

UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CRIMINAL SESSION NO. 12 OF 2023

REPUBLIC

VERSUS

JAFFARI MDOE@ABUU KISHIKI1ST 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 MBWATE20TH 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: 20/12/2023

Date of Ruling: 22/12/2023

BEFORE: G. P. MALATA, J

This ruling is in respect to objections raised by the defence counsels, Mr. Mohamed Tibanyendela for the 28th accused and Mr. Roman S. Lamwai

for the 4th accused with regards to admissibility of a certificate of seizure of items from one Mohamed Ally Omari sought to be tendered by P2.

The objections speak that;

1. The accused never signed the certificate of seizure, thence it is forged one.
2. The signature of the document read during committal was hidden manilla tap but the present signature in the certificate of seizure is not hidden thence a different document.
3. The signature in the present certificate of seizure has protruded to the signing dotes whereas that of the photocopy is not.
4. P2 identified the certificate of seizure by two marks, signature and handwriting, however the said certificate has no signature as it is hidden manilla tap
5. The certificate of seizure is irrelevant to the terrorism offences arraigned against the accused.

In support of the objection Mr. Mohomed Tibanyendela submitted on the first to fourth objection.

Backing the first objection, Mr. Tibanyendela submitted that, accused No. 28 never signed the document sought to be tendered, thus the document was forged and is not authentic. He thus asked the court to

decide the same in line with directives given in paragraph 2. 4. 8 of the Exhibit Management Guidelines, 2020.

Supporting the second objection, Mr. Tibanyendela argued that, the certificate of seizure read over by the committing court to the accused is different from the one sought to be tendered by P2. Whereas in the copy of certificate of seizure read during committal, the accused's signature, one Mohamed Ally Omar was hidden, the present original document sought to be tendered the signatures is not hidden, thus a different document.

He alluded further that, in support of the third ground that, in a copy read by the committing court had no signatures protruded to the signing line or dotes, whereas the present certificate of seizure sought to be tendered has signature protruding to the dotes, thus different and not authentic.

To bolster his submission, he referred to the case of **Director of Public Prosecutions vs. Sharif Mohamed @ Athumani & 6 others**, Criminal Appeal no. 74 of 2016, where the court commented on authenticity of document.

He prayed that, the certificate of seizure be declared different from the one served to the accused.

Submitting in support of the fourth objection, P2 testified that he identified the document by his signature and handwriting but the document has hidden signature which is not visible, thus the document has no signature. P2 did not tell the court how he identified his signature in the circumstances.

In the result Mr. Tibanyendela submitted that, P2 has not recognized his handwriting as by making comparison with Exhibit PE3 and the present is completely different. He finally, prayed that, the certificate of seizure sought to be tendered be rejected based on the said grounds.

As to the issue raised by the court, on whether the court can continue to make other ruling on the same point of admissibility of documentary evidence already ruled by court in matter in case. Mr. Tibanyendela was of the view that, the court will have to deal with it regardless of the existing ruling by the same court on the same subject matter in the same case. What matters is that, the latter is different document though the principle is the same on admitting it. The latter is different piece of evidence.

Regarding the fifth objection, Mr. Lamwai stated that, the document has no relevancy to the case at hand as it does not indicate anything of terrorism acts. The relationship is between the charge and documentary

evidence is one of the criteria for relevancy and admissibility of the document. He submitted that, the relationship is known from the context of the document. He referred this court to case of **Director of Public Prosecutions vs. Sharif Mohamed @ Athumani & 6 others**, where the court discussed one the thing to be considered when admitting a document is relevance.

Mr. Lamwai submitted that, for this kind of document to be admitted it must have foundation and complied with PGO 229/2006. The PGO required exhibits to be labeled as per Para 8-15.

The purpose of labelling of document is to have case file number and order number, the present certificate of seizure has no compliance with the PGO by failure to label it and have a case file number. He thus prays that, the document be rejected.

As to the point raised by the court, Mr. Lamwai submitted that, despite the issue of relevance having a ruling in this case but it is our settled view that, the objection on the same must continue to be raise in every document regardless of the present ruling on the same, in the same case involving same parties. This is because every piece of evidence is admitted in isolation with the other. Should we let the document unopposed on the relevance, we shall have no room to raise it as

ground of appeal in case we are aggrieved by the outcome of the Judgement in this case.

