IN THE HIGH COURT OF TANZANIA

AT MTWARA

CRIMINAL SESSION CASE NO. 15 OF 2022

(Original PI No 1 of 2022 in the Resident Magistrate's Court of Mtwara at Mtwara)

THE REPUBLIC

VERSUS

GILBERT SOSTENES KALANJE..... 1st ACCUSED

CHARLES MAURICE ONYANGO.....2ND ACCUSED

NICHOLAUS STANSLAUS KISINZA.....3RD ACCUSED

MARCO MBUTA CHIGINGOZI.....4TH ACCUSED

JOHN YESSE MSUYA.....5TH ACCUSED

SHIRAZI ALLY MKUPA.....6TH ACCUSED

SALIM JUMA MBALU.....7TH ACCUSED

RULING

Date of last Order: 13/11/2023

Date of Ruling: 13/11/2023

E.E. KAKOLAKI, J.

Before the prosecution could parade their witnesses in Court, the lead counsel Mr. Maternus Marandu, Principal State Attorney moved the Court with a prayer to record the filed Notice of intention to bring in additional evidence (documentary exhibit) of a witness for the prosecution which according to him was filed on 31/10/2023 and served to all accused persons. The prayer was vehemently resisted by Mr. Majura Magafu, learned Senior

Counsel and lead counsel for and on behalf of all other defence counsel. His objection mainly based on three grounds, **one** that, all accused persons are not aware of its existence since it has never been served to either of the accused person or their advocates. **Secondly** that, this Court is functus officio to entertain this prayer as similar prayer was previously made by the prosecution on 09/08/2023 when this matter came for preliminary hearing but refused on the ground that, the statement of witness whose the notice sought to add for tendering of caution statement was read during committal procedure but skipped to read the said cautioned statement hence it was improper for the prosecution to rely on the provisions of section 289(1) and (2) of the Criminal Procedure Act, [Cap. 20 R.E 2022] (the CPA). According to him since the ruling of this Court of 09/08/2023 in relation to the Notice filed under section 289(1) of the CPA was refused despite of another unsuccessful attempt during preliminary hearing to list caution statement of Insp. John Jesse Msuya as part of the prosecution documents intended to be relied upon during trial, this Court cannot entertain Notice of similar nature arising from section 289(1) and (4) of the CPA for being functus officio. Lastly he argued, the purported notice filed on 31/10/2023 has failed to comply with the requirement of section 289(1) and (2) of the CPA

demanding for Notice to be given within reasonable time and that must have names and address of the witness intending to make additional evidence. And further that, the prosecution has not stated the provision enabling them to refile similar application to the formerly rejected one. He thus prayed the Court to uphold the objection and reject the prayer by the prosecution.

In rebuttal Mr. Nassir, Senior State Attorney urged the Court to dismiss the objections for want of merit. To start with the last argument he responded that, the provisions of section 289(1) and (2) of the CPA were complied with as names and address of the witness intending to tender the said exhibit are provided and further that, the Notice was served to the accused person through the prison officer one S/Sgt. Mohamed who signed their copy. The said copy was provided to the Court for reference. As to what should be contained in the Notice relying on the case of **Masamba Musiba @Musiba Masai Msamba Vs. R, Criminal Appeal No. 138 of 2019 (CAT-unreported)** he said the requirement is that, the Notice must state the name and address of the intended witness together with the substance of her evidence, the particulars which are provided in the present notice. As to whether mentioning of the caution statement in the statement of witness whose Notice of additional evidence was rejected by the court on 09/08/2023

suffices to allow the prosecution proceed tendering the said exhibit Mr. Nassir responded that, the case of **DPP Vs. Sharif Mohamed @ Athuman and 6 Others**, Criminal Appeal No. 74 of 2016 (CAT-unreported) provides an answer. In that case he argued the Court of Appeal said it is not enough for a witness to merely allude to a document in his witness statement, but rather the contents of that document must also be made known to the accused person(s). He therefore contended the Notice is properly before the Court for complying with the law, hence defence's objection is bound to fail.

On the second limb he retorted that, it is not true as submitted by Mr. Magafu that this Court is functus officio. According to him the issue on the merit of the Notice was not deliberated and decided on by this Court as the same was struck out on the ground that, since the statement of recorder of the caution statement was read during committal and not the caution statement itself, hence the purported Notice could not have introduced it in as it was meant to add additional witness and not a document, hence ended up being struck out for being improperly titled. He argued that, as per the case of **Cyprian Mamboleo Hizza Vs. Eva Kioso and Another**, Civil Application No. 3 of 2010 (CAT-unreported) when the application is not dismissed the applicant can go back to the same court and start the process afresh. To him

therefore the struck out application can be refiled and so submitted. It was his further submission that, even by assuming that the prayer for recording of the Notice was dismissed still the prosecution could have filed the present Notice the two being different in contents as the rejected one sought to add additional witness of ASP Esau James Ikamaza while the present one seeks to add the exhibit (caution statement) of Insp. John Jesse Msuya. He finally prayed the filed Notice to be recorded as filed as prayed.

