THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY AT TARIME)

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 163 OF 2022

THE REPUBLIC

v.

ELIJA THOMAS PATRICK @ PATRICE ANTHONY PATRICK

RULING

22.11.2023 & 22.11.2023
Mtulya, J.:

In the course of producing her evidence in the instant case, **NMB Bank PLC** (the Bank) officer named **Ms. Lucy Stephen Sebe,** who was brought by the Republic in the case to be a prosecution witness number ten (PW10), prayed to tender a Bank Cash Withdraw Slip (the slip) to show that a transaction of withdraw of cash monies had occurred at the Bank Musoma Branch on 15th July 2020, and involved her as a Bank Teller No. 2 and **Kyaro Steven Matiko** (the deceased).

Her prayer was heavily disputed by **Mr. Onyango Otieno,** learned Defence Attorney In his protest, Mr. Onyango had registered two (2) points of protest, *viz*: first, the prayer of PW10 breaches the directives of the Court of Appeal (the Court) in the precedent of **Paul Maduka & Four Others v. Republic,** Criminal Appeal No. 110 of 2007, for want of chronological order of the

chain of custody in handling exhibits from a police officer Mponda to PW10, and that PW10 did not say where she kept the slip from 15th July 2020 to 22nd November 2022. According to Mr. Onyango, the slip is a document that can be easily tempered by other persons; second, the exhibit displays a name of **Kyaro S. Matiko** whereas PW10 had testified on the names of **Kyaro Steven Matiko** hence the intended exhibit be refused and PW10 be asked to tender a slip which reflect the testified names.

Replying the submission **Mr. Tawabu Yahya Issa**, learned State Attorney for the Republic submitted that the protests produced by Mr. Onyango have no merit for five (5) reasons. In producing the reasons, Mr. Tawabu stated that: first, the test at admission of exhibits stage is not chain of custody, but knowledge of a witness on the intended exhibit; second, the protests are premature as PW10 is still in the witness box and will say all details after admission of the document; third, the indicated precedent of **Paul Maduka & Four Others v. Republic** (supra) regulates chain of custody of exhibits and not admission of documents; fourth, Mr. Onyango is not aware of the new developments brought into practice by the Court, which have adjusted the law regulating chain of custody; and finally, the document slip cannot be easily tempered or equated with a Coca-cola species of drinks or tooth brushes.

In support of his move, Mr. Tawabu has produced three (3) precedents of the Court in the **DPP v. Mirzai Pirbakhshi @ Hadji & Three Others**, Criminal Appeal No. 493 of 2016; **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015; and **Anania Clavery Betela v. Republic**, Criminal Appeal No. 355 of 2017. In responding Mr. Tawabu's submission, Mr. Onyango insisted his previous submission and stated that Mr. Tawabu did not dispute the directives of the precedent of the Court in **Paul Maduka & Four Others v. Republic** (supra), but had produced other decisions of the Court. According to Mr. Onyango, Mr. Tawabu knows that the decision in **Paul Maduka & Four Others v. Republic** (supra) is a bitter pill to the Director of the Public Prosecutions, but there is no any other way to avoid the precedent.

In his opinion, the Republic has to swallow the capsules though they are unpleasant as the intended exhibits slip is a physical document that can be easily tempered and must display a paper trail at arriving in this court. According to Mr. Onyango, in the present protest, a pink paper called bank cash withdraw slip can be easily tempered or destroyed.

In distinguishing the case of **DPP v. Mirzai Pirbakhshi @ Hadji & Three Others** (supra), Mr. Onyango stated that to have a knowledge on an item is one thing, and the procedure regulating admissibility of bank slip is another, and in any case the precedent

of **Paul Maduka & Four Others v. Republic** (supra) had directed on the need to have a paper tray in transferring and handling exhibits, and that the precedent has not been adjusted by any decision of the Court. Regarding the prematurity of the points of objection, the defence thinks that at the time of making the prayer PW10 had remained silent on how she got hold of the slip from police officer called Mponda. On names indicated in the slip, the defence thinks that PW10 was supposed to pin point specific identification marks of the intended exhibit bank slip. Finally, the defence had produced a surprising prayer that this court may call and examine the contents of the intended exhibit before a ruling on the disputes is delivered.

This court is guided by the laws in enactments or precedents of this court or the Court. It is fortunate that the learned minds have produced a bunch of precedents of the Court in their submissions. For purposes of appreciation of the dispute at hand and decision of this court, I will summarise what the Court had thought and directed to lower courts in all the indicated decisions.