He finalized his submission by stating that, this court is not functus officio as the principle applies only on the finally judgement not the ruling on certain objection. The, principles of functus officio does not apply where the decision is not finally determining the case.

Replying to the submission by defence counsels, Mr. Edgar Bantulaki, learned Senior State Attorney started with fourth objection on relevancy. He submitted that, the objection is misplaced and wrongly premised. Relevancy cannot be gathered by looking the exhibit and charges only. The criteria for determining relevancy are gathered from fact to prove or disprove. The document is relevancy as seeks to prove that Mohamed Ally Omar was seized with the items listed in the said certificate.

As to reference to PGO 229/2006 in particular order No. 13-15, he submitted that, the rationale of labelling is to avoid tempering not otherwise, thus the objection is misplaced.

As to the 3rd objection, P2 has made clear identification of the document by among others handwriting. The signature is there but is hidden however, he managed to identify it by his handwriting.

Additionally, in terrorism cases, signatures are not necessary in establishing the offence in a document. He referred this court to Section 89(2) of the Evidence Act, Cap 3 R. E 2022. That, under the provision, there is no need to have proof by signature. As the case **Misc. Crim. Appl. No. 114/2022 DPP V Jaffar Mdoe and 3 others at Page 6** cited by defence counsels. He submitted that, P2 is in line with the principle made therein as he identified the document by inter alia his handwriting which suffices.

Mr. Bantulaki conjoined and argued together objection No. 1 and 2 and submitted that, the governing rules, it is not the duty of the accused to speak the truth. Further, unless the evidence is barred by any rule of evidence or any statutory, it will be admitted if it will be relevant, material and competent. It is the averment by the defence counsels that, the certificate sought to be tendered is not the one read during committal. The Certificate read before committal had a signature of the accused hidden where the present one is not hidden and that the signature in the certificate has an extension to other lines. However, they are not disputing the substance of evidence read over by the committal court which is their documents.

In compliance section 245(6) of Criminal Procedure Act, the accused is entitled to be supplied with copies made from mechanical process of the same document. The document is the same and containing same substance. The raised issue of signature does not go to admissibility of the document rather on the weight to be attached on that particular evidence. There is no infringement of Section 245 (6) and 246 of the Criminal Procedure Act. The issue of signature overlapping should not be an issue at admission stage but be an issue in assessing the weight of that evidence. He thus prayed that, the objection be overruled.

Additionally, Mr. Valence Mayenga, learned Senior State Attorney subscribed to submission by Mr. Bantulaki SSA and stated that, the issue of relevancy has already been dealt by this court in same case, when the defence counsels objected on admissibility of exhibit P3. As such, it cannot be raised again as the ruling had cross-cutting effect due the set-up principle.

He invited the court to be persuaded by court decision in the case of case of **Bibikisoko Medard Vs Minister for lands Housing and Urban developments and another** (1983) TLR 250, where the court held that;

"A matter of judicial proceeding, once a decision has been reached and made known to the parties, the adjudication tribunal thereby becomes functus officio."

On the issue of relevancy, he submitted that, P2 has already laid down relevancy of the document sought to be tendered, that the document sought to be tendered contain the items seized from accused no.28 to the charge sheet. The evidence cannot be said to be irreverent by only looking at single piece of evidence without considering other evidence.

The defence counsels are discussing the contents of the document which cannot be discussed at this stage before admission. The proposed way by the defence counsels is in our view a delaying tactics as the document is relevant to the facts sought to be established.

As to the reference to DPP's case, we submit that the same is distinguishable as at page 13-15 of the said case, the issue was the evidence not being read during committal, thus the court of appeal made decision in that regard.

As to the hiding of signatures, the act was made in compliance to this court's order by **Hon. Kisanya, J.**

The hiding of signature in a document do not make it different from the photocopy one as they are same document in all aspects and was identified by the make or author. We thus pray that the objection be overruled.

By way of rejoinder Mr. Mohamed Tibanyendela stated that, we recognize the existence of Misc. Criminal Appl. No. 114/2022. Further, we pray it be recorded that, the signature was not identified since prosecution side conceded. P2 did not testify if has removed the lamination thus being able to identify it.

He further, submitted that, we are in consensus that, the document read before the committal was hidden on the part of signature, we thus submit that it should not be admissible.

As to the issue overlapping, the rationale behind having signing the certificate stipulated under para 2. 4. 8 of the exhibit Management guidelines Rules, 2020 is to avoid forgery, we thus argue that, it was forged.

