IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(CORRUPTION AND ECONOMIC CRIMES DIVISION)

AT DAR ES SALAAM

ECONONIC CASE No. 16 of 2021

(ORIGINATING FROM ECONOMIC CRIME CASE No 63 OF 2020 OF THE COURT OF RESIDENT MAGISTRATE OF DAR ES SALAAM AT KISUTU.)

THE REPUBLIC

VERSUS

HALFAN BWIRE HASSAN.....1ST ACCUSED

ADAM HASSAN KASEKWA @ ADAMO.....2ND ACCUSED

MOHAMED ABDILLAHI LING'WENYA .....3RD ACCUSED

FREEMAN AIKAEL MBOWE.....4TH ACCUSED

RULING

15th & 17th December, 2021

TIGANGA, J.

This ruling is in respect of the objection raised by all defence counsel against the admission of the certificate of seizure allegedly prepared by PW8 after search and seizure conducted at the home of the 1st accused. The objection is the result of the prayer made by PW8 which he presented after he had told the court that, on 10/08/2020 in the afternoon while in the company of PW1, ACP Ramadhani Kingai, Insp. Mahita, D/Sgt Goodluck, and D/Sgt John, they went to Yombo Kilakala at the home of the

1st accused where they were to conduct a search. He said on their arrival the asked for the people who were around, to show them the owner of the house in which the 1st accused was actually residing. According to him, they conducted the search in the presence of the 1st accused's Land lady who introduced herself to be Mariam Juma Abdallah. The Land lady proved to them that the 1st accused was her tenant. The other person who was present is the street chairman who introduced himself to be Obasi Lupakonga, and the wife of the 1st accused who introduced herself to be Tumaini John Chacha.

After a search has been conducted, they seized the following items, three Olive Green (OG) shirts the uniform of The Tanzania Peoples Defence Forces (TPDF), One shirt a uniform of National Service (JKT), two combat shirts of TPDF, three trousers of OG, TPDF uniform, one trouser of JKT, one trousers combat, three T-shirt of TPDF, one Jacket combat colour which had a cap, one rain coat with a combat colour, two Ponjoo with cap of TPDF one with green colour the other one with combat colour, an overall with combat colour, five cap of TPDF combat, two beret caps of maroon colour, four "CPL" military ranks one with a Military Police label, one exercise book with the words "Five Star", one red note book, which had details like account numbers and the name of the accused person, two

green colour kits used to carry fire arms written Hassan, HB, one parachute bedge, one military knife written AK-47, CCCP, one TPDF pullover sweater, one socks green in colour of JKT, one military water calabash of jungle green colour or pale green colour, one drawstring bag, commonly referred to as "lasket" of combat colour and other items as he listed in the seizure certificate.

He said having found the above listed items, he prepared a certificate of seizure in which all items allegedly recovered were listed and the certificate was signed by the accused, all the witnesses listed above including his wife and PW8. It was that certificate which was objected when he tendered it.

In order to appreciate the gist of the objections I find it appealing to highlight the objection raised by each defence counsel and the arguments given in support of the objection. To start with Mr. Nashon Nkungu, Advocate, for the 1st Accused, he objected the admission on the ground that the document sought to be admitted is not a seizure certificate as it has not been witnessed by the witnesses, because the second page has no signature of the witnesses and not dated. Therefore, the second page contains additional information which has no explanation from the witness.

Mr. John Mallya, Advocate, for the 2nd accused had two objections, the first is basing on the relevance of the document sought to be admitted while the second objection bases on the competence of the document sought to be admitted.

On the first limb of relevance, he submitted that, the document was prepared under section 42 of Criminal Procedure Act [Cap 20 R.E 2002], which is a non existing law. More importantly, it has also been made under as section 31(1) and (3) of the Cyber Crimes Act, the law which applies on seizure of computer device or computer system. To support his argument he referred this court to section 5 of the Police Force and Auxiliary Services Act, [Cap 322 R.E 2002] which empowers the Police Officers do a lot of job including conducting search, but section 27(1) requires them to exercise such powers in accordance with the law.

It is his argument that for the document sought to be tendered to be relevant, PW8 was supposed to follow the law as directed by section 27 of the Police Forces and Auxiliary Services Act, he said since the document shows that the police went to seize computer devices and computer system and not the items listed in the document, then the document lacks relevance. He said that since the document lacks relevance it has affected the accused when his properties were seized, and that the said police

officer can not ask the court to bless that illegality. He submitted further that the law which was cited was not cosmetic they are there for purpose, since the whole exercise was illegal from the inception, the same cannot be blessed by the prayers of the witness.

He submitted that assuming that section 42 cited in the exhibit sought to be tendered is of [Cap 20 R.E 2019], even that provision is not a specific provision. That provision applies in the conduct of emergency search as opposed to a normal search.

He submitted that the evidence of PW8, did not suggest that the search was conducted in an emergence as after they had discovered that the 1st accused's house was at Yombo Kilakala, PW8 had the time to prepare as he went to Chang'ombe Police Station, took out the 1st accused and went with him at Yombo Kilakala. This, according to him shows that, he had time to prepare and therefore he was supposed to have the proper form which complies with the law. He asked the court to refuse to bless the noncompliance and the omission. He insisted at the end that, the document is not relevant.

The other objection is based on the competence of the document itself. It was argued that, the person who was searched is Halfani Bwire Hassan in the Seizure Certificate the name is written Halifan Bwire who is a

completely different person from the 1st accused. Further to that, the document was edited or altered adding items No. 9 – 15, which were neither dated nor have signature of the witnesses. He submitted that there was no explanation as to why that page appears like that, and that if the paper was not enough to accommodate all items on the first page there is no explanation as to why the witness did not sign at that added page.

On the other hand, he said they were supposed to have enough papers under which the witnesses would have signed. He prayed the Court to reject the document on the ground he has presented. He said PW8 had all the time to lay a foundation but he did not do so before tendering the document for admission. In other words PW8, has been very economical with his words, the counsel asked the court to apply its dicta in its ruling dated 29/11/2021 when it refused the letter which was tendered by the 3rd accused.

Mr. Kihwelo, Advocate for the 3rd accused, also had two sets of objections, first is based on the list of items as listed in the exhibit sought to be admitted and second, is based on the chain of custody.

On the first ground he submitted that, there is a disconnection between the 1st and 2nd page because in the 1st page there are names and signatures of witnesses while on the 2nd page there are no names and

signature. He submitted that, the anomaly has not been explained by PW8. In his view it has not been said that the document has two pages and the 2nd page was not signed.

Regarding the second ground which based on the chain of custody, he argued that, there is no explanation that after taking the document to A/Inspector Swila, he has ever come across the document. Mr. Kiwhelo submitted that, PW8 did not say how he came across the document while in court before he tendered it. He urged the court to find that there is a broken chain of custody of the document for the reasons he has given, and consequently asked the document to be rejected in evidence.

Mr. Peter Kibatala, Advocate, for the 4th accused, supported all objections raised by all defence counsel who submitted before him. In addition, he submitted that, the witness has been economical with words, as he failed to authenticate the document which he submitted for admission. He prayed for the Court to apply the principle and its dicta in its decision dated 29/11/2021 as this scenario is not new to this court. He submitted that the witness has not said how sure he is that the document at hand is the same as the one he handed over to A/Inspector Swila.

The prosecution through Messrs' Robert Kidando, and Abdallah Chavulla, learned Senior State Attorneys, replied at length what has been

submitted by the defence. However, for purposes of avoiding unnecessary repetition, I will not reproduce their submission here, but will be referring and considering them on every respective point of objection.

Now from what have been submitted, a gist of the objection centres on the admissibility of the exhibit in court. The ground for objection may be grouped in two bases which are competence and relevance. Under competence, the first limb is on the competence of the document sought to be admitted. Under that limb, Mr. Nashon Nkungu, Mr. John Mallya, and Fredrick Kiwhelo, learned counsel objected the admission of the document basing on what they called either the alteration or editing of the document after it had already been prepared.

Secondly, under the limb of competence, Mr. Fredrick Kiwhelo and Peter Kibatala, learned counsel challenged the document basing on the chain of custody. They argued that, the chain of custody from when the accused parted with the document up to when he came by the same was not established.

On the second limb of relevance Mr. John Mallya was of the opinion that, the document is irrelevant on the two grounds, one that the document was prepared under the provision of section 31(1) and (3) of the Cyber Crimes Act, 2015 which means, the search which is a result of this

document was conducted under that section and law, while the accused persons have not been charged under that law, but under the Prevention of Terrorism Act.

The second point under that limb of relevance is that the document does not in any way relate to the 1st accused at hand because the document refers to one Halifan Bwire as opposed to Halfan Bwire who is the 1st accused in this case. While the third point under the limb of relevance is that, the document is actually made under section 42 which provides for an emergency search, while all the circumstances show that the search was not an emergency.

After a quick assessment of the submissions made in support of the objection, I find it important, for the sake of easy flow of the idea in this ruling, to start with the issue of relevance under which I will consider all the points under that limb.

Under the limb of relevance, I will start with the citation of section 31(1) and (3) of the Cyber Crimes Act, (supra) as an enabling provision on the seizure certificate sought to be admitted. According to Mr. Mallya, the provision has been cited as an enabling provision to enable the Police Officer to conduct search.

On that point the prosecution alerted the court that Mr. Mallya has deliberately misquoted the provision to mislead the Court. Further to that the prosecution submitted that, first that the provision is not the only provision cited as an enabling provision. Following that alert by the learned Senior State Attorney I quickly examined the document and realised that, what the learned State Attorney alerted the court is true. As a matter of fact I tend to agree with the prosecution that Mr. Mallya, has misquoted as it appear in the certificate of seizure sought to be admitted. The fact as reflected in the said certificate of seizure is that, the certificate has two provisions the first, is section 42 (1) and (3) of the Criminal Procedure Act, [Cap 20 R.E 2002], while the second one, is section 31 of the Cyber Crimes Act of 2015. It should also be noted that, the subsection (1) and (3) which Mr. Mallya informed the court that they are the subsection under section 31 of the Cyber Crimes Act, they are in fact, of section 42 of the Criminal Procedure Act, the CPA.

Therefore reading of section 31(1) and (3) of the Cyber Crimes Act and an invitation to the Court to refer to the same was really misleading court by referring to the provision which was completely different to what was actually before the court in the document under scrutiny.

Secondly, by the presence of the two provisions, one being of CPA, (supra), and the other one being of the Cyber Crimes Act, (supra) does not make the document irrelevant, in the matter because though section 31 of the Cyber Crimes Act is not relevant, but the presence of section 42 of the CPA makes the certificate of seizure relevant.

Moreover, even if there was no provision of the CPA, still the omission would have been termed as the wrong citation of the law a subject of which has already been settled by the court of record including this court specifically in its ruling dated 09/11/2021 where in a similar circumstance the certificate of seizure was objected on the ground that, it cited a non existing law. It is on record that, the court held that wrong or non citation of the enabling provision is not fatal unless there is a proof that the party pleading it has been prejudiced by such omission. In that decision this court relied on the following authorities namely **Charles Mkande vs R,** Criminal Appeal No. 270 of 2013 (unreported) **Jamal Ally @ Salum vs R**, Criminal Appeal No. 52 of 2017 (unreported) in which the Court of Appeal held *inter alia* that;

> *"Recently the court has taken different stance on defective charges and non or wrong citation of the law, that as long as the accused has not been prejudiced, the non or wrong citation is curable under the provision of*

section 388(1) of the Criminal Procedure Act, [Cap. 20 R.E 2019]"

This court in that very ruling dated 09/11/2021 while relying on the authorities in the case of **Shabani Said Kindamba vs R,** Criminal Appeal No. 390 of 2019, which cited its previous decision in the case of **Selemani Abdallah vs R,** Criminal Appeal No. 354 of 2008 in which it was held that, the purpose of issuing the certificate of seizure is to minimise complaint of fabrication and to make sure that the seized items come from the purported place or person. The court went further and held on that point that;

"There is no dispute that, there is a factual and logical difference in weight and consequences between failure to cite the proper provision, or citing the wrong one in the charge sheet, or chamber summons or a notice of motion (motion document) and on a document like seizure certificate. While the former seeks for the substantive orders determining the case, the later seeks to eliminate the possibilities of fabrication, and maintaining the chain of custody. If with the former as serious as it is, non citation is curable unless the person pleading it establishes that he was prejudiced, there cannot be a way for the latter not to be saved by the standard set in respect of the former."

On that matter I find the objection to be misconceived, it is thus overruled for want of merits.

Still under the limb of relevance, regarding the citation of section 42(1) and (3) of the CPA, it was submitted that, the provision applies in the conduct of emergency search as opposed to a normal search.

He submitted that the evidence of the PW8, did not suggest that the search was conducted in an emergence as after they had discovered that the 1st accused's house was at Yombo Kilakala, PW8 had the time to prepare as he went to Chang'ombe Police Station, took out the accused and went with him at Yombo Kilakala therefore he had time to prepare and therefore he was supposed to have the proper forms which complies with the law. He asked the court not to be lead to bless the noncompliance and the omission.

Mr. Kidando, learned SSA, submitted that PW8 managed to say in his evidence, that he was instructed by PW1 to hurry up because it was apparent that since the accused person did not disclose that he had residence in Dar es Salaam, obviously there was something which he was hiding there. He submitted that, the evidence is clear that it was not the 1st accused person who took PW8 and his fellow Police Officers to his home. Further more, PW8 said in his evidence how he was instructed to be quick and the reasons for such emergency therefore, he submitted that the document was relevant.

It is true that when the witness was giving his testimony he said that ACP Kingai instructed him to immediately go to the police station so that they could go with him to where the informer had hinted them that it was a home of the 1st accused. The aim being that should they find the information true then they conduct search.

However, the evidence is also clear that initially the accused person did not tell the police officer that he had residence in Dar Es Salaam, and that he was not the one who led them to his residence. That presupposes that, the main aim of the arresting Police Officers was to conduct search, but did not know where exactly they were going to conduct that search. Now, can we term this an emergency? The answer is no, as that can not be an emergency. This is because the searching officers were aware that should they succeed in locating the home of the 1st accused they were going to conduct search, therefore the search was not an emergency. This is also exhibited by the fact that the police officers who conducted search had a seizure certificate with them, and managed to fill it after the search. From that fact the search was supposed to be conducted under section 38 of the CPA. To further prove that it was not emergency even the mode of search and the procedure followed in conducting the search is the one provided under section 38 of the CPA.

Now, having found the matter document was on wrong provision while the procedure followed was proper, what should be the right recourse?

The plain interpretation of what happened leads to a conclusion that, the certificate of seizure cited wrong provision of the law, with the consequence which is similar like that on the first point. Therefore, this point also falls under the category of the wrong citation of the of the law in the sense that, citation of section 42(1) and (3) of the CPA, in a situation which was not under emergency is citing the wrong provision of the law, which its consequences has already been cited when I was dealing with the first objection on relevance. Therefore this objection is also overruled for want of merit for the reasons given.

Last on this point of relevance is that the document does not in any way relate with the accused, as the same relates to a person going by the name of Halifan Bwire as opposed to Halfan Bwire who is the 1st accused in this case. On this, the prosecution through Mr. Chavulla, SSA, submitted that, that is not a point of law, it is a point of fact which cannot be entertained to invalidate the document. He also cited the authority in **DPP vs Shariff Mohamed @ Athuman** (supra) on the issue of the prerequisites of admissibility of evidence. On this point, I entirely agree with

Mr. Chavula, SSA, that the general rule of admissibility is that, unless it is barred by any rule or statute, any evidence which is relevant, material and competent is admissible. On the contrary, any evidence which is irrelevant, immaterial and incompetent is inadmissible. The contention in this case is that, by an error in the spelling of the name of the accused then the document becomes irrelevant and therefore inadmissible. Now, in the case cited above the evidence is termed to be relevant if it tend to make any fact that it is offered to prove or disprove either more or less probable.

The question is whether the document at hand falls short of that test and liable to be rejected? According to the evidence of PW8 which to this point has never been controverted, the names and the signature contained on the certificate of seizure thereon are of the 1st accused. Standing as it is, that stands to be a point of facts which cannot be decided at this moment. Therefore, I find an error or difference in the names cannot by any standard affect the admissibility of the document, if a difference then that goes to the weight of the evidence. The ground is also overruled for the reasons given.

Having resolved the above issues, I now go to the issue of competence under which there is the component Chain of custody and alteration of the document. Starting with the issue of Chain of Custody this

ground was raised by Mr. Kiwhelo and Mr. Kibatala, learned counsel for the 3rd and 4th accused respectively. Mr. Kihwelo's arguments in support of the ground are that, there is no explanation that after the document was handed over to A/Inspector Swila, what happened to the exhibit up to when the witness met the exhibit in court. He submitted that the witness did not say how he came across the document here in court. He urged the court to find that there is a broken chain of custody of the document for the reasons he has given, he consequently asked the document to be rejected.

Mr. Peter Kibatala, Advocate, submitted in support of the ground that, PW8 has been economical with words, as he failed to authenticate the document. He asked the Court to apply the principle and its dicta in its ruling dated on 29/11/2021 as this scenario is not new to this court. He submitted further that in any case, the facts of the case at hand and the way PW8 failed to authenticate the intended exhibit are similar to the way. He submitted that with the economy of words of PW8, did not tell the Court how sure he is that the document at hand is the same as the one he handed over to A/Inspector Swila.

On that point, Mr. Kidando, learned SSA for the prosecution, submitted that, PW8 has established the chain of custody, which is sufficient at the admissibility stage, as he laid a foundation by

authenticating the exhibit through some unique features which included the items he listed and has proved that it is a document he prepared after conducting search. Regarding the ruling dated 29/11/2021 which Mr. Kibatala had referred this court to follow, he submitted that, the facts of the two cases are completely different, as in the ruling dated 29/11/2021, the 3rd accused was not the author of the letter he wanted to tender, and failed to prove the letter he wanted to tender which had the stamp of the Deputy Registrar was his copy which was served to him and he did not explain about the presence of the stamp of the Deputy Registrar on that letter. Basing on these facts, according to him, the circumstances of the two scenarios are distinguishable therefore the decision in that ruling dated 29/11/2021 is not applicable in this case on the aspect of the chain of custody.

Mr. Kidando referred to the case of **Illuminatus Mkoka vs The Republic** [2003] T.L.R 245, in which the CAT – held that, establishing a chain of custody gives a reasonable assurance that, exhibit tendered at the trail are the same as the one recovered, the purpose of it, being to make sure that the exhibit tendered are not tampered with.

Mr. Kidando submitted in the end that, PW8 has managed to prove the chain of custody sufficient to warrant the admissibility of the document at hand has been established.

On other hand, Mr. Chavulla, SSA submitted in reply that, the chain of custody has not been broken. He supported that argument citing the case of **DPP vs Kristina Biskasevskaja,** Criminal Appeal No. 76 of 2016 at page 7, last paragraph from line 6, where it was held that the issue of chain of custody can be conveniently established at end of the prosecution case.

He submitted that, the chain of custody can not be established by a single witness, it is established by a number of witnesses especially those who dealt with the exhibit. Therefore under the principle in **Kristina's case** he asked the court to find that, the chain of custody would be conveniently established at the end. He submitted at the end that, the objection be overruled and the document be admitted as exhibit.

Rejoining Mr. Kihwelo, Advocate for the 3rd Accused person, submitted that what they are challenging is not the substance, but the admissibility. In his view the defence has the right to challenge the admissibility of the exhibit at this stage basing on the principle of the chain of custody.

