place or seizure to being tendered in court; and
2. Lack of relevancy to the case in which the accused persons are charged.

Submitting in support of the first limb of their objection, Mr. Sijaona stated that there has been no chain of custody of the two fire arms to link them from seizure to court. In other words, the Counsel argued that it is not clear how the two guns reached PW1 and from where and whom.

He submitted further that the two firearms are not labeled in accordance with PGO 229(10) which require among others to show the chain of custody of the exhibit intended to be used in court. According to him the label ought to show the name of a police who handed the firearms to him and the police officer who took them from him then returned them because in his testimony PW1 stated that firearms were once taken from him and returned. That, such connection would differentiate them from other guns. Moreover, he stated that the owner of the exhibit requires to be mentioned in the label.

To bolster his point, he cited the famous case of **Paul Maduka and 4 Others vs. Republic,** Criminal Appeal No. 110 of 2007 (unreported) CAT at Dodoma where it was stated among others that in effect, it is the chronological events of the movements of an exhibit from the period of its seizure to the period when it was produced into evidence. The rationale behind the rule is to establish nexus between the exhibit and the crime and thereby preventing possibility of the exhibit being fabricated to incriminate the accused.

According to the Counsel, the principle in that case applies to the intended exhibits to be tendered in that no chronological events of movements have been demonstrated form seizure to presentation in

court because neither the label or the testimony of PW1 shows that linkage.

In support of the second limb of the objection, the Counsel submitted that there is now evidence showing relevancy of the exhibits. The counsel referred to a statement of the witness (PW1) which he allegedly made before police during investigation, that was read at committal proceedings and attached the said committal proceedings, and said that there is nowhere mentioned the numbers of the intended firearms to be tendered in evidence as exhibits, hence irrelevant to the case.

He submitted that the firearms are not even mentioned in the information. Further, according to him, in law admission of exhibits is subject to relevancy, materiality and competence. That a witness may be competent to tender an exhibit, that is not enough, the exhibit must also be relevant. He cited the case of **DPP vs. Sharifu Mohamed Athuman and 6 Others**, Criminal Appeal No. 74 of 2016 (unreported) CAT at Arusha, where at page 6 it was stated that

> *"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."

He concluded that the two firearms are irrelevant, hence inadmissible. He prayed the objection be sustained and the two intended exhibits ruled inadmissible in evidence.

Then, Mr. Sijaona, passed over the ball to Mr. Karumuna, who submitted insistingly on what Mr. Sijaona had submitted on lack of chain of custody added that there is no linkage of the two firearms between the event at the place where they were seized and the instant event of tendering in court, hence they are inadmissible. He cited the case of **Jackson Paschal and Another, vs. Republic,** Criminal Appeal No. 615 of 2020 (unreported) which referred to the case of **Paul Maduka (supra)**. He retairated the prayers by Mr. Sijaona.

In reply, Mr. Marungu, learned Principal State Attorney, submitted opposing the objection. He started with the objection based on relevance of the intended exhibits arguing that that same are most relevant in this case because they are evidential exhibits as explained by PW1 that he received the same and entered them in entry numbers 23 of 2016 and 11 of 2019 and the same had reference to this case. He stated that the two firearms were correctly labelled by PW1. He pointed

out that PGO 229(10) of 2021 does not support the defence Counsel argument because it does not provide so.

As regard to principle of chain of custody, the Principal State Attorney submitted that according to the case laws which propounded it cannot be established by one witness, there must be several witnesses and it is assessed by the court after adduction of all the evidence of the case during assessment of value or weight of evidence. To support his argument, he cited that case of **DPP vs. Kristina Biskasevskaja**, Criminal Appeal No. 76 of 2016 (unreported) where it was held among others that chain of custody is subject of weight or value of the evidence.

Moreover, the Principal State Attorney submitted that PW1 was just a custodian of the exhibits, hence competent to tender them in court as exhibits per the authority in the case of **Fatuma Said Mahanyu vs. Republic,** Criminal Appeal No. 32 of 2019 (unreported) CAT at Arusha where at 10 it was held that any person having custody, possession or owner of the exhibit can tender it in court.

As regard to the arguments about relevancy of the exhibits, the Principal State Attorney was of the views that it has been raised pre-maturely and it is subject to evaluation of evidence weight. He

submitted further that the challenge of evidence of (PW1) by defence counsel based on the statement he made before police during investigation, is misplaced because his evidence can only be questioned during cross examination, hence it cannot be used to bar admission of exhibits at this stage.

