**UNITED REPUBLIC OF TANZANIA**

**HIGH COURT OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**CRIMINAL SESSIONS CASE NO. 12 OF 2023**

**REPUBLIC**

**VERSUS**

**JAFFARI MDOE@ABUU KISHIKI .....1ST ACCUSED**

**SADICK SHABAN@MDOE@WHITE.....,.....2ND ACCUSED**

**IBRAHIM ABDALLAH IBRAHIM@MASUFURIA.....3RD ACCUSED**

**SAID HAMIS MTULYA@ AL KATAIMI.....4TH ACCUSED**

**ALLY AYOUB NGINGO @MANFUDU.....5TH ACCUSED**

**SAID WAZIR NKURO @ ABUU WALDA.....6TH ACCUSED**

**UMMA ALLY @HASSAN @MAKATA.....7TH ACCUSED**

**SHOMARU SAID NGWABI.....8TH ACCUSED**

**KHATIBU HASSAN HAMISI.....9TH ACCUSED**

**ISSA HASSAN JABIR.....10TH ACCUSED**

**NURDIN SAID MHAGAMA.....11TH ACCUSED**

**HAMAD OMARY HAMIS JUMA.....12TH ACCUSED**

**AHMAD YUSUFU NDULELE.....13TH ACCUSED**

**HAMIS HUSSEIN RAMADHANI.....14TH ACCUSED**

**HAMIS MIRAJI HUSSEIN.....15TH ACCUSED**

**ALLY JUMA NGACHOKA @ALLY.....16TH ACCUSED**

**ABDALLAH HAMIS MOHAMED LUPINDO @MZEE.....17TH ACCUSED**

**ABDUBILLAH ISMAIL NDIBALEMA.....18TH ACCUSED**

**SHAIBU SAM MKUNGU.....19TH ACCUSED**

**SEIF RAMADHAN SEIF MBWATE .....20TH ACCUSED**

**HASSAN ABDALLAH @MADINKI.....21ST ACCUSED**

**ABDURASHID SAID SADICK.....22ND ACCUSED**

**PAUL ABUBAKAR MGITA@ABUU OSAMA.....23RD ACCUSED**

**ABDALLAH FAKIHI MOHAMED.....24TH ACCUSED**

**ABASS AYUB MKANDA.....25TH ACCUSED**

**NASSORO SAID HEMED.....26TH ACCUSED**

**RAJABU SELEMAN CHIJEJA.....27TH ACCUSED**

**MOHAMED ALLY OMARI.....28TH ACCUSED**

**SAID MWINCHANDE MANDANDA.....29TH ACCUSED**

**SHAFII SHAIBU MPUTENI@ ABUU @ABUU TARIQ.....30TH ACCUSED**

**TWALHA AHMAD MWALUKA.....31ST ACCUSED**

**RULING**

*Date of last Order: 07/12/2023*
*Date of Ruling: 08/12/2023*

**BEFORE: G. P. MALATA, J**

In the course of examining in chief a witness referred to as P32 a point of objection was raised by Mr. Mohamed Tibanyendela, learned counsel for the 28th accused on behalf of the defence counsels to the effect that, the said P32 was testifying by departing substantively from his statement he made before the police officers. As such, Mr. Mohamed learned counsel was of the opinion that, P32's oral testimony was limited substantially to the statement he made before the police officer and that he was not allowed to depart travel so beyond therefrom. He submitted that the nature of testimony by P32 tends to depart from the substance of his statement supplied to the defence counsels.

The above position by the defence counsels was not really in line with the prosecution side who was of different opinion that he can bring any add anything which was not captured or reflected in the statement he made before the police. As the parties hold horns on the matter this court was compelled to decide and give the way through on the raised matter. This court called upon the parties to address on it for the court to decide. Thence submissions and the present ruling.