In **Paul Maduka & Four Others v. Republic** (supra), the Court, on 28th October 2009 had resolved, at page 18 of the Judgment that: *a chronological documentation or paper trail showing seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronics, should be established.*

According to the Court the rationale is to establish that the alleged evidence is in fact is related to the alleged crime. This is so to avoid fraudulent planting of exhibits to accused persons.

The Court in 2002 had touched on chain of custody issues while busy interpreting confession and trial within trial matters in a complaint of armed robbery. The Court was silent on knowledge of a witness who prays to tender exhibits and chain of custody. The nexus was brought in this jurisdiction eight (8) years later, specifically on 4th December 2017, by the same Court in the precedent of **DPP v. Mirzai Pirbakhshi @ Hadji & Three Others** (supra). In the precedent, the Court, at page 8 of the judgment thought that:

> *The test for tendering the exhibit therefore is* ***whether the witness has the knowledge and he possessed the thing in question at some point in time, albeit shortly.*** *So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question.*

(Emphasis supplied).

The Court in the indicated precedent was resolving an issue whether this court was right in rejecting to admit three boxes allegedly containing Narcotic Drugs Heroin Hydrochloride and Cocaine Hydrochloride, as exhibits on the ground that PW1 was not

the right and competent witness to tender the boxes as she was not the custodian of the drugs.

In between the two indicated precedents in **Paul Maduka & Four Others v. Republic** (supra) and **DPP v. Mirzai Pirbakhshi @ Hadji & Three Others** (supra), on 24th August 2017, a decision in **Joseph Leonard Manyota v. Republic** (supra) was determined and Justices of Appeal thought, at page 10 and 17 of the judgment that:

> *we are aware that the stated guidelines were never meant to be exhaustive or conclusive. At the end of it all, therefore, each case has to be decided on its own set of facts.... there ought to have been a transparent way on how that handing over was done, an aspect which would be in spirit with the demands of the doctrine of chain of custody, that is, the chronological documentation or paper trail, showing the paper trail custody, control, transfer, analysis, and disposition of evidence. The reason why evidence of this nature must be handled in a scrupulously careful manner is to prevent possibilities of tempering with it, possibilities of contaminating it, or fraudulently planted evidence. It is important to point out however, that notwithstanding what we have just stated,* ***it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature****...the circumstances may*

reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case.
(Emphasis supplied).

The most recent development on the subject was pronounced by the Court on 22nd May 2020 in the decision of **Anania Clavery Betela v. Republic** (supra), at page 18 of the judgment, which shows that: *the rationale for the above position [want of chain of custody] is to avoid treating the principle governing the determination of the chain of custody as a straitjacket but one that has to be relaxed whenever an item that is not amenable to being easily altered or corrupted is involved.*

The case in **Anania Clavery Betela v. Republic** (supra) concerns unlawful possession of Government trophy, to wit, twenty-eight pieces of elephants' tusks and the Court, after inviting and considering its previous precedents in **Paul Maduka & Four Others v. Republic** (supra), **DPP v. Mirzai Pirbakhshi @ Hadji & Three Others** (supra), and **Joseph Leonard Manyota v. Republic** (supra), had resolved, at page 21 of the judgment, that:

Even though he did not have immediate custody of the tusks before he tendered them, ***he was competent to do so as he was knowledgeable***

about it *having examined it and assessed its value as an expert... At any rate, PW3, who testified on the same day in succession to PW2, tied the loose ends by telling the trial court that he had brought the tusks (Exhibit P.5) after collecting them earlier that day from D/SSgt Hamisi at Chalinze Police Station. Accordingly, we are satisfied that the prosecution sufficiently proved that the tusks exhibited at the trial were the ones seized from the car at the petrol station at Vigwaza.*

(Emphasis supplied)

From the reading of the above decisions, any person, even a lay person, may note that there are two schools of thought on the subject, namely: first, old school of thought and second, contemporary one. The current school of thinking is based on totality of evidence and substance of the matters in dispute. The Court in the precedent of **Joseph Leonard Manyota v. Republic** (supra), thought at page 24 of the judgment that: the analysis in respect of all the witnesses and evidences must be considered in resolving matters brought before courts.