He concluded that admissibility of the intended exhibits cannot be barred by chain of custody nor relevancy issues at this stage. He prayed the objection to be overruled and admit the intended exhibits.

Then, with leave of this Court, he invited Mr. Kwetukia, learned Senior State Attorney, who simply adopted what Mr. Marungu had said and added that the argument of the labels disclosing names of persons involved is barred by operation of the order of this Court in order to protect the witnesses. He also distinguished the case of **Paul Maduka (supra)** from the circumstances of this case arguing that chain of custody is evidential issue assessed during evaluation of evidence. He reiterated the prayer by Mr. Marungu.

In rejoinder, by Mr. Sijaona basically repeated his submissions in chief and added that the labels do not shows if there is a name of a witness hidden by erased for purposes of protecting him, therefore it remains as a fact that there are no names of persons who show handled

the exhibits before or after PW1 to establish chain of custody. He insisted that PGO 229(10) the version before 2021 was not complied.

As regards to relevancy, the Counsel insisted that relevancy of an exhibit for admissibility is determinable at this stage, and that none of the nine (9) counts in the information accuse the accused persons in this case in connection with the two firearms intended to be tendered in evidence, hence they are irrelevant and inadmissible.

Those were the submissions by the Counsel for both sides.

As it can be seen, basically, the issue is whether the two firearms make AK 47 commonly known as SMG with Registration Numbers BE 351380 and another UC 82951998 are admissible in evidence as exhibits in this case.

Admittedly, as alluded by Mr. Sijaona and the Court of Appeal of Tanzania in the case of **DPP vs. Sharifu Mohamed Athuman and 6 Others (supra)** after making reference to a book called, **Cross & Tapper on Evidence,** by Collin Tapper, 9th Edition at page 55, that the basic prerequisites of admissibility of evidence in a court of law are relevance, materiality and competence. And that 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 evidence which is irrelevant is inadmissible.

In that case, the Court of Appeal elaborated what amounts to relevancy by stating at page 7 as follows: -

> *"Briefly, evidence is relevant if it tends to make any fact that it is offered to prove, or disprove, either more or less probable.*

As far as the objection based on relevancy or otherwise of the two firearms is concerned will stand or fall depending on the evidence of PW1. The defence Counsel questioned his evidence based on a statement he gave at police during investigation. In my view, with due respect, the counsel has jumped a stage afar. At this stage during examination in chief he is supposed to look at the testimony of the witness as presented in court. If he feels to challenge the same his time will come during cross examination. As of now he can arm his bow but he is not allowed to fire.

Going by the record, the testimony of PW1 reveal that being Exhibit Keeper at his work station, received the two firearms among others from his fellow police officer who brought the same for the sake of being used in court. He labelled and recorded in the Court Exhibit

Register in entries 23 of 2016 and later when they were taken to Forensic Bureau for examination, they were returned to him and recorded them in entry 11 of 2019.

As it can be seen, the firearms are intended to be admitted in evidence as exhibits hence making the fact that in issue in this case intended to be proved, or disproved, either more or less probable.

What is the fact in issue in this case intended to be proved or disproved, Mr. Sijaona said neither of the firearms are contained in the information against the accused persons. On the other hand, Mr. Marungu said it is not necessary for information to mention specifically the exhibits, but evidence will reveal its involvement directly or indirectly.

I subscribe to Mr. Marungu's argument. Looking at the information, the same contains nine (9) counts. The first and seventh counts concern offences of conspiracy to commit terrorism and participating at terrorism meeting. These counts, if looked at, have generic issues of terrorism basically tending to accuse the accused of involving themselves in terrorist acts which may include a wide range of activities.

Moreover, there are proceedings of preliminary hearing which in our jurisdiction save as opening statement of the case. The facts read reveals that there were some weapons which were seized from the

accused in connection with commission of the offences they are charged with.

It is therefore, too early in views to hold anything irrelevant at this stage when only one witness and in particular exhibit keeper whose evidential value is only tendering the exhibits whose relevance or otherwise is subject to scrutiny during assessment of value or weight of the evidence.

In the case of **DPP vs. Sharifu Mohamed Athuman and 6 Others (supra)** the Court of Appeal was dealing with the testimony of PW9 a police officer who purported to identify a car which he had inspected but when it came to court, he failed to show identification mark he said he had, hence the trial court ruled him incompetent to tender the same. It stated at pages 9 and 10 as follows: -

> *"In the first ground of appeal, the real evidence is a car and the issues is whether PW9 was competent to produce it as an exhibit. When it came to tendering it as an exhibit, PW9 was competent 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 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."

