IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL SESSION CASE NO. 212 OF 2022

(ORIGINAL P.I NO. 18 OF 2013)

REPUBLIC

V

1. **ALLY OTHUMANI RASHID**
2. **FARAJI ALI RAMADHANI**
3. **SHABAN BAKARI WAZIRI**
4. **MUSSA DAUDI MTWEVE**

RULING

17th & 18th April, 2024

I.C MUGETA, J

The background to this ruling is that a point of preliminary objection was raised. I overruled it and proceeded with the hearing following an order to give reasons for the decision on 18/4/2024. It concerned the issue whether a witness can testify on matters not contained in his statement whose substance was read at committal proceedings. As the hearing continued, another objection was raised concerning the admissibility of the seizure certificate. Hearing stopped to

determine the second objection. I decided to seize the opportunity to give reasons for overruling the first objection too.

To support the argument that a witness cannot give evidence other than that which is in his statement, the defence team, cited section 245(2) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the CPA) for statements read at committal proceedings and section 289 of the CPA if a notice of additional witness has been filed. The learned counsel cited **R v. Jaffari Mdoe @ Abuu Kishiki and 30 Others,** [2023] TZHC 23225 (8 December 2023) TANZLII to buttress their argument. In this case my learned brother Judge ruled that a witness in the witness box ought to confine his evidence to his statement supplied to the other party to avoid taking the other party by surprise.

The Republic argued that the argument is valid but has been raised prematurely. In their views, the opportunity available for the defence at this stage is to impeach the witness's credibility based on the statement under section 164(1)(c) of The Evidence Act [Cap. 6 R.E 2022]. Her further settled opinion is that the witness has not departed from the substance of the statement. He just expounded it.

Regarding the authority in **Jaffari's case**, the prosecution side submitted that besides the decision being of mere persuasive value, it

was misplaced as the principles therein ought to be used at judgment stage when analysing the evidence if the witness' veracity was impeached against his statement. In rejoinder, the defence side argued that section 164 (1)(2) of the Evidence Act does not create a leeway for witnesses to depart from their statements against the rules established under sections 246(2) or 289 of the CPA. They further argued that no firm grounds have been advanced for this court to depart from its decision in **Jaffari's case** (supra).

I have considered the rival arguments. It is my view that the point raised does not qualify to be a point of preliminary objection. Whether the witness has departed from his statement is a matter of fact which can be proved by comparing his evidence and the statement. As that statement has not been tendered in court, there is nothing upon which the impugned evidence can be tested. The rationale for the court not to decide on documents not already tendered in evidence is that while the trial court can have the advantage to look at the impugned document, the action would deny the higher court the opportunity to test the correctness of the decision made in case that document fails to be admitted in evidence and an appeal lies against the decision that prevented a witness to give evidence at preliminary stages on account

of allegations of variance of his evidence and the statement he made at the police. The intention of section 246 and 289 of the CPA is to give the substance of the evidence to the other party not to bind a witness while testifying under oath to reproduce word to word the contents of their statement. I agree with the prosecution that the remedy available in such cases is to impeach the witness' evidence against the statement. This can be done by showing his inconsistence under section 166 or impeaching him under sections 154 and 164 of the Evidence Act. The procedure to do it was stipulated in **Lilian Jesus Fortes v. R**, Criminal Appeal No. 151 of 2018, [2020] TZCA 1936 (2 September 2020) TANZLII.

I have read the decision in **Jaffari's case**. In reaching the conclusion, my brother relied on **Alberto Mandes v. R**, Criminal Appeal No. 473/2017, [2020] TZCA 210 (8 May 2020) TANZLII. In this case the Court of Appeal discussed a situation where the witness gave evidence differing from that which he made in the statement. It concluded that the evidence and the statement were contradictory which affected the credibility of the witness. The Court did not say that the witness was barred from giving evidence that is not in the statement. It discussed the evidence that had been impeached by cross examination as seen

from page 29 – 30 of the judgment. Therefore, not only that the objection raised is not a point of law but also is, indeed, premature as submitted by the learned State Attorney. Consequently, the decision in **Jaffari's case** cannot be binding for a reason that my learned brother misapplied the principle. He barred the witness to give evidence instead of discussing the issue at judgment stage in case the witness' credibility was impeached per the procedure in **Lilian Jesus Fortes** case (supra). On that account, I reject the plea by the defence side for me to follow the **Jaffari's case**. Those are my reasons for overruling the first objection.

The objection on admissibility of the seizure certificate is based on section 33(1) of the Prevention of Terrorism Act, 2002. Firstly, that PW3 who seized the 2nd, 3rd and 4th accused persons' passports had no powers to do so as he did not tell the court if at the time of the seizure, he was the IGP or Commissioner of Police. Further, that after seizure, no order for detention was sought and obtained from the court. Another reason for the objection is that the document sought to be tendered is not the one supplied to the defence and the court by the notice of additional exhibit filed on 15/4/2024. That while the document attached to the notice has the name of the witness erased, the intended exhibit

has the word P16 interpolated on the erased parts meaning the interpolation was done after the document was filed in court. This makes, it was argued, the authenticity of the document doubtful.

The learned State Attorney replied that section 33(1) of the Prevention of Terrorism Act does not apply to this case because by the time of seizure of the documents the seizing officer had not in his mind the fact that the suspects were involved in acts of terrorism. The erasing of contents on the document, she argued, was for hiding the identity of the witness per the none disclosure order made by this court on 18/3/2022 in miscellaneous criminal application No. 28/2022. In rejoinder, defence team argued that the provisions of the Prevention of Terrorism Act started to apply immediately when the opinion that suspects committed acts of terrorism was formed.

Section 33(1) of the Prevention of Terrorism Act, 2002 provides:

> *"Where the Inspector General of Police or Commissioner of Police has reasonable grounds for suspecting that any property has been, or is being, used to commit an offence under this Act, he may seize the property"*

As submitted by the defence team, PW3 did not state his rank when he seized the passports. However, I agree with the learned State

Attorney that at the time of seizure, PW3 had no reasonable grounds to suspecting that the suspects were involved in terrorism. He thought they were committing immigration violations. Therefore, the provision above stated would not have applied. The seizure was lawful as was done under the CPA.

Did the detention of the copies of the passport listed in the seizure certificate require a detention order under section 33(3) of the Prevention of Terrorism Act, 2002? The defence team has argued that as soon as the allegation against the suspects changed to terrorism, procedures under the CPA ceased and those under the Prevention of Terrorism Act, 2002 came into force. I agree with them. However, the argument has been overtaken by events because the seized properties have already been admitted as exhibits P1, P2 and P3. On their admission no objection was raised in relation to the lawfulness of their detention. Currently, the issue is the admissibility of their seizure certificate whose custody, I hold, did not need a detention order because the same is not a property of any of the suspects.

On the interpolation of the word P16 on the seizure certificate, I agree the document is interpolated which makes it dissimilar to that attached to the notice of additional witness. I am, however, satisfied

that the interpolation was made in good faith to replace the erased actual name of PW3 in order to hide his identity following a none disclosure order of this court made on 18/3/2022. The act was wrong but, considering the peculiarity and novelty of the application of the procedures in the prosecution of terrorism cases under the Prevention of Terrorism Act, 2002, the error cannot be held to make the document a different one or inadmissible.

In the event, I overrule the objections. I hold that the seizure certificate is admissible.

I.C MUGETA

JUDGE

18/4/2024

Court: Ruling delivered in open court in the presence of all accused persons, their advocates and the learned State Attorneys whose identity I have deliberately withheld for security reasons.

Sgd: I.C MUGETA

JUDGE

18/4/2024