In rejoinder Mr. Magafu maintained his submission in chief while insisting that, neither accused nor their advocates were served with the Notice after it was filed in Court on 31/10/2023. He argued that, assuming for the sake of argument the said Notice was served to the accused which fact is denied still it would not have been considered to be reasonable as provided by the law since it was assumingly served on 10/11/2023. As to what Notice is reasonable he argued, section 289(3) of the CPA provides the answer as the circumstances as to when the party seeking to add evidence became acquainted with nature of evidence sought to be added or witness to be called must be taken into account. And that where the nature of evidence is discovered in the course of trial then the Notice is dispensed with. On how did the defence know the contents of the Notice which according to Mr.

Nassir were challenged Mr. Magafu recanted to have made such submission on missing particulars in the Notice accusing Mr. Nassir to have misquoted him as when submitting on that area he was referring to what the law provides of a competent Notice and not its contents since the copy was never served to the accused nor to their advocates. In another exhilarating argument Mr. Magafu contended that this being a criminal matter the struck out Notice cannot be refiled as such relief is provided only in civil matters hence the Case of **Cyprian Mamboleo Hizza** (supra) relied on by the prosecution to impress upon the court that the struck out matter can be refiled is inapplicable to the circumstances of this case. As to other cases he also submitted the same are distinguishable from the facts of this case. Otherwise he reiterated his submission that this Court is functus officio hence the objections raised be sustained.

I have taken time to chew out both fighting submission by the parties, consult the law and peruse the Notice at dispute in a bid to answer the issue as to whether this Court should record the Notice or not as prayed. To start with is the second limb on issue as to whether this Court is functus officio to entertain the Notice allegedly formerly decided on in its ruling of 09/08/2023. It is a settled principle of law that, a court becomes functus officio over a

matter if that court has already heard and made final determination over the matter concerned or made some orders finally disposing of the case. See the case of **Yusuf Ali Yusuf @ Shehe@ Mpemba & 5 Others Vs. The Republic**, Criminal Appeal No. 81 of 2019 (unreported) and **Kamundi Vs. R** (1973) EA 540.

Applying the principle in the above cited cases to the facts of this matter and having glanced at the ruling of this Court dated on 09/08/2023 on whether Notice of Additional witness filed in Court seeking to introduce admission of addition exhibit a caution statement in which Mr. Magafu for defence had objected its recording on the ground that, the Notice does not cater for additional evidence/exhibit but rather a witness whose statement explaining substance of his evidence was not read during committal proceedings, I do not subscribe to Mr. Magafu's proposition that this Court is functus officio. I so do as the court when determining of the preliminary objection noted that the said witness statement which Mr. Magafu claimed not to have been read during committal proceedings was in fact read and further noted that, the Notice itself concerned intention to add additional witness and not caution statement which the prosecution was aiming at, hence the court ruled out that the purported Notice for additional of caution statement did not qualify

to form part of the filed Notice for additional witness before the same was struck out. The said Notice in my opinion was struck out for being incompetent before the Court as legally the incompetent matter is abortive, meaning it is incapable of being heard or adjourned since there is no any matter before the Court. The above legal stance was given legal backing by the Court of Appeal in the case of **Yahya Hamis Vs. Hamida Haji Idd and 2 Others**, Civil Appeal No. 225 of 2018 (CAT-unreported) where the Court had this to say:

> *"…the remedy of a matter which is incompetent before the Court is to be struck out. The reason for striking it out is that such matter is abortive or rather is incapable of being heard or even to be adjourned. In other words, it carries the implication that there is no matter at all before the Court."*

As the Notice subject of the ruling of 09/08/2023 was struck out on account of being incompetent it is my finding that there was no Notice at all before the Court warranting entertainment of the prayer by the prosecution to have it record. The first notice having been struck out, I hold there was no any conclusive decision made by this Court on whether the Notice should be recorded or not as prayed by the prosecution to render it functus officio. Assuming for the sake of argument there was a decision was made on the

said Notice, still I would hold this Court not functus officio as the Notice concerned an intention to add a witness ASP Esau James Ikama only and not for addition of caution statement of Insp. John Jesse Msuya (exhibit). This limb of objection therefore fails.

Next for determination is whether the struck out criminal matter can be refiled, in which Mr. Magafu submits such remedy applies to civil matters only and not criminal matter. With due respect to the learned counsel I do not subscribe to his proposition on two grounds. **One**, he cited no any authority to the Court in support of his stance. **Secondly**, it is settled law as correctly submitted by Mr. Nassir when relying on the case of **Cyprian Mamboleo Hizza** (supra) that, the applicant whose matter is not dismissed but rather struck out can go back to the same court and start afresh. As to whether such remedy is applicable to criminal matter, I have no hesitation in making a finding that it does. The Court of Appeal in the case of **Juma Nhandi Vs. R**, Criminal Appeal No. 289 of 2012 (CAT-unreported) where the Court had an occasion of dealing with the issue as to whether it was proper for the first appellate court to dismiss the appeal which was incompetent, the Court ruled that the same ought to have been struck out and the appellant advised to file an application for extension of time so as

to refile the competent appeal. In so doing the Apex Court of the land had this to say:

> *"After perusal of the order dismissing the appeal to the High Court and also the "summary rejection order" of the same court, we are in agreement with the learned State Attorney that the learned Judge should have struck out the incompetent appeal that was filed out of time and advise the appellant to seek an extension of time before filing a competent appeal to the High Court."*

Back to the present matter since the first Notice of the intention to add witness was struck out, it is the findings of the Court that, the only prosecution's remedy was to refile the Notice afresh.