To start with, Mr. Mohamed Tibanyendela, learned counsel submitted that, the statement by P32 was made to present the nature and substance of evidence to be adduced by adduced by P32. That, P32 was not among the

listed witnesses by the Republic during committal proceedings, however the Republic applied and granted leave to file notice of additional list of prosecution witnesses attached with the P32's statement and documents.

He submitted that, the gist of the statement by P32 is to the extent that he gathered information on presence of group of people, retrieved piece of paper and knife at a rice farm. However, during examination in chief he continued to testify that, he saw the Ward leader interviewing the owner of the farm on whether he knows the piece of paper and knife retrieved from his farm by P32. In response thereof, the owner of the farm refuted to know them. It was Mr. Tibanyendela's submission that, P32 was substantially limited to the substance of what he narrated in his statement and not to travel or depart therefrom. Further, he submitted that, the above statements introduce new story from what is written in P32's statement in which he did not state if he ever witnessed any interview between the Kibindu Ward leader and owner of the rice farm on the retrieved knife and piece of paper. He thus prayed that, the P32 should limit himself to what is substantially contained in his statement and not otherwise. Consequently, prayed for striking out the testimony which completely goes beyond what is stated in the P32 statement.

Additionally, Mr. Omary Kilwanda, learned counsel for the 3rd accused invited this court to refer to decision in the case of **Vallel Palutala vs. DPP,** Criminal Appeal No. 102 of 2019 and stated that much as P32's statement was not part of committal proceeding but added with leave of this court during trial, his statement provides for limits of story to be narrated by the said witness. Under Section 289(4) Criminal Procedure Act, the word document as stated in the said section provides for such limit to the contents of the supplied document. In his view the witness statement falls within the word "document"

It is therefore our humble submission that, the prosecution side has to be bound by their own statement not to depart completely and create a new story outside their documents.

Finally, Mr. Roman S. Lamwai, learned counsel for the 4th accused added that, section 289 of the Criminal Procedure Act, used in issuing the notice limits the testimony to the witness statement or document or record or anything tangible. Section 289 (2) of Criminal Procedure Act gives the prosecution side a duty to state the substance of evidence. The substance contained in P32's statement is on how he salvaged a piece of paper and

knife. He thus prays that, the new testimonies by P32 which goes beyond or create new story from the statement be disregarded. He succumbed.

In reply thereof, Ms. Mkunde Mushanga, Principal State Attorney and Mr. Venance Mayenga, learned Senior State Attorney started by refuting the defence counsels' opinion, by stating that P32 was not narrating a new story from what is contained in his witness statement.

They submitted that, during committal there is no evidence read over to the accused. Section 246(2) of Criminal Procedure Act requires what is to be read by the subordinate court is statement and documents containing substance of evidence as presented by the Director of Public Prosecutions (DPP). Therefore, there is no evidence read by the committing court. The defence counsels did not cite any provision or case law that the witness story is limited to the substance of his statement he made before the police.

It was submitted that, section 245(6) of the Criminal Procedure Act, requires the DPP to file information with statement of the intended witnesses containing substance of evidence. That, during testimony, the witness is not limited to what is contained in his witness statement made before the police but can go further in his oral testimony.

In the present case, P32 is adducing evidence orally and the said evidence can be on what he did, saw and heard. It is for that reason, he is subject to cross examination. The Republic has not sought to produce any statement in court as such it cannot be limited to the statement made before the police office by P32.

Notwithstanding that, the witness statement intends to inform the other party to a case on the gist of evidence to be adduced.

They submitted that, the word document referred in section 289(4) of Criminal Procedure Act is on exhibits, be it documentary or tangible and not witness statement which are not exhibits unless it is tendered as such. Thus the submission by the defence counsels in relation to witness statement that it falls within the word document is unfounded.

The rationale behind filing and reading witnesses statement by the committing court is to inform the other party, on the nature of evidence by the prosecution side. Therefore, P32's oral testimony is in line with his statement.

As to the cited case of **Vallel s/o Palutala V. DPP,** the case is distinguishable as it is deals with witness evidence and not witness statement.

They invited the court to refer to the case of **Abdallah Rajab Waziri V. Republic,** Criminal Appeal No. 116/2004 CAT Tanga, at page 9 of the Judgment PW4. In his testimony PW4 did state that he placed the accused in custody but in his statement, he did not state the same, thus the words were added during testimony. The court allowed such words to stand despite the fact that it was not part statement.

It was further submitted that, the evidence is what is being adduced before the court not recorded in the witness statement. The witness in dock is adducing evidence under Section 62 of the Evidence Act, the defence counsels will a right to cross examine on the same. As such, anything arising therefrom will be covered through cross examination.

Finally, Ms. Mkunde Mshanga Principal State Attorney submitted that, the oral testimony by P32 had nothing of departure from the statement he made before the police, she thus prayed for rejection of the point of objection raised by the defence counsels.

By way of rejoinder Mr. Mohamed Tibanyendela, learned counsel submitted reiterated the submission in chief and maintain that, there should be not departure from the main story the witness made before the police.

As to the cited case of **Abdallah Rajab Waziri**, we submit that the same is distinguishable and inapplicable to our case. The issue of PW4 arose out of cross examination to shake the credibility of the witness whereas in the present case the issue is the material departure from the witness statements. We thus submit that P32 be limit to the substance of what he narrated in his statement without coming with material departure from his narration at police.

Having gone through the submission from both sides, I am now in a position to gather the central issue of concern by the parties herein, that is to say whether during oral testimony, the prosecution witnesses is mainly limited to story contained in the statement made before the police officer and filed in terms of sections 245 (6) or 289 of the Criminal Procedure Act, Cap.33 R.E.2022. (CPA)

To start with, section 245 (6) of the Criminal Procedure Act, provides that,

> *(6) Where the Director of Public Prosecutions or that other public officer, after studying the police case file and the statements of the intended witnesses, decides that the evidence available, or the case as such, warrants putting the suspect on trial,* ***he shall draw up or cause to be drawn up an information in accordance with law***

***and, when signed by him, submit it together with three copies of each of the statements of witnesses sent to him under subsection (4), including any document containing the substance of the evidence of any witness who has not made a written statement.***

***246****.-(1) Upon receipt of the copy of the information and the notice, the subordinate court shall summon the accused person from remand prison or, if not yet arrested, order his arrest and appearance before it and deliver to him or to his counsel a copy of the information and notice of trial delivered to it under subsection (7) of section 245 and commit him for trial by the court; and the committal order shall be sufficient authority for the person in charge of the remand prison concerned to remove the accused person from prison on the specified date and to facilitate his appearance before the court.*

*(2) Upon appearance of the accused person before it,* ***the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial.***

*(3) After complying with the provision of subsections (1) and (2), the court shall address the accused person in the following words or words to the like effect:*

***"You have now heard the substance of the evidence that the prosecution intends to call at your trial.*** *You may either reserve your defence, which you are at liberty to do, or say anything which you may wish to say relevant to the charge against you. Anything you say will be taken down and may be used in evidence at your trial."*

***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.***

*(3) The court shall determine what notice is reasonable, regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness's evidence and determined to call him as a witness; but no such notice*

*need be given if the prosecution first became aware of the evidence which the witness would give on the date on which he is called.*

*(4) For the purpose of this section, "substance of evidence" includes substance contained in a document, record or any other tangible object.*

Reading the above cited provision of law, it is clear that, section 245 (6) the CPA, imposes the duty to the Director of Public Prosecutions to; ***one***, draw up or cause to be drawn up an information in accordance with law, ***two,*** sign on it, ***three***, submit it together with three copies of each of the statements of witnesses sent to him under subsection (4), including any document containing the substance of the evidence of any witness who has not made a written statement.