He also referred this court in the case of **Kennedy Owina Onyachi and others, Vs Criminal (2009) TLR 229** if the matter has already

been dealt by the same court, that the court must continue ruling on the same on other piece of evidence.

We thus pray that our objection be sustained.

Mr. Roman S. Lamwai rejoined that, what is required is the document to be relevant, there is no evidence on materiality Section 245 (6) of Criminal Procedure Act require that the document should come from Police case file.

As to the cited case, **Bibikisoko Medard Vs Minister for lands Housing and Urban developments and another** (1983) TLR 250 is distinguishable and the Ruling is not final and function to court.

Having assembled the submissions for and against from the counsels, this court is now in position to rule on the raised objection on admissibility of certificate of seizure of items from one Mohamed Ally Omar.

Commencing with disposition of objection raised by Mr. Roman S. Lamwai learned counsel, on relevance of document sought to be tendered, in short, the submissions are to the effect that; **one**, it does not make reference to the charges of terrorism arraigned against the accused, **two**, it bears no case file number and **three**, it has no label or

order number. The above objection will be tackled together with the concern raised by the court if the issue which has already been ruled by the court in the same case can be re-raised and re redetermined in similar issue in the same while admitting other pieces of evidence.

This court has carefully gone through, the ruling delivered on 8th December, 2023 and noted that, it discussed similar points of objection and decided before admitting Exhibit PE3. The objection raised was on lack of relevance of certificate of seizure to charges against the accused similar to the present objection. This court vehemently discussed and principled that,

"In principle matters of relevance of facts constituting facts in issue are well stipulated in sections 7, 8, 9, 10, and 11 of the Evidence Act, Cap.6. R.E.2022.

The word "fact" has been defined by the Evidence Act, Cap.6. R.E.2022 to

includes-

(a) anything, state of things, or relation of things, capable of being perceived by the senses;

(b) any mental condition of which any person is conscious;

And the phrase, "Facts in issue" has been defined by section 3 of the Evidence Act, Cap.6. R.E.2022 to mean;

***"Fact in issue"** means any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows;*

Section 8 provides that;

"Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different times and places."

Section 9 provides that;

"Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transactions, are relevant."

Section 10 provides that;

"(1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact."

(2) The conduct of any party, or of conduct any agent of any party, to any suit or proceeding, in reference to such suit or proceeding or in reference to any fact in issue or relevant thereto in the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

(3) When the conduct of any person is relevant, any statement made by him or in his presence and hearing which affects such conduct is relevant.

(4) The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this provision shall not affect the relevancy of statements under any other section of this Act."

Section 11 provides that;

"Facts necessary to explain or introduce a fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or

person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted are relevant in so far as they are necessary for that purpose."

*Reading the above sections, it is clear that the relevance of fact constituting fact in issue may be established through; **one**, connection and or transaction of a fact in issue whether they occurred at the same time and place or at different times and places, **two**, facts pointing out occasion, cause or effect of a fact in issue or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transactions, **three**, any fact showing or constituting a motive or preparation for any fact in issue, **four**, facts establishing conduct of any person or any statement made by him or in his presence and hearing which affects such conduct, **five**, facts necessary to explain or introduce a fact, or which support or rebut an inference suggested by a fact in issue, **six**, facts establishing the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any*

*such fact was transacted are relevant in so far as they are necessary for that purpose and **seven**, facts establishing direct or indirect connection or transaction on the materiality of the fact in issue.*

Before an attempt to tender the certificate of seizure in respect of the items retrieved from one Juma All Hassan, P2 explained who he is, what was there, what he did to Juma All Hassan, why he did, and what he gathered from Juma All Hassan, what he did thereafter and finally explained how he can identify the certificate of seizure.

In view thereof, the testimonies by P2 narrates nothing but what in law is facts constituting the fact in issue as stated in sections 8, 9, 10 and 11 of the Evidence Act as reproduced here in above.

*As to submissions by the defence counsels that, the certificate has no case file and order number and that the same did not state connection to the offence of terrorism arraigned against the accused, this court is of the settled legal position that, having case file and order number is **one**, just to get out of mixing investigation reports or evidence with other case file number, **two**, to simplify referencing. However, in this case the exercise was*

conducted under operation and there was one incidence at a time save for terrorism. P2 managed to identify the certificate of seizure, thus no mixing up with other case files. The defence counsels did not in their submission point any doubt on the same.