Lastly is whether the filed Notice is incompliance with the provisions of section 289(1) and (2) of the CPA. In order to appreciate gist of the contending arguments by the parties it is imperative that the said provision of section 289(1) and (2) of the CPA be reproduced:

> *289.-(1) A witness whose statement or substance of evidence was not read at committal proceedings shall not be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness.*

(2) The notice shall state the name and address of the witness and the substance of the evidence which he intends to give.

From the above exposition of the law, parties are at one concerning the requirement of the provisions of the law in that, no witness whose statement or substance evidence was not read at committal proceedings shall be called by the prosecution to testify unless a reasonable notice is given in writing to the accused person or his advocate of the intention to call such witness. As to what constitute a Notice subsection (2) of section 289 of the Act is categorical that it should mention name and address of the person intended to be called to give evidence. The object of the said section 289(1) and (2) of CPA as obtaining in the case of **Said Shabani Malikita Vs. R**, Criminal Appeal No. 523 of 2020 (CAT-unreported) is to make aware the accused person of evidence likely to be used by the prosecution against him or during the trial. It is undisputed fact under the same case that, an omission to list and read any exhibit during the committal proceedings which is sought to be tendered during the trial in the High Court is curable by the application of section 289(1) and (4) of the CPA.

In this matter in which the prosecution's prayer is for recording the filed Notice, the complaint by the defence is that neither the accused persons nor

their advocates were served with the same in compliance with the provision of section 289(1) of the CPA and that the particulars of name and address of the party seeking to tender the exhibit is not provided for something which is contested by Mr. Nassir when submitted that, all requirements were complied with. It is not in dispute that, the said notice was filed on 31/10/2023 and purportedly served to the accused on 10/11/2023 vide B. 1903 S/Sgt. Mohamed of Lilungu prison. This Court upon passing a eye to the copy of the said Notice allegedly filed on 10/11/2023 is in agreement with Mr. Magafu that, there is nothing showing that the same was served to accused persons through the prison authority for want of prison receiving stamp. Mere name and signature of the alleged prison officer without proof of the office in which he is coming from in my opinion is insufficient evidence to prove that service done to the accused persons. I therefore find the Notice under dispute was not served to the accused person. As to whether the same bears names and address of the witness intending to tender the caution statement subject of the Notice at dispute, I find the law as provided under section 289(2) of the CPA was fully complied with by the prosecution, hence dismiss the complaint by Mr. Majura on that aspect as names of ASP. Essau James Ikamaza and his address which is under care of the RCO for Mtwara

Region were provided. Further to that, substance of the exhibit sought to be added is supplied in the notice as Cautioned Statement of PF 19906 Insp. John Yesse Msuya recorded by ASP Essau James Ikamaza as witness. Save for omission of service of the said notice other requirement of the law were complied with by the prosecution and I so find.

Now the last issue for determination is whether an omission or failure by the prosecution to serve the accused person the filed Notice within reasonable time affects their prayer for recording it to form part of this Court's proceedings. In my humble view such omission or failure does not taint the Notice itself for two good reasons. **One**, the requirement of the law is for the party seeking to tender additional evidence or exhibit to file a Notice, the object of which is to make sure that accused person(s) are made aware of the prosecution's intention to rely or tender such evidence or exhibit in Court as it was stated in **Said Shabani Malikita** (supra), the requirement which in my considered view was complied with by the prosecution when the Notice was filed in Court on 31/10/2023. **Second**, the issue of reasonability of service of the Notice is prematurely raised since the same can be raised, tested and determined if need be when the additional witness is called to testify or tender the sought to be tendered exhibit in Court.

All said and done, I find the objections raised by the defence devoid of merit and overrule them. It his hereby ordered that the Notice of additional exhibit (cautioned statement) of PF 19906 Insp. John Yesse Msuya filed on 31/10/2023 by the prosecution is hereby marked recorded as prayed. It is further ordered that, the same be served to the accused person or their advocates within reasonable time and before presentation of additional evidence or exhibit in Court.

It is so ordered.

Dated at Mtwara this 13th November, 2023.

E. E. KAKOLAKI

JUDGE

13/11/2023.

The Ruling has been delivered at Mtwara today 13th day of November, 2023 in the presence of both parties and Ms. Asha Mboga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

13/11/2023


IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY