

UNITED REPUBLIC OF TANZANIA
HIGH COURT OF TANZANIA
DAR ES SALAAM SUB - REGISTRY
AT DAR ES SALAAM
CRIMINAL SESSIONS CASE NO. 12 OF 2023

REPUBLIC

VERSUS

JAFFARI HASSAN @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
TVALHA AHMAD MWALUKA.....31ST ACCUSED

RULING OF THE COURT

Date of last Order: 15/05/2024

Date of Ruling: 15/05/2024

BEFORE: G. P. MALATA, J

In an attempt by Prosecution witness P29 to tender firearm make AK 47 with serial No. 56-14302621 as an exhibit, the defence counsels raised objections on its admissibility. They objections were to the effect that;

1. The exhibit AK 47 with serial No. 56-14302621 sought to be tendered is not relevant to the case;
2. The prosecution witness, P29 is not a competent witness to tender exhibit firearm make AK 47 with serial No. 56-14302621;
3. There is procedural irregularity in that exhibit the firearm make AK 47 with serial No. 56-14302621 was not pleaded and made part of the physical exhibit to be relied upon by the prosecution side.
4. That, the evidence sought to be tendered is not preceded by court order issued under section 33 (3) of the Prevention of Terrorism Act, 2002, thus inadmissible.

Based on the said afore stated objections, the defence counsels asked the court to reject the said exhibit.

Submitting in support of ground 1st and 2nd ground, Mr. Omari Kilwanda learned counsel started by covering the first objection. He submitted that, it is a principle of law that, before admitted an exhibit, it must pass some credentials of admissibility. That is to say; relevancy, materiality and competency. For the

purposes of first objection, he informed the court that, he shall submit only on relevancy and competency.

Mr. Kilwanda succumbed that, relevancy is in relation to the facts which tends to disprove or prove existence of certain fact. To bolster his submission, he referred this court to section 7 of the Evidence Act, Cap. 6 R.E.2022. The evidence adduced outside the relevant fact in issue is inadmissible. The exhibit sought to be tendered firearm make AK 47 with serial No. 56-14302621 is inadmissible as prosecution witness P29 is seeking to tender exhibit with serial number that (313)-56-14302621 different from the one he testified about. He cemented by submitting that, P29's failure or omission to mention (313)- was fatal irregularity. Since the serial number is different from thus irrelevant and inadmissible.

He further submitted that, the exhibit sought to be tendered AK47 was not among the physical exhibits mentioned at the committal stage and preliminary hearing. At the committal it was a firearm make SMG with serial no.14302621. However, P29's report is mentioning AK47 with serial number 56-14302621 whereas the one sought to be tendered is AK47 with serial number (313)-56-14302621.

He concluded by praying that, the said exhibit be rejected on relevancy.

On the second part of competency, he submitted that, P29 is not competent to tender such an exhibit as he failed to lay down foundation of the said exhibit

sought to be tendered. He sought refuge to the decision in the case of **DPP vs Shariff S. Mohamed @ Athumani and 6 others**, Criminal Appeal No. 74/2016 at page 7. He stated that, failure by the witness to lay down foundation of the evidence renders such witness to incompetent to adduce or tender such evidence. As such, he submitted that, P29 is not competent to tender such physical evidence AK 47 with serial number adduce (313)-56-14302621.

He submitted that, P29 laid down foundation in respect to AK 47 with serial number 56-14302621. To the contrary, the exhibit sought to be tendered bears different features [313]-56-14302621. There is no foundation of the said firearm sought to be tendered. What is sought to be tendered is different from the evidence adduced by P29.

Additionally, the missing serial Number [313] was not featured in P29's evidence as part of the serial number. He stated that, in the case of **DPP v Sharrif.S. Mohamed and 6 others**, the issue was identification of chassis number of the car. The court held that, failure by the witness to identify the chassis number turned the witness incompetent witness to testify on the same. Finally, he prayed that, the exhibit sought to be tendered be rejected.

Regarding the third point of objection, Mr. Selemani Almas learned counsel on behalf of defence counsels submitted that, the firearm referred to as AK 47 with serial 56-14302621 is not the one of the pleaded physical exhibits at committal

stage. As such, the objection is that the purported exhibit is being tendered in contravention of section 246(2) of the Criminal procedure Act, Cap 20 R. E 2022. Section 246(2) of the Criminal Procedure Act requires all intended exhibits by the prosecution side to be listed and read to the accused at committal stage.

The rationale behind is to enable the accused understand the type and nature of evidence by the Republic. If the exhibit was not part of the committal proceedings, the exhibit cannot be admitted at later stage subject to compliance with section 289 of the Criminal Procedure Act.

In **Kristina Biskase Kaja Vs R**, Criminal Appeal No. 65/2018 CAT at pages 11-14, the court held that, the evidence not pleaded during committal stage cannot be admitted at trial. The Court of Appeal expunged the exhibit erroneously admitted. The court of appeal stressed similar position in **Musa Ramadhan Magae Vs R**, Criminal Appeal No. 545/2021 CAT.

That P29 is requesting the court to admit AK 47 with serial Number 56-14302621 or serial number [313]-56-14302621. During committal the said firearm was not among the listed physical exhibit by the prosecution side, and no compliance with requirement of section 289 of the Criminal Procedure Act. As such, P29 is contravening the gist of Section 246(2) of the Criminal Procedure Act and principles in the cases of **Musa Ramadhani Magae** and **Kristina**. The physical exhibit listed at committal stage was firearm make SMG serial No.

14302621. The said exhibit was not listed and there is no testimony that, the SMG mentioned at committal stage with serial No. 14302621 is the AK 47 with serial No. 5614302621 or [313]-56-14302621. As such, he prayed that, the said exhibit is inadmissible.

Submitting in support of such objection Mr. Mohamed Tibanyendela learned counsel on behalf of the defence counsels, he stated that, section 33(3) of the Prevention of Terrorism Act, 2002 (PTA) requires that, there must be an order by the court granting detention of the said firearm sought to be tendered under section 33(3) of the PTA, 2002.

P29 did not at any point in time testified that, the IGP or P29 sought for such an order under Section 33(3) of the PTA for detaining the present exhibit to date. There is no evidence from the prosecution side that, Section 33(3) of the PTA were complies with for the physical exhibit to be admissible. The rationale behind detention order is to protect the sanctity of such exhibit. The absence of court's order pursuant to section 33(3) and (4) of the Prevention of Terrorism Act, 2002 proves beyond reasonable doubt that, the said exhibit is being erroneously tendered. As such, they prayed for rejection of the said exhibits sought to be tendered.

In reply thereof, Mr. Edgar Bantulaki learned Senior State Attorney started by addressing on the issue of relevancy of exhibit and competency of witness. Reliance was made to the case of **DPP V Shariff. S.Mohamed & 6 others**, Criminal Appeal No. 74/2016 and section 7 of the Evidence Act. He submitted that, his fellow defence counsels mixed the application of the said principle. The relevancy has been pegged on omission by P29 to mention serial number [313]. That is the nuclear of their objection. The said number is in the said exhibit not an invention. What is before the court therefore is reliability and not relevancy.

Reliability refers to process of identifying exhibit by unique features or establishing chain of custody. This goes to the fact that, the exhibit sought to be tendered is the same or not. The process is called authentication. The relevancy issue is misconceived and irrelevant. The submission by defense counsels is to the effect that, P29 is not a competent witness as he failed to lay down foundation of the said exhibit. It clear that, P29 has just narrated how got possession of the exhibits, examined, pigeon-holed and returned them to the Regional Crime Officer -Coast Region. Additionally, P29 is tendering exhibits he investigated as per the request in exhibit PE5 and response thereto in exhibit PE6.

In that regard, he is competent as he himself examined and now tendering it.

In the **DPP's** case, competency of a witness is governed by section 127(1) of the Evidence Act. Every witness is competent to testify unless is he is barred by the law. Competency of a witness is in relation with materiality. That is to say the witness has knowledge of the subject matter.

Lack of foundational evidence in a trial from a witness for admission of exhibit does not make the said witness incompetent to tender the said exhibit. This is well captured in the DPP's case pages 8-9.

It is principle of law that, unless evidence is barred by any rule or statute, if that piece of evidence is material, relevant and authentic is admissible in evidence.

Legally, there four types of exhibits; **one**, documentary, **two**, real/physical, **three** testimonial and **four** elaborative evidences. In our case, we are concerned with real/physical evidence. This kind of evidence is tangible object possesses unique characteristics which are relevant and material showing that it is a real thing as it is claimed to be.

He submitted further that, P29 testified as to how he could identify the firearm as it brought to him. That, P2 provided description as to what it was, what was it, how he testified and described the identifying marks he placed thereon. P29 submitted that, he branded as 56-14302621. The number is not in dispute.

The inference drew from the DPP's case that, the situation was similar is misconceived perception as it is distinguishable. In DPP's case, the witness

stated that, he will identify the car by plate Number and Chassis number. The said witness failed to open the car bonnet and point the chassis number.

In the present case, P29 described what is it and stated the unique feature he placed on the said exhibit. P29 managed to describe the same and it is really seen of the said exhibit. In view thereof, the objection is misconceived.

This court has already given ruling on similar issue on how relevancy should be treated via this court's decision in the same case in the course of tendering exhibit and the defence counsels raised similar issue which was settled. He ended by making reference to the case of **DPP vs Mirzai Purbakhshi and three others**, Criminal Appeal No. 493/2016 Dar es Salaam, pages 7-8.

Additionally, Mr. Nassoro Katuga learned Senior State Attorney submitted that, the 3rd and 4th objection are misconceived. Arguing on position of law as per section 246(2) and 289 of the Criminal Procedure Act, he submitted that, during committal the firearm make SMG with serial No. 14302621 was placed on record whereas the exhibit sought to be tendered is AK 47 with serial Number. 56-14302621.

What was stated during committal is firearm make SMG with serial number, 14302621 whereas P29 wants to tender AK 47 with serial number 56-14302621. The identification of physical evidence is its uniqueness number that is serial number and the sought exhibit bears serial No. 14302621.

Defence counsels are complaining that, they were not told if SMG and AK 47 are the same thing and used interchangeably that is not a ground for rejection of the exhibit. Our limited understanding of the exhibit cannot lead to rejection of the same of which we are lay person in terms of how the same is called in different names.

In terms of section 145(4) of the Evidence Act, this court has discretion to admit exhibit, despite, the fact that there was no such clarification.

As to the issue of section 33(3) and (4) of Prevention of Terrorism Act, he submitted that, the same fall within the mandates of the IGP not the present witness P29. P29 is tendering items brought to him for examination by RCO – Coast region. The raised issue falls within the mandates of the IGP not P29 as ballistic expert who was asked to come up with expert opinion on the seized properties. P29's testimony had nothing to do with issues of detention of those exhibits but merely to examine, prepare expert opinion and submit to the requesting authority. He thus prayed for dismissal of the objection.

By way of rejoinder by Mr. Kilwanda learned counsel submitted that, we have no concern with competency to testify but competency to tender the exhibit as P29 failed to describe the unique features in particular mentioning [313] which is part of the serial number. There is omission of some of the numbers which makes the exhibit different. The mere fact that, he failed to described the correct

number of the said exhibit then he is incompetent to tend the same. Reference was made to the case of DPP's case page 8 paragraph 2 and submitted that, unique feature comes from the object itself.

Firearm is not a unique object but its uniqueness is gathered from serial number. The unique number is [313] 56-14302621 and not 56-14302621. That P29 testified failed to correctly mention all the features of the exhibit sought to be tendered.

As to the application of section 145(3) of the Evidence Act, the discretion has to be applied judiciously. The non-compliance of section 33 (3) and (4) of the Criminal Procedure Act cannot be cured by this court invoking section 145(3) of the Evidence Act.

Having heard the arguments for and against, this court assembled facts that; **one**, P29 is neither the Inspector General of Police nor seizing police officer of the exhibits sought to be tendered including the firearm, **two**, the Regional Crime Officer for Coast Region via exhibit PE5 requested the Forensic Bureau to conduct special investigation of the seized properties from accused and ascertain what are those and its effect, **three**, P27 delivered the said properties to the Forensic Bureau on behalf of the Regional Crime Officer for Coast Region, **four**, the Commissioner in charge of Forensic Bureau executed assignment through P29, **five**, P29 testified as what he received and worked upon following the

RCO's request, **six**, P29 placed special marks for identifying each of the said properties subjected to investigation, **seven**, P29 prepared a expert report and stated what he observed on every item.

Besides, P29 is testifying on which properties were subjected to forensic investigation as per exhibit PE5, the method he used in executing the assignment, its outcome from each property and its effect if improperly applied. At the end, P29 placed special marks on every property subjected to investigation. P29 is now tendering the properties which passed through investigation by first detailing its descriptive features of identification he placed as special marks differentiating from other properties. P29 testified nothing as from whom, in particular the properties were gathered and who retained it for how long and under which procedures.

Having assembled the above facts, this court is now in a position to discuss on the raised issues. Regarding the first objection, the issue of relevancy was categorically pegged on three parameters; **one**, that the exhibit sought to be tendered is AK47 with serial number 56-14302621 whereas the intended physical exhibit listed during committal was SMG with serial Number 14302621, **two**, the said exhibit has been referred to as AK47 with serial number 56-14302621 but through observation of the object itself, it was noted that the serial number is (313)-56-14302621, thus different and **three**, that the AK47 with serial number

56-14302621 sought to be tendered is in contravention of the requirement stated in section 246(2) of the Criminal Procedure Act for failure to list the same as what is listed in SMG with serial number 14302621.

Upon reading the evidence adduced by P29, P29 stated that, **one**, after investigation of the said exhibit he noted that it was AK47 with serial number 56-14302621 as stated in Exhibit PE7 and same which reads similar with exhibit PE6 stating serial number 14302621, **two**, P29 clarified that, in recording one may start with 14302621 or 56-14302621 but the serial number is same that is 14302621, **three**, that after examination he placed a mark AK47 serial number 56-14302621 as identification number, **four**, P29 identified the mark as it appears on the said exhibit sought to be tendered.

Based on the above testimony, it is evident that, P29 managed to identify the said exhibit by special mark he placed as AK 47 with serial number 56-14302621 with serial number 14302621 similar to what is stated at the committal stage, preliminary hearing and exhibit PE6. During testimony he stated that; the (313) represents industrial code, number 56 represents type and number 14302621 is serial number. What P29 was required to do is to be able to explain the special mark he placed on the exhibit for purposes of unmistakable identification. That is what is called identification by unique feature either through the registration

number or serial make number or special mark by the identifying witness like what it happened in exhibit PE2 and PE8 and like.

The ways through which identification can be effected was clearly articulated in the case of **DPP V Shariff. S. Mohamed & 6 others**, Criminal Appeal No. 74/2016 have fully been complied with by P29. P29 managed to identify the exhibit by its unique and special mark he placed on it and the serial number 14302621 or 56-14302621 both appearing in the said exhibit. The same number were stated during committal, preliminary hearing, in exhibits PE6, PE7 and PE 8 all with matching story. Thence, no variations.

Counsels for both parties hold horns on relevance due to what they submitted as variations of details provided by P29. Generally speaking, a fact is said to be relevant to another if by itself or in connection with other facts renders the existence of a fact in issue either probable or improbable. The word "relevancy" implies relationship and such relationship which the facts in issue as convinces or has a tendency to convince the judge as to the existence or otherwise of the fact in issue.

The word "relevant" means, that any two facts to which it is applied are so related to each other that, according to the common course of events one taken by itself or in connection with other facts proves or renders probable the existence or non-existence of the other.

In principle matters of relevance of facts constituting facts in issue are well stipulated under sections 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;

Having explained what is all about "facts" or "facts in issue" I now turn to elucidate on the issue of relevancy as echoed by the Evidence Act, Cap.6 R.E.2022.

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 or 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 connecting; **one**, a fact with fact in issue as to form part of the same transaction whether it occurred at the same time and place or at different times and places (res gestae) **two**, facts which are the 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 shows 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.

Relevancy of fact to the fact in issue is assembled through the above seven sources of facts, as such it cannot be looked into a single piece of evidence but connecting different piece from a witness or witnesses. The question and answer on whether certain fact is relevant or not is comes after assessment of all adduced evidence not otherwise.

Establishment of facts relevant to the fact in issue is process of connecting different pieces of evidence with view of getting a complete story relevant to the facts in issue proving or disproving the matter. In unlikely event, the court might to look at a single piece of evidence but after being satisfied beyond sane of doubt that, the evidence is misplaced. Doing otherwise is tantamount to nothing but denying litigants from being heard by presenting their complete story for determination by the court. In other words, the court cannot determine and conclude in between an issue of relevancy while there are other witnesses not yet testified. It will be like jumping to the end before passing through justice

delivery artery of affording parties right to be heard by presenting evidence for or against. The process of connecting facts as per sections 8, 9, 10 and 11 of the Evidence Act, Cap. 6 R.E.2022 is complete at the closure of hearing of the case. Thereafter the court will be in a position to assess and gauge relevancy of each of piece of evidence to the fact in issue.

In my view, since proving a case is process whereby the verdict of the same is gathered at end, then it is unsafe and unprocedural to rule on relevancy on evidence based on a single piece of evidence. It has to be born in mind that, relevancy is achieved by connecting one fact to another to form one complete set of transaction of the fact in issue. One may ask, what will happen if certain piece of evidence is rejected on relevancy ground and later noting that, it had connection other testimonies. Litigants should refrain from raising objection on relevancy as ground of objection of tendering documentary evidence.

Relevancy can only be considered by the court when assessing evidence with view of confirming its relevance, materiality and authenticity when making

Judgement not otherwise.

Generally speaking, it should be noted that, grounds for rejection of documentary evidence are legal ones not factual. The grounds are on non-compliance of legal requirement for admissibility of documentary evidence in the court of law. At this stage, court and litigants are not concerned with

contents of document itself. The grounds for rejection of a document may be; **one**, that the document is a secondary one instead of being primary evidence, **two**, lack of certification, if the document is secondary one, **three**, that it is not part of pleading or documents listed and filed in court, **four**, that the document failed to meet certain requirement envisaged by law for it to be admissible and **five**, in unlikely event on lack of relevancy, if the court and the offering litigant agree that, the document falls outside the context of the case. If the offering litigant does not agree on it, then the court cannot accommodate it but continue to admit and consider it at the time of making decision when considering, weight attached thereto, credibility and its relevancy.

Issues of relevancies, contradictions, weight of evidence, credence and discrepancies do not touch matters of admissibility and can only be considered assessment of evidence at the time of composing a judgement.

In the present case, P29 is testifying on what he collected from RCO-Coast region, what was it, his observation and special marks he placed therein for identifying it.

The objection on relevancy is neither featuring on admissibility objections nor describe peculiar circumstance for it to be upheld, thus misplaced.

As to the issue of competency, this court noted that P29 laid down foundation on the nature of evidence he was brought to court to testify, thus competent to tender the sought exhibit. Both parties were in agreement that, issues of competency to testify is governing by section 127(1) of the Evidence Act which reads;

"Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.

In the present case, P29 was able to testify on what he went through as far as properties seized in terrorism acts as per exhibit PE6, PE7 and PE8 are concerned. P29's testimonies had nothing to do with searching, arresting, seizing and detaining the said properties save as what is stated in exhibit PE6. P29 was able to identify unique features he placed and serial number that is 56-14302621 in AK 47.

Looking exhibit sought to be tendered the defence counsels noted to have been written (313)-56-14302621 and insisted that to be the serial number. Be it as it may, the special mark placed by P29 as unique identifying number is 56-14302621 which is undisputed. The number by defence counsels are not known if it is serial number or not and where it starts to count its serial.

This court observed that the defence counsels will have an opportunity to cross examine on the same from P29 and note if it is omission or not. Be it as it may, such omission, if any has no effect as P29 testified that, he placed special mark as 56-14302621 and not the one referred by advocates. Further, there is no testimony that, the reference of the exhibit sought to be tendered starts with (313)-. P29 was testifying as an expert witness on firearms and ballistics. Further, if there was minus or plus in mentioned number, the same cannot be a ground for rejection of exhibit but it goes to credence of evidence and witness. It will be considered by the court as discrepancy or inconsistency while taking into account its effect.

In **Deus Josias Kalala vs Republic**, criminal Appeal no 191 of 2018 the Court of appeal did hold that:

".....material contradiction or discrepancy is that which is not normal and not expected of a normal person and that courts have to determine the category to which a contradiction, discrepancy or inconsistency could be characterized"

The court has to decide whether the inconsistencies and contradictions are only minor or not at the time of determining weight of evidence not during tendering. (See: **Mohamed Said Matula v Republic** [1995] TLR3). Further,

the Authors of Sarkar, The Law of Evidence 16th edition, 2007, had these to state at page 48-50

"Normal discrepancies in evidence are those which are due to normal errors of observation; normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case, material discrepancies do."

Based on the above position of law, it is clear that, issues of discrepancies or lapses on testimony, if any, is not a ground for finding a witness incompetent to tender a document in terms of section 127 (1) of the Evidence Act. Issues of contradiction, discrepancy or inconsistency and lapses are considered at the time of assessing weight of evidence and credibility of witness not at tendering of evidence stage.

Lastly, the defence counsels raised objection of non-compliance of section 33 (3) of the Prevention of Terrorism Act, 2002. They argued that, the sought exhibit cannot be tendered unless the parties and court is first availed with evidence on compliance of section 33 (3) of the PTA. Section 33 (1), (2) and (3) reads;

(1) 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.

(2) The Inspector General of Police or Commissioner of Police may exercise his powers under subsection (1), whether or not any proceedings have been instituted for an offence under this Act in respect of that property.

(3) The Commissioner of Police, shall as soon as practicable after seizing any property under subsection (1), make an application, exparte, to the Court for a detention order in respect of that property.

(4) A Court to whom an application is made under subsection (3), shall not make a detention order in respect of the property referred to in the application unless he-

(a) has given every person appearing to have an interest in the property, a reasonable opportunity of being heard; or

(b) has reasonable grounds to believe that the property has been, or is being, used to commit an offence under this Act."

This court has carefully gone through the above referred section and nature of evidence adduced by P29. It observed that, P29 is an expert witness who was requested to examine the properties seized by police officers as listed in exhibit PE5 and exhibit P6. That P29, examined a total of two hundred twenty-six (226) different items and thereafter placed special mark on all the properties he investigated and preparing an expert report. Thereafter, he returned all the properties to RCO-Coast region via P27.

Before tendering the exhibits, P29 described the unique features he placed on the properties, identified them and prayed to tender them as exhibits. His testimonies had nothing to do with the requirement of section 33 of the PTA. P29 is neither the Inspector General of Police nor Commissioner of Police accountable to discharge functions under the said section. Further, he was not the arresting officer and seizing officer of the properties sought to be tendered. P29 is solely adducing evidence in respect of what he was called upon to examine. All issues of detention of properties sought to be tendered to not fall within what P29 was asked to do.

Issues of detention of properties as envisaged under section 33 of PTA cascades within the hands of Inspector General of Police or Commissioner of Police as the law, with free from ambiguity, vests obligation to above authority, not the P29 from Forensic Department. Thus, the objection is misplaced.

Additionally, the argument that, this court has first to be given evidence on compliance of section 33 of the PTA before tendering such evidence is untenable in law. The defence counsels have no mandate to dictate what should come first and last as all falls within the prosecution's strategy. There is no such requirement existing under our laws.

Neither this court nor the accused or defence counsels have mandate to dictate how the prosecution side should prosecute a case. The prosecution side is at liberty to bring certain witness or not but at the end, the court will determine the case based on the evidence adduced. If there was certain legal requirement to be met but not discharged, parties will have an opportunity to address on the same at later stage. It can when respective witness adduces evidence or elsewhere. Defence counsels did not cite any provision supporting their version of arguments as well the provision empowering this court to so dictate.

Borrowing the position by in **Justine Hamis Juma Chamashine Vs Republic**, criminal appeal No 669 of 2021, the court of appeal stated that:

*"We think the prosecution had the discretion regarding which witness to call and which type of evidence to produce as long as they comply with the laws governing the admissibility of evidence, relevancy, competence, and compellability of witnesses to testify. **In other words, subject to any written law applicable, choosing which***

witnesses to present to court was a matter of prosecution's trial strategy"

This is court of law discharging its functions in accordance with Constitution and Acts of Parliament. Courts cannot exercise powers which do not exist under the law. It is there to discharge the dictates of law based on facts, evidence and law not litigants' wishes or approach. Much as their feelings might be very appetizing but is it legally tenable? The answer is no. This court is calling both counsels to be governed and bound by facts, evidence and principles of law, not otherwise.

All said and done, the evidence by P29 cannot be subjected to requirements under section 33 of the PTA.

Indeed, P29 is just tendering exhibits which he examination as per exhibit PE6. He has testified nothing as from whom, where, when and how the properties were seized. Further, he testified nothing on how detention of the said properties was sought and granted in compliance with section 33 of the PTA. Counsels are called upon to wait for the appropriate time and proper witness to ask what they are thinking about. Parties must at all-time gauge the nature of the evidence adduced by such witness and structure objection and question based on the same.

Having said all what, I wanted to cement on arguments for and against the objections, this court is thus inclined to agree with the position presented by the prosecution side based on the afore stated ratio decidendi.

In the event, I hereby dismiss all the objections.

IT IS SO ORDERED

DATED at DAR ES SALAAM this 15th May, 2024




G. P. MALATA

JUDGE

15/05/2024

RULING delivered at **DAR ES SALAAM** in open court this 15th May, 2024.




G. P. MALATA

JUDGE

15/05/2024