As it can be gleaned from that case, the CAT agreed with the High Court that PW9 was incompetent witness to tender the car for failure to properly identifying it hence failing to connect it to the case, it became irrelevant.

Unlike, in the instant case, PW1 identified the two firearms as the ones entrusted to him for safe keeping until when needed in court as exhibits. He is competent and the exhibits are relevant to this case as elaborated above. The objection based on irrelevancy of the exhibits is devoid of merit.

Now, turning to the other limb of objection that the two firearms are inadmissible because there is no chain of custody. In the first place I subscribe to the submissions by the Counsels for both sides that it is a

requirement that chain of custody of a real or physical exhibit is established in order to make it reliable and its probative value high. Chain of custody is an alternative way of making an exhibit which is otherwise irrelevant, relevant, by connecting it to the case.

The Court of Appeal stated in **DPP vs. Sharifu Mohamed Athuman and 6 Others (supra)** at page 11 as follows: -

> *"The alternative method was by establishing a chain of custody. Mr. Magafu had submitted, we believe, quite correctly, that when the police investigate criminal case, the relevant regulation controlling chain of custody is the PGO 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."*

As it can be seen, in that case there were no elaborations as from whom the car was after transfer of the RCO to whom it was entrusted, then PW9 did not give explanations on how he came into be with the car, the chain of custody was broken. Authenticity of the car was not established making it irrelevant and unreliable.

Unlike in the case before the CAT, the case in hand, PW1 had told this Court that he received the exhibits from his fellow police officer and when the same were taken to Forensic Bureau by another police officer the same were re-handed to him by that second police officer.

The defence Counsel argued that the handing overs are required to be depicted on the label fixed on the item as a requirement of chain of custody. The prosecution Counsel opposed it arguing that it is pre-mature to judge whether chain of custody is established until during evaluation of the evidence. Moreover, it was argued for the prosecution that names of police officers handling the exhibits could not be displayed because the witnesses are protected. The defence countered this argument by saying that at least the names could have been seen erased.

I think this argument should not detain me. My understanding of the law is that, initially, the principle strictly required that chain of custody be, in all cases, established by documentation from seizure of the exhibit to time of tendering in court. However, in **Joseph Leonard Manyota vs. Republic**, Criminal Appeal No. 485 of 2015 (unreported), the scope of the principle was narrowed down so that it could not apply strictly to the exhibits that which cannot be easily tempered with.

This modified position has been consistently followed in the subsequent decisions of the Court of Appeal of Tanzania, such that, it has now become settled that, in fit cases, chain of custody can be established by oral account. See for instance, **Issa Hassan Uki v. R.,** Criminal Appeal No. 129 of 2017 (unreported), **Marceline Koivogui v. R**, Criminal Appeal No. 469 of 2017 and **Ernest Jackson @ Mwandikaupesi and Another v. R**, Criminal Appeal No. 408 of 2019 (all unreported).

In the case at hand, PW1 stated that he received the items from his fellow police officers and the same happened when were returned from the Forensic Bureau. Is that not oral account of chain of custody as far as his evidence is concerned. In my view, it is. The chain will strengthen of broke on subsequent evidence. This is what the prosecution said that proper assessment of whether there has been established a chain of custody will better be assessable after closure of the prosecution's case. The authority in the case of **DPP vs. Kristina Biskasevskaja becomes relevant here where the CAT stated at page 7 as follows: -**

> *"as to the issue of chain of custody, we are in agreement with the learned Senior State Attorney that this issue can*

be in whatever circumstances conveniently established upon close of prosecution case and not otherwise."

To this end, and taking into consideration that PW1 testimony is to the effect he was a custodian of the firearms he intends to tender, under the authority in the case of **Fatuma Said Mahanyu vs. Republic, (supra),** he is a competent witness to tender the same, I therefore, find that the two firearms are admissible in evidence.

Consequently, I overrule the objection in its entirety and order that the said two firearms make, AK 47 or SMG with Registration Numbers BE 351380 and UC 82951998 respectively are admitted as such, and marked as follows: -

1. The firearm, make, AK 47 or SMG with Serial Number BE 351380 **Prosecution Exhibit 3 (PE3)**; and
2. The firearm, make, AK 47 or SMG with Serial Number UC 82951998 is marked as **Prosecution Exhibit 4 (PE4).**

Order accordingly.

Dated at Mwanza this 05th day of June, 2023.

HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
UHURU NA HAKI

F. K. MANYANDA

JUDGE