Since the decision of **Paul Maduka & Four Others v. Republic** (supra) was rendered down in 2009 three (3) important developments have taken their course at the Court since 2017 in

the decision of **Joseph Leonard Manyota v. Republic** (supra) and 2020 in the precedent of **Anania Clavery Betela v. Republic** (supra). The three (3) developments indicate the need of further considerations of other issues than concentrating only on a break of chain of custody, namely: the rule is not a straitjacket; knowledge of a witness on the intended exhibit to be tendered; and finally, the danger of the intended exhibit to be easily altered or corrupted.

In the present protest, witness PW10 is still in the witness box and has not completed producing her evidence to see whether there are any materials related to the chain of custody either by mere testimony or by paper trail. Even if it is not shown in her testimony, the Court has just said on knowledge of the witness who intends to tender exhibits. In the present case, PW10 had testified to know the slip as she attended **Kyaro Steven Matiko** at Teller Number 2 of the Bank on 15th July 2020 and correctly identified the slip.

The present protests produced by the Defence Attorneys are related to admissibility of exhibits. The Court in the precedent of **Paul Maduka & Four Others v. Republic** (supra) in 2009 was silent on the new indicated developments, such as the rule is not a straitjacket and knowledge of a witness on the intended exhibit to be tendered. The Court was busy interpreting confession and trial

within trial matters in a complaint of armed robbery. On the other hand, the Court was silent on knowledge of a witness who prays to tender exhibits and chain of custody.

Reading the judgment of **Paul Maduka & Four Others v. Republic** (supra), this court noted that the case did not resolve the words tendering or admission of exhibits, save for words admissible evidence which is displayed three (3) times in the judgment and related to confession made to a police officer. There is nothing at all in the judgment related to admission of exhibits. PW10 prays to tender the intended exhibit bank slip which is relevant to the case and its weight shall be measured by this court in its decision. In any case, the defence in this case will enjoy the right to cross examine PW10 on important matters.

The Court in the case of **Anania Clavery Betela v. Republic** (supra) had considered the decision of **Paul Maduka & Four Others v. Republic** (supra) and had declined an issue whether there is paper trail on every move of documents and preferred issues on: first, whether the alleged evidence relates to the alleged crime; second, whether the document can be easily tempered; and whether a witness has knowledge on the intended exhibit. In the present case, PW10 was summoned to display a link between herself and the withdraw of the monies by **Kyaro Steven Matiko** in

her Teller Number 2, the bank slip cannot easily be altered and she has a knowledge on the intended exhibit bank slip.

The law regulated admission of evidence was declined by both learned minds in the Republic and Defence. The law is enacted under section 145 (2) of the **Evidence Act [Cap. 6 R.E. 2022]** (the Evidence Act). In brief, the enactment provides that: *the court shall admit the evidence of any fact if it thinks that the fact, if proved, would be relevant.* The intended exhibit if proved will be relevant in the present case.

The practice available at the Court is that the current decision of the Court overrides the previous ones. In the present case, learned minds are in dispute which case to follow. It is obvious the decision delivered on 22nd May 2020 in **Anania Clavery Betela v. Republic** (supra). The inviting part of the case is that of consideration of section 145 (2) of the Evidence Act and its thinking at page 15 of the judgment where it was stated that: first, the evidence must have relevance with the alleged crime; second, it considered the precedent of **Paul Maduka & Four Others v. Republic** (supra); and finally, cited the word *tendering of evidence* appears five (5) times in the case.

On my part, I will follow the recent decision of the Court on the subject. I am aware that the defence prayed for this court to

peruse the intended exhibit bank withdraw slip in order to satisfy itself on the reflected names. I think that was rightly stated by Mr. Tawabu that the defence supports the move into admission of the document in the case as there are allegations of uncertainties of the names in the bank slip. I was wondering whether after the perusal of the intended exhibit, what will happen then. The prayer was a bit strange to me.

Having said so, and for the need of justice of the parties, I am moved by section 145 (2) of the Evidence Act and precedent of **Anania Clavery Betela v. Republic** (supra) to admit the bank slip and hereby mark the same as an Exhibit P. 3.

It is so ordered.

THE HIGH COURT OF TANZANIA MUSOMA

F. H. Mtulya

Judge

22.11.2023

This Ruling was delivered in the open court in the presence of accused, **Mr. Elija Thomas Patrick @ Patrice Anthony Patrick** and his learned Defence Attorneys, **Mr. Otieno Onyango** and **Mr. Paul Obwana**, and in the presence of **Mr. Tawabu Yahya Issa** and **Mr. Davis Katesigwa**, learned State Attorneys for the Republic.

F.H. Mtulya

Judge

22.11.2023