Regarding to the principle cited in the case of **Illuminatus Mkoka**, he said the same is very much in support of the defence case that, the aim of the principle of chain of custody was to make sure that the exhibit is not tampered with. He submitted that there is no assurance that the document has not been tampered with as PW8 did not tell the Court how the same was handed over to him to assure the court that, it was not tampered with.

Winding the rejoinder for the defence team, Mr. Kibatala insisted that from the outset there is no evidence establishing the chain of custody. It has not been said how the document passed by the witness. He insisted that there is no any nexus built showing the movement of the exhibit. He asked the court to use its dicta in its ruling dated 29/11/2021, when it held that the 3rd accused was very economical with words, thus leaving doubt on the chain of custody. He cited the case of **Mayala Mbiti vs The Republic**, Criminal Appeal No. 177 of 2019 where it was held at page 6 that any doubt should be resolved in the favour of the accused person. He submitted that the authority of **Kristina's Case** does not change the stand of the law on the chain of custody.

Regarding the issue of chain of custody, he refers the court to the case of **DPP Vs Sharif Mohamed @Athuman** (supra) that the chain of custody must all the time be established. He submitted that, how the

document was treated from when PW8 left it up to when he came by it has to be established, but in this case, it has not been established. He in the end reiterated what he submitted and prayed the document to be rejected.

As submitted by the counsel for the parties that, the issue of admissibility has on a number of times, before now, exercised this court and the court resolved it. In the ruling of this court dated 11/11/2021 and that of 29/11/2021 which the defence counsel have mostly reminded me to follow, this issue exercised the mind of this court and in both ruling the court held basing on a number of authorities of the Court of Appeal of Tanzania that; Chain of Custody is one way of authenticating the exhibit, the other way being identifying or showing unique features of the exhibit and all these are done to prove the competence of both the exhibit sought to be tendered and the witness tendering it.

In the case of **Republic vs Shariff Mohamed @ Athuman** & **6 Others** (Supra), the Court of Appeal of Tanzania held inter alia that, the chain of custody intends to explain the whereabouts of the evidence at all times since when the evidence was seized or dealt with up to when it is tendered and that, it is established by competent testimony given by a competent witness to tender the evidence.

Regarding the competence of the witness, the decision of the **The Republic vs Charles Abel Gasilabo @ Charles Gazilabo** (Supra), citing with approval the decision of the case of **DPP vs Murzai, Pirbakhishi " @ Hadji and 3 Others**, (supra) and **Hamis Said Adam vs Republic,** (supra) said it all, when it held that;

> *"A person who at one point in time possesses anything a subject matter of trial, is not only a competent witness to testify but could also tender the same. ...The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time albeit shortly. So, a possessor or custodian or an actual owner or a like are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question."*

In this case, there is no dispute from the evidence that, PW8 is the author of seizure certificate sought to be admitted, therefore he has knowledge of the exhibit, and I would say is one of the competent witness to tender it.

The complaint here is that, he has not told the court where the exhibit has been before it fell in his hand for tendering, in the other words he has not assured the court that, for the whole period when the exhibit was out of his hand it was safely kept and has never been tampered with.

Now without unnecessarily repeating what PW8 said in his evidence and what the Senior State Attorney submitted in that regard, I feel it imperative to restate what the witness said here in court regarding the exhibit. He said after the seizure certificate had been signed by the accused, the persons who witnesses search and himself, he took the exhibit with him to the Central Police Station where he handed over the physical exhibit he tendered to the exhibit keeper one Sgt Johnston. He also said while he handed over the seizure certificate to A/Insp. Swilla, who kept it in a case file, which was later taken to the DPP.

He thereafter described on how he could identify the said seizure certificate if shown to him, said it is by his he described the handwriting and signature as well as the list of the items he seized which he recorded as well as the reference case number which he mentioned to be CD/IR/2097/2020. The feature he could recognise is the presence of the names of the persons who witnessed search which he mentioned to be Mariam Juma Abdallah, Obasi Lupakonga, and Tumain John Chacha.

When he was shown the said documents he managed to identify the same using the features he has earlier on mentioned. It is true that PW8 was not lead to say that the document was still the same as he prepared it, but reasonably by identifying all the features which he mentioned and the

fact that, all details were still in his handwriting leads to reasonable conclusion that, the document is still the same.

It is true that he did not say that he went to the DPP to collect the document but that does not defeat the reasons that it is the DPP who filed this case, and those prosecuting it are doing it on his behalf. That being the case, the fact that PW8 was handed over the document for recognition by the State Attorney, who before so doing asked for the leave of the court to do so, clears doubts of the chain of custody. If some where the chain has not been explained from A/Insp. Swilla to the DPP, I think that is where the decision in the case of **DPP vs Kristina Biskasevskaja**, (supra) that such kind of chain of custody can be conveniently determined at the end of the prosecution case, if I may add that after all the prosecution witnesses have testified.

On this aspect I have been invited to adopt my findings in the ruling dated 29/11/2021 on the dicta of the witness being economical with words. Without much going into details, I agree with Mr. Kidando that, the circumstances between these two cases and the facts leading to the decision are different. In the decision of 29/11/2021, the witness was tendering the letter which he did not author, but which was copied to him, the base of the decision was that, the letter he presented for admission had

a Stamp of the Deputy Registrar, which rose an assumption that it was a copy which was served to the Registrar or a copy returned to the author after serving the letter to the Deputy Registrar that stamp an acknowledgment or rather proof of service. In short, there was no explanation given by the witness on the condition of the letter and how it landed in his hand. It is such lack of explanation which brought about the dicta the "economy of words" the situation which in my view is distinguishable in the case at hand.

Under this head, I have been called upon to use the principle in the case of **Mayala Mbiti vs The Republic,** (supra) I think for what I will explain soon herein after, the dicta in that case suit most in the next ground of objection, which I am soon going to consider. Having said all these, it suffices to find that this ground has no merit and it is overruled for the reasons given.

Next and last is the complaint for alteration or editing of the exhibit which makes the exhibit incompetent. On this point, it should be noted that all defence counsel raised it as the ground of objection. This is because even Mr. Kibatala who did not in express terms raise it, supported those who raised it, and said what he said in addition.

Now without much repeating what the Advocates and Senior State Attorneys submitted in support and rebuttal of the objection, at least both parties are in agreement that the exhibit sought to be tendered has two pages. Parties are also in agreement that, the first page is on a form which has been customarily used as a seizure document, and on that, the names of the officer conducting search, the suspect against whom a search has been conducted, the offence he is accused or suspected to have been committed, the reference number of the Police case, the date on which the search was conducted, the names of persons who witnessed search, the items searched and recovered, the signature of the 1st accused, all persons who witnessed search signed and so is the officer conducting search and the items listed ending on item number 8.

On the second page, there are items listed from 9 to 15 and after these items, there is a signature of the officer who conducted search. The second page has not been signed by the persons who witnessed search, and it is not dated. It is this part of the document which is the centre of the objection raised. It is the defence view that the second page is not part of the document as had it been part of it, it would have been signed by the witness who witnessed it.

As earlier on pointed out, the prosecuting State Attorney are not disputing the anomaly in the document, but they insist that, considering the evidence of PW8 that he listed on the same document all the items he seized, and that challenging the list on the second page is going to the substance of the contents which is a point of facts, which cannot be challenged by the submission from the bar. In support thereof they cited the case of **Trans Africa Assurance Co. Ltd Vs Ciribrid (EA) Ltd** [2002] 2 EA, to support their arguments.

Also that since, PW8 said that the document is the one he prepared, after conducting search and that by the presence of the word P.T.O means that the items are not ending at number 8, it means the list goes to the second page. They also submitted that, nevertheless and without prejudicing what they actually said, it is their view that the objection goes to the substance/content of the document which is not the domain of admissibility.

They reminded the court of the fact that, the admission or rejection of the exhibit or evidence in court depends on two things, **one,** the existence of the statutory law which is enacted by parliament or **two**, any principle of law prohibiting the admission of evidence. They submitted that, in the absence of any law prohibiting admission of evidence, any evidence which

is relevant, material and competent should be admitted in court. They referred this court in the case of **DPP vs Sharif Mohamed @ Athuman**, (supra) at page 7, they said that the whole document is relevant therefore admissible.

They also submitted that neither the CPA nor any other law provides for prescribed form of certificate of seizure, therefore it is not proper to base the objection on something which is not a point of law. In the end they submitted that, the document be admitted as exhibit.

In rejoinder submission Mr. Nashon Nkungu – Advocate, submitted that the case **DPP Vs Shariff Mohamed @ Athuman** (supra) be applied in the favour of the defence. He submitted further that he did not base on the substance but on the face value of the document. He said that the submission that there is no foundation built was not countered.

Regarding as to whether there is a format of the seizure certificate form, Mr. Mallya said, though he can cite no law providing for such format, but the police force has created the format and that format has received judicial acceptance. Regarding the presence of the word P.T.O at the end of the first page, he submitted that, the witness did not say the meaning. He prayed the exhibit to be rejected for the reasons given.

In response to the last issue of the format, I have had no enough time to research on the source of the seizure certificates form, however, I entirely agree with Mr. John Mallya, Advocate that though there may be no law prescribing the form, but the form used as certificate of seizure as in our jurisdiction has received legal and judicial acceptance that is why the police are using it in conducting search and courts have been receiving and accepting them as certificate of seizure.

Moreover, on my search from the PGO, I found PGO 226 (17) (b) providing that the service of the local leader or two independent witnesses who should be present through out the search should be obtained. This is to make sure that they may be in a position to give supporting evidence if anything incriminating the suspect for purposes of refuting the allegation that the search was roughly carried out and that the property damaged.

PGO 226 (18) provides that, on the completion of the search a report should be made out at the scene giving all details of the same articles seized, and a copy thereof shall be handed to the occupier.

PGO 226 (19) The search report shall state clearly that nothing other than the articles enumerated on the report were taken away and after the conclusion of the report, the police officer conducting the search, the

occupier of the premises searched, if he is willing, having been asked, the local leader or two responsible inhabitants should sign the report.

The details contained in the report provided under PGO 226 (19) in my considered view, is what should contain the seizure certificate. Therefore, from the above provisions the signing must be done immediately after the list of the found items.

That means that the requirement of the signature on the certificate of seizure immediately after the list of the seized items is a matter of law, this means the document or certificates end where the signature of the above listed persons are affixed, anything listed out of that part are not part of the certificate of seizure.

The reasons why the signature of the witnesses on the Certificate of seizure is important is provided in the case of **Shabani Said Kindamba vs The Republic**, Criminal Appeal No. 390 of 2019, decided in June 2021, by the Court of Appeal of Tanzania while interpreting the provision of PGO 226, which quoted with approval of its previous decision in the case of **Selemani Abdallah and Others vs The Republic,** Criminal Appeal No. 354 of 2008, held *inter alia* that,

> *"the whole purpose of issuing receipt to the seized items and obtaining signature of the witnesses is to make sure*

that the property seized came from no place other than the one shown therein. If the procedure is observed or followed the complaint normally expressed by the suspects that the evidence arising from such search is fabricated will to the great extent be minimized."

That is also the position in the case of **Paschal Mwinuka vs The Republic,** Criminal Appeal No. 258 of 2019, CAT- Iringa.

That means a certificate or part of it without signature of the persons who witnessed search is doubtful, even if the listed items may have been found in the premises searched. Their listing without being signed by the persons who witnessed search goes to the heart of the document and affects the admissibility it creates doubt which Mr. Kibatala invited me to apply the principle in **Mayala Mbiti vs The Republic** (supra) and resolve the same in the favour of the accused.

As the objection was raised against the second page containing items 9 to 15, and the first page has met the criteria provided in PGO 226 (19), I thus, partly sustain the objection by expunging the second page of the said certificate of seizure containing the 9 to 15 items, I admit only the first page with items number 1 to 8 which has met the criteria of PGO 226 (18) and (19).

It is accordingly ordered

DATED at **DAR ES SALAAM** this 17th day of December, 2021

J.C. TIGANGA

JUDGE