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.)

(IN TRIAL WITHIN TRIAL FOR 3RD ACCUSED)

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

18th & 22nd November, 2021

TIGANGA, J

On 17/11/2021, when PW2 (in the trial within trial) hereinafter PW2 (TWT) in respect of the 3rd accused was testifying, he sought to tender a detention register which he used on 07/08/2020 at Central Police Station, Dar es Salaam when he detained in and out, the 2nd and 3rd accused after they had been submitted to him by ACP Ramadhan Kingai and SP Jumanne Malangahe, herein after PW1 and PW8, respectively.

That prayer was objected by the defence, by raising three points of law styled as follows: **First,** that the detention register is incompetent for lack of disposal order in terms of section 353(3) of the Criminal Procedure Act [Cap 20 R.E 2019]

Second, that since the said exhibit has already been tendered and rejected in this trial within trial before this court, the court is therefore *functus officio*.

Third, that the admission of the detention register is bared by a doctrine of *issue estoppel* as the issue of the admissibility of the same has already been dealt with by this court in this case.

The objection were raised and argued by two defence counsel namely Messrs Jeremiah Mtobesya, and Peter Kibatala for 1st and 4th accused persons respectively, but they did so representing the whole defence team. On the other hand the prosecution were also represented by two learned Senior State Attorneys namely Messrs. Abdallah Chavulla and Pius Hilla, who submitted for the whole prosecution team. For purposes of brevity I will summarise their submissions together, but without unnecessarily missing any point.

Starting with the 1st ground of objection, the defence counsel submitted that, under section 353(3) of the Criminal Procedure Act [Cap 20 R.E.2019], the only get way of any exhibit tendered in court is through a court disposal order. It was their view that, the said detention register sought to be tendered, was once tendered and admitted as exhibit in the trial within trial which involved the 2nd accused in this case, that is Economic case No.16 of 2021.

However, there is no proof that there is an order for disposal of exhibit which was made either by the presiding Judge in those proceedings or a successor Judge. In their opinion without an order for disposal of exhibit, any administrative arrangement to obtain the said admitted exhibit is not operational. They submitted that disposal orders are of two types, namely the one issued at the end of judicial proceedings and the other one is the one issued when the proceedings are still pending.

It is their submission that the disposal order has the following qualities as follows: **One,** it is a participatory exercise, **two**, the same must be given by the same judicial officer who admitted it or an officer of the same rank of the judicial officer who is the successor in office who decided the case, and last **three**, it must be in an open proceedings.

In their view, even if the letter of the Deputy Registrar was authentic, the Deputy Registrar had no power to issue the disposal order, as that is within the mandate of the Judge who admitted the exhibit or his successor. They submitted that exhibit disposal order would be an all assurance that, the exhibit was properly discharged and procedurally landed in the hand of the witness who wants to tender it.

Further to that, they insisted that, even if the disposal order is there, that would not have been enough, without the extract of the exhibit register which is a form attached to the Exhibit Management Guideline issued on September 2020, by the Judiciary of Tanzania and signed by the Hon. Chief Justice of Tanzania, of interest in that Guideline according to them is page 19-23 item 4.3 titled "Disposal of Exhibit", which among other things requires a 30 days' notice to the parties before disposing the exhibit. Generally, they asked the court to find that, noncompliance of that law and the Guideline renders the exhibit incompetent.

On the second point of objection that the court is *functus officio* to deal with the admission of detention register, their arguments are that, since PW1 in this trial within trial, had already tendered the exhibit and the same was rejected by the court, this court cannot once again deal with the

said exhibit. Therefore, under the doctrine of *functus officio*, the purpose for which it was tendered notwithstanding, the rejection of the same constitute a complete order, therefore the court cannot once again deal with it.

Being aware that, PW1 tendered it for identification purpose, nevertheless, they argued that the procedure of seeking for admission of a document or an object for identification is similar. They reminded the court that, the issue of *functus officio* goes to the jurisdiction of the court, rendering this court to lack jurisdiction to entertain the issue of admission of detention register.

To support their contention, they cited the case of **Bibi Kisoko Medard vs Minister for Lands and Human Settlement Development @ Another** [1983] T.L.R 258. The second authority in that respect is the case of **Theresia Zakaria vs Oscar Rwechungura,** PC. Civil Appeal No.73 of 2004 – High Court, Dar es Salaam (unreported) at page 4 of the judgment. The third and last case authority on that point is **NBC Ltd and IMMMA Advocate vs Bruno Vitus Swalo**, Civil Appeal No.331 of 2019 – CAT – Mbeya (unreported) at page 10.

In their view, since the issue of admissibility of the detention register has already been determined when the PW1 (TWT) in these proceedings was testifying, therefore this court is now *functus officio* to deal with it again.

On the doctrine of "*issue estoppel*" which is the third point of objection they submitted that, the doctrine of "*issue estoppel*" is originally a civil law doctrine. However via a decision of the Court of Appeal of Tanzania in the case of **Issa Athuman Tojo vs The Republic**, Criminal Appeal No.54 of 1996, CAT, (now reported as [2003] T.L.R 199), His Lordship Samatta, CJ, at page 25-26 of unreported decision in particular held *inter alia* that, the doctrine of "*issue estoppel*" is now part of our criminal law. While emphasising on the point, they also cited the case of **Julius Michael and 4 Others vs The Republic,** Criminal Appeal No. 264/2014 Court of Appeal of Tanzania, Othman, CJ, at page 6-9 while referring with approval the decision of **Issa Athuman Tojo vs Republic** (Supra).

Basing on that findings and the principle in the decisions cited hereinabove they submitted that; the issue of admissibility of this exhibit has already been discussed and the court has already decided it. This

means the Detention Register has already been litigated and an order for its rejection has already been given therefore the prosecution is estopped to re-raise it again.

The two counsel went further citing the philosophy behind the doctrine of *"issue estoppel"* as held in the case **Julius Michael and 4 Others vs The Republic** (supra) that, the doctrine serves three purposes which are all integral to a fair criminal justice system; **first**, fairness to the accused person who should not be called upon to answer questions already determined in his or her favour, **second**, the integrity and coherence of the criminal law, and **third**, the institutional value of judicial findings and economy. In sum, they asked the court to be guided by the said authorities and uphold their objection.

On their part, both Senior State Attorneys strongly contested the objection raised against the admission of the detention register on the arguments that, the objections lack merits.

They started with the objection on the doctrine of *"functus officio"* and *"issue estoppel"*, and submitted that, the defence arguments are wrong and misconceived, in that at no any point in time, the defence side

has ever objected the competence, relevance or materiality of the Detention Register when PW1 (TWT) in these proceedings was tendering it.

According to them, the ruling which rejected the Detention Register, when PW1 (TWT) was testifying based on the argument that the witness did not lay foundation on how the exhibit landed in his hand. Therefore the decision based on complaint that, the witness failed to establish the chain of custody of the said detention register. Therefore the rejection based on the incompetence of the witness who sought to tender it after he failed to lay foundation.

Their second ground of argument was that, even the purpose for which the Detention Register was tendered in the former ruling is different from the purpose for which the same is tendered at the moment. According to them, while PW1 (TWT) was tendering it for identification purpose, PW2 (TWT) it is tendering it for admission as exhibit. Therefore the decision against admission by PW1 (TWT) cannot bind the tendering by PW2 (TWT).

Regarding the cited cases of **Bibi Kisoko Madard vs Minister for Lands and Human Settlement Development** (Supra), and **Theresia Zakaria vs Oscar Rwechugura** (Supra), they submitted that, they have no problem with the authorities cited as they contain the good principle of law, but in their view, the therein principles are not applicable and are highly distinguishable in the case at hand.

Cementing on their arguments, they asked the court to be guided by the case of **Miburo Cosmas vs The Republic,** Criminal Appeal No. 519/2016 CAT (unreported) which held that, the court becomes *functus officio* after it has finally disposed of the case. They invited the court to rely on the other cases relied upon in that authority on particular the case of **Tanzania Telecommunication Company Limited and others vs Tri – Telecommunication Tanzania Limited** [2006] 1 E.A 393, which also quoted a passage in the decision of the Court of Appeal for Eastern Africa in the case of **Kamuli vs Republic** [1993] E.A 540. In their opinion these cases made it clear that the court becomes functus officio when it give the decision or finally disposing the case.

They argued that, since in the case at hand there is no final verdict at all, they asked the court to find that all case authorities cited by the defence are distinguishable in the matter at hand.

Regarding on the doctrine of *"issue estoppel"*, as supported by the cited case of **Issa Athuman Tojo vs The Republic**, (Supra), they invited the court to find that the case is also distinguishable with the fact of this case. In their view, the doctrine of *"issue estoppel"*, can stand when the issue for which the *"issue estoppel"* is pleaded is similar to the previous issue which has already been concluded. They submitted that, when the said detention register was rejected after being tendered by PW1 (TWT), the issue leading to its rejection was the failure of the witness to lay foundation as to how the exhibit came to his possession before he tendered the same in court therefore the objection and consequential rejection was never against the exhibit but the witness.

Further to that, as the authority insists of the former or previous case or matter, in the matter at hand, there is no former or previous case; the case is the same, which is Economic Case No. 16 of 2021. Their argument is based on the reasoning that trial within trial is part of the main trial, but it is made separately because of admissibility of the cautioned statement

process, and as the ruling rejecting the detention register therein did not dispose Economic Case No. 16 of 2021, there cannot be an "issue estoppel" as alleged.

In strengthening their arguments, one of the reasons as to why trial within trial is not a separate trial is that, it bears the same case number of the main case. They gave example of the matter at hand, where the proceedings of trial within trial conducted bears the same case number that is Economic Case No. 16/2021.

Further on the doctrine of *"functus officid"* and *"issue estoppel"*, they submitted that, the issues were raised out of context.

Regarding the issue of lack of disposal order they submitted that section 353(3) meant to apply in cases in which the exhibit was tendered and cases have been finalized. According to them, the provision of section 353(3) is used when the exhibit is intended to be returned to the owner.

It is their submissions that, in this case the purpose for which the exhibit was sought and granted is for retendering the same in the court proceedings in the same case. It did not at all mean to be returned to the owner. They submitted that, the same can be proved by a letter from the

Deputy Registrar to the National Prosecution Services Office exhibit P1 (TWT).

They submitted that, the exhibit at hand and the purpose for which the same was sought does not fall under the process envisaged under items 4.3 and 4.4.2.9 of the Exhibit Management Guideline as the same deals with the disposal of exhibit after finalization of the case. In their respective view, in the situation at hand, the said exhibit was asked for purposes of tendering the same in the same proceedings.

They argued further that, section 353(3) is an extension of the chain of custody. In that regard, they cited the case of **Abas Kondo Gede vs The Republic,** Criminal Appeal No. 472 of 2017 – CAT – Dar es Salaam where it was held that, oral evidence is also sufficient to prove any fact if the same is worthy to believe.

Therefore, they argue that, oral evidence of PW2 (TWT) on how the exhibit was tendered, admitted and later requested for being retendered in this case, there is no point where it has been alleged that PW2 (TWT) is in that aspect unreliable. Therefore, the fact that there is no disposal order cannot be a bar for admission of exhibit.

Regarding the allegation that, the Deputy Registrar has no authority to issue the exhibit, they submitted that, exhibit can be re-obtained from court by either a court order or administrative process and the component of administrative process is supervised by the Deputy Registrar.

Regarding the allegation that, there cannot be a gate way where an exhibit can be given out without a disposal order, they submitted that, since the proceedings are the same in Economic Case No. 16/2021 and are still going on, and the exhibit is intended not for disposition but for retendering it in the same case, the methods used to request the said exhibit from the Deputy Registrar was proper.

They reminded the court that, trial within trial proceedings are still paged to the main trial, and their purpose is just for admissibility of the cautioned statement. In support of their contention they cited the case of **Khatib Ghandi vs The Republic**, (1996) T.L.R 12, where it was held that, issues arising out from trial within trial may be used in the main trial, that means that, trial within trial is part of the main trial.

They reminded the court that, at the admissibility stage criteria to consider are three that is, that is competence, materiality and relevance,

what is important, is for the witness to show how did he come by an exhibit which he clearly stated that he obtained the exhibit after requesting it from Deputy Registrar who is the manager of the case file the exhibit inclusive. According to them, in this case according to them this court had once ruled that, the exhibit may also be asked through administrative process.

While winding their submissions, they submitted that, the arguments by the defence that, even though the document is authentic, the Deputy Registrar has no power to issue the exhibit, is a clear admission that the document is authentic; there is no point they can come back and argue that, the document is not admissible.

They asked the court to direct its mind and attention on the point of admissibility, where it will definitely find that there is no ground for rejecting the admission of the said exhibit. In the end, they prayed the objection to be overruled for having no legs to stand on.

In their rejoinder, the defence counsel in conduct of the objection as alluded hereinabove, submitted regarding the arguments by the prosecution that, trial within trial is not a separate trial. In cementing on

that point, they pointed four issues which in their opinion stand as the operative principle in the case at hand.

One, that in order to conduct trial within trial, the court must for short time stop the proceedings in the main trial and enter in the exercise of conduction of a small trial, at the end regardless the result of small trial, the said court must resume in the main trial. **Two,** the proceedings of trial within trial is a factual exercise which intended to achieve one thing, to prove the voluntariness or otherwise of the cautioned statement of the accused who is under trial. **Three,** just like in the main trial, the person who has a duty to prove the voluntariness is the prosecution who would lead evidence to prove that the statement was obtained voluntarily and the accused against whom the statement is sought to be tendered will be required to prove that, the statement was not voluntarily taken. **Four**, that in Economic Case No. 16/2021, the court once entered in the exercise of similar nature in relation to the 2nd accused in which the exhibit sought to be tendered has already been tendered in that trial within trial.

They further submitted that, under section 353 (3) of the Criminal Procedure Act, the court is required, if it is satisfied and finds it prudent, to issue an order for disposal of exhibit after the termination of the

proceedings. In their opinion, since the exhibit has already been admitted, the prosecution would have moved the court under section 353 (3) of the CPA so that, the order can be made.

Citing one of the example to show the difference between the trial within trial, and the main trial, they submitted that, even the labeling of the the witness are different, in this case for example PW8 in the main case, was styled as PW1 in the trial within trial. They therefore urged the court to find against the prosecution that, it is not proper to say that, the trial within trial is not a separate trial from the main trial. In their view, the argument by the prosecution in a way intends to reinvent the wheel for convenience.

On that point, they insisted that trial within trial is a separate trial that is why, the prosecution is seeking to tender the very same exhibit which they had already tendered in evidence in another trial within trial.

In further cementing on the issue of lack of disposal order, they said in essence section 353(3) of the Criminal Procedure Act, intends to establish the chain of custody, especially on the exit of the exhibit. Therefore there was supposed be a disposal order before the Deputy

Registrar had handed over the exhibit to the prosecution. Since the Deputy Registrar has no power or jurisdiction to give the disposal order of the exhibit, in their opinion, she was either misled or she misconstrued the law, but that cannot validate the exhibit.

They reminded the Court of the Exhibit Management Guideline cited. They asked the court to read the guideline on the issues relating to admission, disposal and rejection of the exhibit, which its procedure of handling has already been provided for. They asked the court to look at the exhibit register attached on the Exhibit Management Guideline and the requirement of the disposal order in one column in the register something which shows that the disposal order is indispensable.

They asked the Court to disregard the authority in the case of **Abasi Gede vs The Republic** (supra) because the same is irrelevant and distinguishable.

On the doctrine of *functus officio*, they submitted that, the learned State Attorney looked at it on different way. In their view, the purpose for which the evidence was sought to be tendered in both case is immaterial what is important is that, this court was once asked to admit the said

exhibit and rejected it, and that, since the procedure for admission of exhibit for both purposes is the same, therefore, the court is barred to reconsider the said exhibit because it has already rejected it. In their opinion retendering it, is just like a review which has not followed procedure.

Distinguishing the case of **Miburo Cosmas vs Republic** (supra), they submitted that, the case is well in support of the objection as it is not only that the doctrine must apply on a finalized case, but also to the issue which has already been decided conclusively. They submitted that, the issue of admission of exhibit has already been decided therefore it cannot be brought again.

Regarding the case of **Khatibu Ghandi vs The Republic** (supra) they submitted that, the import of this case, shows that it was cited out of context as the Court of Appeal did not mean to trans- impose the exhibits from one proceedings to another. Therefore in this case, the same is distinguishable.

Regarding the doctrine of *"issue estoppel"*, they argued that a document admitted by the court either for identification purpose or as an

exhibit uses the same procedure. They insisted that the case of **Issa Athuman Tojo vs The Republic** and **Julius Michael and 4 others vs The Republic** (supra) are applicable and relevant.

While concluding, they submitted that disposal order means maintenance of paper trail, therefore there was a requirement to have a disposal order and thus they prayed for the court to uphold the objection, and reject the exhibit.

That marks the end of the arguments by the counsel made in support and against the objection. As earlier on alluded, the objection by the defence is premised in three limbs, namely, **one**, lack of disposal order to release the exhibit from the former proceedings, **two**, that the court is *functus officio* for having dealt with exhibit when PW1 (trial within trial) tendered it consequence of which it was rejected, **three,** that the prosecution is estopped by a doctrine of *"issue estoppel"* having first attempted to tender the said exhibit which was rejected.

To appreciate what gave rise to the matter at hand, the following background is important. On 09/11/2021 when PW1 (TWT), SP. Jumanne Malangahe was testifying asked to tender for identification purpose, the

detention register in which he allegedly signed when he was taking out the 3rd accused person to record his cautioned statement.

The request was objected on the ground that, the witness did not lay foundation on how on that particular day the said exhibit landed in his hand as he failed to establish the chain of custody. In its ruling dated 11/11/2021, this court upheld the objection on the ground that, the witness failed to lay a foundation on how he came by the exhibit on the date he was coming to tender it in Court. Also, there was no evidence whether administrative or otherwise that the witness sought and obtained the said exhibit from the respective authority before coming to court to tender it. Therefore having failed to lay such a foundation, the witness was not competent tender the exhibit albeit for identification purposes.

Having been faulted on that ground, the prosecution decided to ask for the detention register which was through exhibit P1 (TWT) supplied to them through PW2 (TWT) who now seeks to tender it as exhibit. It is upon such request to tender it; the defence has objected the exhibit on three grounds herein above.

Of three points of objection, the doctrine of "*functus officio*" is a jurisdictional issue. An accepted practice requires me start with it. On the issue I take note that every principle cited to me and submitted by the counsel for parties contains good authority on the general concept of the doctrine of "*functus officid*" depending on the circumstances in which they are applied.

Looking at the relevant parts which this court was directed at by the counsel, the authorities in **Bibi Kisoko Medard vs Minister for Lands and Human Settlement Development and Another (supra), Theresia Zakaria vs Oscar Rwechungura,** (supra) and the case of **NBC Ltd and IMMMA Advocate vs Bruno Vitus Swalo**, (supra) acknowledge the existence and applicability of the doctrine of *"functus officid"* in our jurisdiction, they do not go deeper to say what that doctrine is, what is all about and the ingredients of the same. For instance in **Bibi Kisoko Medard vs Minister for Lands and Human Settlement Development @ Another** (supra), it was held *inter alia* that;

> "*In matters of judicial proceedings, once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio.*"

In **Theresia Zakaria vs Oscar Rwechungura,** (supra) the principle there in is that,

> *".....As I have already said the said court was functus officio. Therefore it was wrong for Makwandi – RM to entertain and grant the respondent's application when the District Court had become functus officio."*

While, in **NBC Ltd** and **IMMMA Advocate vs Bruno Vitus Swalo**, (supra) at page 10, where it was held *inter alia* that;

> *"With due respect, it was not right for the learned Judge to entertain issues which she had already determined in a ruling overruling the preliminary objection, she was therefore functus officio. Be it as it may, we shall leave the matter at that without more. Fortunately both counsel were agreed, and rightly so in our view, that it was improper to raise that issue twice before the same court."*

However, the question when does the court become "*functus officid*" was answered by the Court of Appeal of Tanzania in the case of **Miburo Cosmas vs The Republic,** (supra) quoted with approval the case of **Tanzania Telecommunication Company Limited and others vs Tri – Telecommunication Tanzania Limited** [2006] 1 E.A 393, which also quoted a passage in the decision of the Court of Appeal for Eastern Africa

in the case of **Kamuli vs Republic** [1993] E.A 540 where that court held that,

> *" A further question arises when does the magistrate's court become functus officio and we agree with the reasoning in the* ***Manchester city Recorder case*** *that, this case only be* ***when the court disposes of a case by a verdict of not guilty or by passing sentencing or making some orders finally disposing the case.***"

This reasoning was also adopted by the Court of Appeal in the case of **Maliki Hassan Suleiman vs SMZ** [2005] T.L.R 236 held inter alia that;

> *"A court becomes functus officio when it disposes of a case by a verdict of guilty or by passing sentence or making orders finally disposing of the case, the learned judge became functus officio when he passed the judgment on 19th February 1998 and he was no clothed with necessary jurisdiction to review his own decision subsequently."*

Looking at these two last decisions, they insist on the finality of the order which disposes the case. The defence counsel in rejoinder submitted that, it is not necessary that it be an order disposing of the case, it may be an order disposing of the issue which was decided conclusively. They

submitted that, the issue of admission of the detention register has already been decided by rejecting it, therefore it cannot be brought again.

Now, looking at the arguments by the parties on this point, only one issue can be framed namely; whether this court is *"functus officio"* on the issues of admission of detention register? While the defence argues that since the Detention Register has already been rejected by this court, the court is therefore *functus officio*, regardless the fact that in the previous attempt, it was for identification purpose taking into account that the admission procedures are the same in both cases then. In their view the rejection of the exhibit was a conclusive order.

The prosecution argues that the same is not a conclusive order on the following reasons, **one,** the rejection of the said exhibit based on the inefficiency in the witness evidence laying foundation, thus affecting the competence of the witness, not the competence of the exhibit, **two**, that PW1 was tendering the exhibit for identification purposes unlike in PW2 who is tendering it as an exhibit, **three,** that the rejection of the exhibit is not a final order disposing the case at hand, thus falling short of the requirement of the cases cited herein above. I have compassionately considered both arguments and the followings are the facts that form the

base of this decision. First, from the decisions cited especially those which pointed out the criteria to be considered, for the court to be taken to be "*functus officio*," that is **Miburo Cosmas vs The Republic,** (supra) which relied on **Tanzania Telecommunication Company Limited and others vs Tri – Telecommunication Tanzania Limited** (supra) **Kamuli vs Republic** (supra), and **Maliki Hassan Suleiman vs SMZ** (supra), emphasis on the following;

i) That the court becomes *"functus officio"* when it is established that the matter before it has already been a subject of litigation before the same court and a decision given there at,

ii) The decision must be the one disposing the case by a verdict of not guilty **or by passing sentence or making some orders,**

iii) That the said previous order must have the effect of **finally disposing the case**,

iv) Having given an order finally disposing of the case, the court becomes "*functus officid*" and becomes not clothed with necessary jurisdiction to subsequently review its own decision.

From these conditions, it goes without saying that the order given by this court on 11/11/2021 lack these qualities of making this court to be

"*functus officio*" as it failed to meet an important test which is whether the decision reached, by its nature, has the effect of conclusively determining the proceedings or a case. Not only that, but also even if we go by the argument advanced by Mr, Kibatala that, it is not necessary that, it must be a case, it may also be an issue like in this case where what is in contest is an issue of admissibility, yet still that can not save the objection. This is because the purpose of the prayers by the two witnesses i.e PW1 (TWT) and PW2 (TWT) are different. While PW1 (TWT) asked to tender the Detention Register for identification purpose, PW (TWT) is currently asking the court to admit the Detention Register as an exhibit. In law, exhibits tendered for identification do not become evidence within the strict meaning of the law, as if not tendered as exhibit; it can not be referred and based upon in deciding the case or an issue for which it was tendered.

This means therefore that, tendering and admission of evidence for identification purpose does not bar readmission of the same in the same proceedings as exhibit. This is because if a party wishes the said exhibit to be referred and relied upon as evidence, he must call another witness who is competent to tender as exhibit. Now since its admission for identification does not give it a quality of evidence, unless tendered as exhibit, then

equally so, its rejection when tendered for identification purpose does not bar subsequent admission by the same court as exhibit not withstanding its previous rejection. All these said, it suffices to be held that, this court is not *"functus officio"* in dealing with the admissibility of the Detention Register at hand. Therefore, on that base, the first ground of objection is hereby overruled for the reasons given.

On the point of *"issue estoppel"* I entirely agree that the doctrine is part of our criminal law jurisprudence having been introduced by the Court of Appeal of Tanzania through the case of **Issa Athuman Tojo vs The Republic** (supra) and later by the case of **Julius Michael and 4 others vs The Republic** (supra). The principles in the findings of the Court of Appeal of Tanzania in the two case authorities cited above, entails the following principles which are now part of our law that;

i) Where a court finds that an issue of facts before it has already been tried before it or another competent Court on former occasion,

ii) That in that former occasion the findings have been reached in favour of the accused,

iii) That such findings reached in the former occasion would constitute an estoppel against the prosecution to re introduce the said issue,

iv) That no evidence would be received to disturb those findings of fact when the accused is tried subsequently even for different offence.

The philosophy behind this doctrine is to ensure **first**, fairness to the accused person who should not be called upon to answer questions already determined in his or her favour, **second**, the integrity and coherency of the criminal law, and **third**, the institutional value of judicial findings and economy.

Basing on the principles highlighted above, the defence contends that the issue of admissibility of the detention register has already been discussed and the court has already decided it in the favour of the accused when PW1 (TWT) was testifying. In their view, the Detention Register has already been litigated and an order for its rejection has already been given, therefore the prosecution is estopped to re-raise it again.

Regarding the doctrine of *"issue estoppel"*, as supported by the cited case of **Issa Athuman Tojo vs The Republic**, (Supra), the two State Attorneys invited the court to find that, the case of **Issah Athuman Tojo vs The Republic** (supra) is distinguishable with the fact at hand. In their view, the doctrine of *"issue estoppel"*, can stand when the issue for which the *"issue estoppel"* is pleaded is similar to the previous issue which has already been resolved in the favour of the accused person.

In their opinion, the issue leading to the rejection of the Detention Register when it was tendered by PW1 (TWT), was the failure of the witness to lay foundation as to how the exhibit came to his hand before he tendered the same.

According to them the ruling did not declare the exhibit incompetent, what the court said was that, the witness did not lay a foundation on how the exhibit landed in his hand on that date before he tendered it. It was therefore a competence of the witness to tender it which was declared to be wanting for failure to lay a foundation, not the competence of the exhibit.

As already alluded herein above, there is no dispute that the said detention register, was really tendered for Identification purposes and rejected on the ground that the witness failed to lay a foundation on how the exhibit reached in his hand before he tendered it.

Looking at the authorities in the cases of **Issa Athuman Tojo vs The Republic** (supra) and **Julius Michael and 4 Others vs The Republic** (supra) they give general principle on the applicability of the doctrine of *"issue estoppel"* in Tanzania, now their interpretation depends on the facts and context of the case and facts before the court. As earlier on pointed out when deciding the concept of "*functus officid*", in order for the doctrine of "*issue estoppel*" to apply, the issue tried and decided by the competent Court in the former occasion must be exactly the same, in nature, substance and context with the later issue.

Looking at these three aspects, it goes without saying that the nature, substance and context of the former prayers for admission of the said exhibit, objection raised and the order which upheld the objection are different. While in the former the tendering of the Detention Register was intended to be for identification purpose, in this matter the tendering is intended to be for admission of the Detention Register as exhibit.

It should be noted as earlier on shown that, an item tendered for identification does not acquire status of evidence and cannot be used as such. It may only be used as evidence after it has been tendered by the competent witness as an exhibit in that same case in which it has already been tendered for identification.

This means that, the tendering of exhibit for identification is never conclusive, equally so, its rejection can never be conclusive and therefore the doctrine of "*issue estoppel*" cannot apply on it against the prayer of the same evidence to be admitted as exhibit. Therefore this point also lacks merits and is overruled for the reasons given.

Having resolved the two issues in the negative, I go back to an issue of the lack of disposal order. Under this objection, the contention is that, since the detention register was tendered and admitted as exhibit in the trial within trial in respect of the cautioned statement of the 2nd accused person, then the same could not be taken from the court without an order being issued by the Court, in that respect in terms of section 353(3) of the Criminal Procedure Act, (supra). It is also their contention that, the Deputy Registrar had no power to issue the said exhibit without there being a disposal order. In their view further, they also contended that, the

procedure adopted by the Deputy Registrar in issuing the said Detention Register is contrary to the procedure of handling the exhibit provided by the Exhibit Management Guideline issued by the Judiciary of Tanzania, in 2020.

The other ground which in their opinion necessitates the disposal order is the fact that, the said exhibit was tendered in a trial within trial proceedings in respect of the 2nd accused which was concluded on 20th October, 2021 and trial within trial being a completely separate proceedings then, the exhibit was supposed to be disposed from the said proceedings before the same is tendered in these proceedings.

In further cementing on the issue of lack of disposal order, they said in essence section 353(3) of the Criminal Procedure Act, (supra) intends to establish the chain of custody, especially on the exit of the exhibit. They insisted that there were supposed to be a disposal order before the Deputy Registrar had handed over the exhibit to the prosecution, and the Deputy Registrar has no power or jurisdiction to give the disposal order of the exhibit. In their opinion, the Deputy Registrar was either misled or she misconstrued the law but that can not validate the exhibit.

They reminded the court of the Exhibit Management Guideline cited and asked the court to read the guideline on the issues relating to admission, disposal and rejection of the exhibit, which its procedure of handling has already been provided for. They asked the court to look at the exhibit register attached on the Exhibit Management Guideline and the requirement of exhibit disposal order in one column in the register something which shows that the disposal order is indispensable. Regarding the authority in the case of **Abasi Gede vs The Republic** (supra), they asked the Court to find it to be irrelevant and distinguishable.

In the submissions in reply, the prosecution argued that, the procedure adopted in collecting the exhibit is correct and that the exhibit was not supposed to be subjected to the normal procedure of disposing the exhibit provided under section 353(3) of the Criminal Procedure Act, (supra) and the Exhibit Management Guideline. The submission was based on the argument that, the purpose for which the exhibit was sought and issued by the Deputy Registrar is for retendering it in the court proceedings in the same case. The seeking of the same did not at all intend to be returned to the owner. They submitted that, the same can be proved by a letter from the Deputy Registrar to the National Prosecution Services Office

exhibit P1 (TWT). That is also supported by PW2 (TWT) who in his oral evidence said how the exhibit was tendered, admitted in the proceedings which was in respect of the 2nd accused, and later requested for purpose of being retendered in this trial within trial. They argued that, there is no point where it has been alleged that, PW2 (TWT) is in that aspect unreliable. In that regard, they cited the case of **Abas Kondo Gede vs The Republic,** (supra)**,** where it was held that, oral evidence is also sufficient to prove any fact if the same is worthy of belief. In their view, the fact that there is no disposal order cannot be a bar for admission of exhibit.

In their view, the exhibit at hand and the purpose for which the same was sought does not fall under the process envisaged under paragraph 19.4.3 of the Exhibit Management Guideline as the same deals with the disposal of exhibit after finalization of the case. In their respective view, in the situation at hand, the said exhibit was asked for purposes of tendering the same in the same case.

Regarding the allegation that, there cannot be a gate way where an exhibit can be given out without a disposal order, the learned Senior State Attorneys submitted that since the trial within trial proceedings are still in

the in main case and are conducted under the same case number that is Economic Case No. 16/2021 which is still going on, and the exhibit is intended not for disposition but for retendering it in the same case. The method used to request the said exhibit from the Deputy Registrar was proper. Regarding the allegation that, the Deputy Registrar has no authority to issue the exhibit, they submitted that, exhibit can be re-obtained from court by either a court order or administrative process and the component of administrative process is supervised by the Deputy Registrar. They also reminded the court that, trial within trial proceedings are still paged to the main trial, and its purpose is just for admissibility or otherwise of the cautioned statement.

In support of their contention they cited the case of **Khatib Ghandi vs The Republic**, [1996] T.L.R 12, where it was held that, issues arising out from trial within trial may be used in the main trial, that means that, trial within trial is part of the main trial. They submitted further that, at the admissibility stage, the criteria to consider are three that is, competence, materiality and relevance, what is important, is for the witness to show how did he come by an exhibit. In their view PW2 (TWT) which he clearly stated that he obtained the exhibit after requesting it from Deputy

Registrar who is the manager of the case file the exhibit inclusive. According to them, in this case this court had once ruled that, the exhibit may also be asked through administrative process.

While winding their submissions, they argued that, the arguments by the defence that, even though the document is authentic, the Deputy Registrar has no power to issue the exhibit, is a clear admission that the document is authentic; there is no point they can come back and argue that, the document is not admissible.

Now from the rival arguments advanced by both parties, the main issue for determination is whether, without the order disposing the exhibit, (a Detention Register,) from the proceedings of trial within trial of the 2nd accused the said Detention Register is inadmissible. The court has been moved to find so under section 353(3) read together with the Exhibit Management Guideline, 2020 by the Judiciary of Tanzania. To appreciate the import of these two laws, I find it apposite to reproduce them for easy reference as follows;

Section 353(3), CPA

"Notwithstanding the provisions of subsection (1), the court may, if it is satisfied that it would be just and equitable so to do, order that anything tendered, or put or intended to be put in evidence in criminal proceedings before it should be returned at any stage of the proceedings or at any time after the final disposal of such proceedings to the person who appears to be entitled thereto, subject to such conditions as the court may see fit to impose."

It is incumbent that, an exhibit once tendered in court is expected to remain under the custody of the court up to when it will be disposed by the same court by an order of the court under the condition stipulated under section 353 of the Criminal Procedure Act (supra).

Once admitted in court, the procedure through which the same is controlled and managed is provided under the Exhibit Management Guideline, issued out by the Judiciary of Tanzania in 2020.

Under that guide, the exhibit is placed under the control and management of the Registrar or Magistrate in charge depending on the level of the court in which the exhibit was tendered. That judicial officer will under item 4.2 (f) appoint in writing an employee who shall be responsible for day to day control and management of the exhibit room.

Further to that under 4.2 (c) these Judicial Officers are given the control and management of the exhibit role as follows:

4.2 (c)

> *"The Registrar or Magistrate in charge shall inspect the exhibit registers at the end of every month for purposes of ensuring* ***existence of the exhibits*** *and* ***disposition where necessary****." [Emphasis added].*

The procedure for disposal of the exhibits under the Guideline, is provided under Chapter Four item 4.3 which reads as follows:

> *"Disposal of exhibit is done at the conclusion of the trial or appeal as indicated by the CPA. Disposal aims at insuring that, an exhibit has met the retention schedule. However, under special circumstances disposal can be done before or during trial as indicated bellow:*
>
> *(a) The court shall give disposal order in respect of exhibit tendered in court and if not disputed shall be returned to the lawful owner until needed by the Court,*
>
> *(b) The court shall give disposal order in respect of exhibit that was tendered in court immediately after completion of the trial or appeal or on expiration of appeal time (where there is no appeal)*

(c) The court order shall directed exhibit tendered be returned to the lawful owner, destroyed, sold and or forfeited to the government;

(d) During monthly inspection of the exhibit room, the court shall determine exhibits eligible for disposal or destruction, and

(e) A 30 days' notice of intent to dispose of exhibits be issued to the state Attorney office seizing agency defence counsel and victims or accused person. lawful owner until needed by the Court".

This part of the Guideline give effect the provision of section 351(1) and is also the stand of the law as held by the Court of Appeal of Tanzania in the case of **Song Lei vs The Republic and the Director of Public Prosecutions vs Xiao Shaodan & 2 Others,** Consolidated Criminal Appeal No. 16 "A" of 2016 and No. 16 of 2017.

Reading between lines the provision of section 353(3) and the Guideline, I entirely agree with the defence counsel that the Registrar or his Deputy has no power to issue the disposal order of an exhibit tendered in court. The powers vested to him is to control and manage the exhibit, he is also empowered to dispose the exhibit where there is a disposal order

with the mode of disposal directed by the order for disposal issued by the Court.

It is also the stand of the law that the disposal order must be given at the end of the case or expiration of appeal time where there is no appeal, or where the return of the exhibit to the owner has not been disputed.

It is also the stand of the law as indicated under item 4.3 (c) that the order for disposal should be confined to the following directives either that the exhibit be returned to the owner, or destroyed, or sold and or forfeited to the government.

Basing on operative principle highlighted by Mr. Jeremiah Mtobesya in his rejoinder submissions in relation of the status of the trial within trial vis a vis the main trial, I agree with the counsel for defence that, trial within trial is separate proceedings on the criteria they highlighted in their arguments. However, though separate, the proceeding still bears the case number of the main case, if I may add, to prove that they are not completely separate, in case of an appeal to the Court of Appeal of Tanzania, a record of appeal cannot not be said to be complete where the

record of trial within trial is missing. In the circumstances where the exhibit was sought for being retendered in court in the same case but separate proceedings of trial within trial, the issue of the same by the Deputy Registrar cannot be said to be disposal of the said exhibit as alleged. This conclusion is supported by the provision of chapter four, item 4.4.2.8 off the Exhibit Management Guideline, 2020 which clearly direct what is to be done in case one exhibit needs to be used in two cases or even in two different courts? The Guideline provides as follows;

"4.4.2.8. Exhibit in more that one Case or Court

(a) The court shall take note, in the register of the exhibits used in more than one case or court;

(b) Exhibit used in more than one case or court may be stored in court where the exhibit was first admitted; and

(c) The last court where the exhibit was admitted shall order disposal upon determination of the case."

As held in the case of **Song Lei vs The Republic and the Director of Public Prosecutions vs Xiao Shaodan & 2 Others**, (supra)

This part leads us to the conclusion that, where the exhibit is used in more than one case, it is not necessary that before being used in the second case the person in need of using it must secure a disposal order, it

can be used as evidence in other case or even before other court without the disposal order in the first case/court. That means he may obtain it by administrative arrangement made by the controller and a manager of the exhibit, who would note that movement in the register waiting for a disposal order to be made by the last court to admit it.

That said I would hold that the disposal order is not necessary for admission of this Detention Register at hand, the issue of the said exhibit by the Deputy Registrar was correct and justified by law. This objection also fails for the reasons given. Thus making all three points of objection raised to fail, consequence of which the Detention Register of Central Police Station, PF20 with mark 12 of 2020 is admitted and marked as exhibit P2 (TWT).

It is accordingly ordered

DATED at **DAR ES SALAAM** this 22nd day of November, 2021

J.C. TIGANGA

JUDGE