Upon receipt of the information filed by the DPP in terms of section 245 (6) of the Act, section 246 (2) of the said Act imposes the duty to the Subordinate court to read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial.

Section 289 of the Act provides for leeway to the prosecution side in case they have failed to comply fully 245 (6) of the CPA, that the prosecution shall give a reasonable notice in writing to the accused person or his advocate of the intention to call such additional witness. That, the notice shall state the name and address of the witness and **substance of the evidence** which he intends to give.

The word *"Substance of evidence"* as used in the afore cited provision is interpreted to mean,

> *"Any of the material items or assertions of facts that may be submitted to a competent court as a means of ascertaing the truth of any alleged matter of fact under investigation before it. And "substantive evidence" refers to things that have substance, real things, rather than imaginary, "source: https/www.britannica.com"*

The word *"Substantive evidence"* has been defined by the Essential law Dictionary to mean

> *"Evidence offered to prove a fact at issue in a trial, as opposed to character evidence about a witness"*

This court has carefully read the provisions and noted that, they are all couched in the mandatory forms by using the word **"SHALL"** meaning that the obligations so conferred must be executed to the dictates.

It is a well settled principle of law that, where a provision in a statute uses the word shall in conferring functions, it shall be interpreted to mean mandatory. This is echoed from section 53 (2) of the Interpretation of Laws Act, Cap.1 R.E.2019 which provides that;

> *"Where in a written law the word **"shall"** is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed"*

This court is of the opinion that, in having section 245(6), 246, 289, and 192 of the CPA, the Legislature intended that, both parties have knowledge on; ***one***, nature of charges laid down against the accused, ***two***, to have statements of the intended prosecution witnesses, ***three***, have substance of the evidence to be adduced, ***four***, accused be availed with all committal proceedings, statements of prosecution witnesses and list of intended exhibits be it documentary or tangible things.

Certainly, the afore stated provisions of the law intended to prevent anything do with surprise but enable the accused to have prior knowledge of the substance of the prosecution evidence before commencement of hearing. Moreover, to enable the accused and defence counsels prepare for the hearing of the case without being taken by surprise by the prosecution side.

Finally, section 289 of the CPA requires the prosecution side to give a reasonable notice in writing to the accused person or his advocate of the intention to call additional witness attached with the statement carrying the substance of evidence. The word reasonable notice connotes nothing but prevent taking the accused by surprise.

It is therefore, without iota of doubt that, preparation for hearing by the accused and his advocate will certainly be centered on the supplied statement of witnesses showing the substance of the evidence to be adduced. Thus, the oral testimony must be in line with what is stated in the supplied statement of witnesses. Beyond that the rationale behind having the witness statement being filed in court read over and explained to the accused and finally served accused will be rendered nugatory and meaningless.

It is my settled opinion that, the prosecution cannot have different story from that the statement read over and explained to the accused and finally served him for preparation. In this case, it is not meant to mimic but to maintain the core story as per statement made before the police but not depart therefrom.

In the case **Alberto Mendes Vs, the Republic, Criminal Appeal No. 473 Of 2017**, the court of appeal court was caught with almost similar situation

- where the statement by the witness made at the police did differ from oral
- testimony, the court went on holding that;

> *"Deducing from the evidence of the above witnesses, there is no doubt that their statements at the police differ with the oral evidence they gave in court. In our view, the contradictions cannot be termed to be minor as observed by the learned trial judge as they go to the root of the matter. Such contradictions have tainted their credibility hence they cannot be believed.*
>
> *In* ***Goodluck Kyando v. R*** *[2006] TLR 363 it was stated that:*
>
> > *"It's a trite law that, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*
>
> *Based on the above decision we are satisfied that, the evidence of the aforementioned witnesses was tainted and cannot be believed because their statements to the police varied with what they testified in the trial court. We find merit in this ground and allow it."*

Now having the above position in mind, I am satisfied beyond sane of doubt that, oral testimony must have similar story with the statement made by the

said witness before the police officer, contrary thereof is deliberate departure from the rationale of having sections 245, 246 and 289 of the Criminal Procedure Act, Cap.20 R.E.2022. Further, contrary to the rationale of having section 192 of CPA as well.