In that regard, the defence counsels' position is with no legal basis as it is out of legal context thence legally unbearable.

As to the issue of failure by the prosecution side to connect the certificate with terrorism charges, this court finds no base on the objection, in the sense that, the investigators are not legally required to state connection between the documents gathered with the charges. The link and connection between one piece of evidence to another and the charges is a process and it completed after taking all testimonies from the prosecution side.

Besides, proving a case is a process. It is a matter of connecting one piece of evidence to another be it direct or indirect but corroborative thence getting a complete set of evidence proving the case.

The issue of relevance is boarder line issue whereby, in most cases are considered after hearing all the witnesses. It will be so unsafe to conclude that, certain piece of evidence is irrelevant, immaterial

and incompetent before hearing and considering other pieces of evidence from not yet testified witnesses. The rationale behind is that, fact suggesting or establishing fact in issue is outcome of all testimonies tabled before the court not just piece of evidence.

*Further, the issue of relevance is a judicial pronouncement made after consideration of all evidence on record not by just picking a piece of it and ruling before looking into other subsequent evidence. Doing otherwise, the gist of having sections 7, 8, 9, 10 and 11 of the Evidence Act will be rendered nugatory. That is where, we gather what is called **res gestae**.*

In the end therefore, Parties, should not to rash to the test of relevance at every piece of evidence, as the same need to be after consideration of all evidence adduced. The question on whether piece of evidence is relevant or not comes at the end of the trial as it comes as final assessment of all testimonies. In this case there are 32 prosecution witnesses and only 4 witnesses have testified.

Therefore, it will be unsafe to make such conclusion without hearing and assessing the evidence with other witnesses who have not yet testified."

The issue of relevance therefore and how it should be tackled has clearly been settled by this court in the same case, parties, couple defence counsels and State Attorneys on the same objections and the decision thereof delivered 08/12/2023. As matter principle of law, the decision thereon has cross cutting effect on other similar objection in the same case. The court, Parties and counsels are bound to such decision on the already ruled matter in the same case and parties in respect of the same issue. The case at hand is, **Republic Vs Jaffari Mdoe @Abuu Kishiki and 30 others, Criminal Session No. 12 Of 2023.**

Having observed and rule that, the issue of relevance has already been given guidance, parties thereto are barred from raising similar kind of objection as the laid down principle has a cross cutting effect to similar issue in the same case

In the event, I am inclined to agree with prosecution side, thence I hereby reject the objection of relevance for the above well-reasoned grounds.

Reverting to the points of objection raised by Mr. Mohamed Tibanyendela learned counsel for the 28th accused and having made reliance to 2.4.8 Exhibit Management Guidelines, 2020 which provides

2.4.8. Where the Authenticity of Document is at Issue When the objection to authenticity of the exhibit such as forgery is raised during tendering, the court may record but reserve the decision thereon to the final determination of the case. The reason is that authenticity touches the contents of the documents which cannot be dealt with at the admission stage.

I am of the settled view that, the kind of objection that is to say; **one**, the accused did not sign the certificate, **two**, protruding of a signature in certificate as opposed to the one with hidden signature and **three**, lack of case file number in the certificate of seizure touches the contents of document itself which are not grounds for rejecting admissibility of document sought to be tendered.

The contents of a document can be dismantled and watered down through cross examination and finally the court will look at and see what kind of weight to be attached to it. This is in my view, what is stated in **paragraph 2.4.8 of the Exhibit Management Guidelines, 2020**. One cannot discuss the contents of the document which is not part of the court record.

Furthermore, hiding identity to the said document is result of this court's decision in **Miscellaneous Criminal Application no 114**

of 2022 between the same parties and all parties are very much aware of it, thus in case of anything can be dealt by the parties during examination of the respective witness, if it not covered by this court's Ruling by **Hon. Kisanya, J.**

In the upshot, I hereby overrule all the raised objections and order that, the certificate of seizure for items retrieved from one Mohamed Ally Omar will be admitted as an exhibit.

IT IS SO ORDERED.

DATED at DAR ES SALAAM this 22nd December, 2023


G. P. MALATA

22/12/2023

RULING delivered at **DAR ES SALAAM** in open court this 22nd December, 2023.


G. P. MALATA

JUDGE

22/12/2023