This court is of the settled position that, what is required to be taken into account is that, there should be no departure of the story contained in the witness statement adduced before the police officer and the oral testimony. It can be minus or plus but without uprooting the substance of the evidence as contained in the statement made before the police.

If the said witness had additional story different from the one contained in the statement taken before the police, then, the investigator could have recorded additional statement from the said witness to form part thereof and not create it during examination.

As such, this court is of the settled opinion that, in criminal cases where procedures set out under sections 245, 246 and 289 of the Criminal Procedure Act, Cap.20 R.E.2022 has to be followed by filing of information, charge sheet, witness statements, and list of documentary or tangible exhibits, the conclusion of the process binds both parties it. The process is concluded by the trial count by conducting preliminary hearing under section 192 of the CPA which binds the parties therein.

In civil matters, parties are bound by their own pleadings, and pleading under the Civil Procedure Code Cap.33 R.E.2019 means; plaint, written statement of defence, set off and counter claim. In criminal cases, in my view, pleading is what is filed under sections 245, 246 and 289 of the Criminal Procedure Act, Cap.20 R.E.2022 and confirmed at the preliminary hearing under section 192 of the said Act. Upon conclusion all processes, the parties thereto are bound to it and no departure is allowed unless leave to amend is sought and granted.

That being the position, the parties herein are bound by the criminal pleadings as filed under sections 245, 246 and 289 of the Criminal Procedure Act, Cap.20 R.E.2022 and confirmed at the preliminary hearing under section 192 of the said Act.

Contrary to what is stated herein above, the principle by the court of appeal in the case of **Alberto Mendes Vs the Republic, Criminal Appeal No. 473 Of 2017**, come into play as the oral testimony will be in contradiction with prosecution witness statement made before the police and filed in court by the DPP under sections 245, 246, and 289 of the Criminal Procedure Act.

The opinion of the prosecution side that, in case of departure, it will have no prejudicial to the accused as it will be cured by cross examination, unhesitatingly, that goes outside the rationale behind having criminal

pleading filed under sections 245, 246 and 289 of the Criminal Procedure Act. Further, it will be tantamount to taking one's by surprise, thus contravening the afore cited provisions of law.

It will be prejudicial to the accused and his advocate in the sense that, while they have prepared their case based on the criminal pleadings filed and served to them, in entering the court they will encounter a different story from what they were served and prepared for cross examination. Allowing the sky to be the limit in a situation will be prejudicial on the accused's side.

This court therefore is of the settled view that, based on the reasons advanced herein above, P32's oral testimony is limited to the main story he narrated before the police officer. Should there be any variations, then it be not of departure from the main story to the extend of introducing new story far beyond from what is contained in his statement filed under sections 245, 246 and 289 of the Criminal Procedure Act, Cap.20 R.E.2022 and finally confirmed during preliminary hearing by the trial court under section 192 of the Act.

Certainly, justice will be seen to be done if the parties will be travelling with due regard to afore stated road of justice delivery.

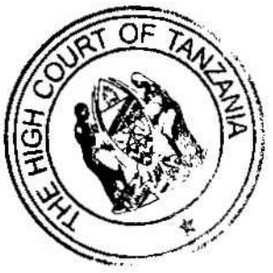
All said and done, I am inclined to agree with defence counsels on the point of objection. In the event, I hereby uphold the objection.

**IT IS SO ORDERED**

**DATED** at **DAR ES SALAAM** this 8th December, 2023


08/12/2023

**RULING** delivered at **DAR ES SALAAM** in open court this 8th December, 2023 in the presence of Prosecution and defence counsels and all accused.




G. P. MALATA

**JUDGE**

08/12/2023