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

20th December, 2021 & 10th January, 2022

TIGANGA, J

This ruling intends to determine the objections raised by the defence counsel against the admission of the physical exhibits which are mainly clothes and one exercise book allegedly seized from the 1st accused, Halfan Bwire Hassan.

The objections were raised by the defence counsel against the prayers made by PW8, SP Jumanne Malangahe, to tender the said exhibits for admission. Before tendering exhibits, PW8 testified that, he conducted

search in the house in which the 1st accused was residing at Yombo Kilakala. That search was witnessed by Obas Lupakonga, the street leader, Tumaini John Chacha, the wife of the 1st accused and Mariam Hamis, the Land lady of the 1st accused. It is evident that, after conducting search, he filled in the certificate of seizure, exhibit P14 which was signed by the above mentioned witnesses and in that exhibit he listed all the items he seized.

According to him, he seized three Olive Green trousers of TPDF, a trouser of JKT, three combats shirts of TPDF, one shirt of JKT, three Olive Green shirts, three combat shirts, one rain coat with combat colour, one jacket combat of TPDF, five Combat caps five, four being of round shape with, one of normal shape, name tags of Hassan HB, four Corporal ranks, one of the MP, two Ponjoo, one has combat ponjoo colour, the other one is green, the fire arm cleaning kits which have items for cleaning fire arm, these have iron roads for cleaning fire arms, the second fire arm cleaning kit which has one brush and two iron roads for cleaning fire arm, One military overall with a combat colour, one exercise book with a mark of five star, "Five" is in red colour while "Star" is in grey colour.

He said after that seizure, he marked all exhibits X/HB, each, and handed over the same to Sgt Johnston, a person he identified as the exhibit keeper of Central Police Station. However, on 15/12/2021 after receiving the summons from the court, he went to Central Police Station, took the said exhibits from Sgt Johnston, moved them to the former CID HQ, Dar Es Salaam, where he kept them in a room which he was given and on 17/12/2021, the date he was summoned to testify in court, he took the exhibits with him and kept them in the prosecutors' room before he started testifying.

Of all items listed in exhibit P14, the red notebook listed as item 8 which had names and the account number of the 1st accused person was not tendered for admission. The reason why it was not tendered, PW8 said in his assessment the same did not relate to the case at hand. Before he tendered the exhibits, he identified them by their colour, names and the mark X/HB which he personally inscribed on each exhibit.

On tendering the exhibits, the defence side through four defence counsel namely Mr. Nashon Nkungu, for the 1st accused, Mr. John Mallya, for the 2nd accused, Mr. Dickson Matata, for the 3rd accused and Mr. Peter Kibatala, for the 4th accused objected the admission. However, since some

of the issues have been raised and argued by more than one Advocate, therefore for avoidance of repetition in this ruling, I will go by issues as raised and argued.

The objections are centred on the admissibility of the physical and documentary exhibits. They are rooted on two main limbs namely, the chain of custody and competence of both, the witness and the exhibits sought to be tendered.

The concept of admissibility is not new in this court, particularly in this case, for on a number of occasions, the objections on the admission of exhibits have been raised, argued and decided by this court.

Form the past experience, I find it apposite to start with the general principle of admissibility of exhibits in court as expounded in the cases of **The DPP vs Shariff Mohamed @ Athuman & 6 others**, Criminal Appeal No. 74 of 2016 – CAT (unreported) **Republic vs Charles Abel Gasilabo @ Charles Gazilabo & 3 Others**, Criminal Appeal No. 358 of 2019, that the criteria to be considered in admitting the evidence are relevance, materiality and competence, the competence being of both, the exhibit or evidence itself and that of the witness who is tendering the evidence.

Under the criterion of competence, the test is through the process called authentication. Under that process, the competence of the exhibit can be determined in three ways, **first**, by identification of a unique feature on the exhibit, **second**, by identifying a feature which was made unique or **third,** by establishing a chain of custody. This means therefore that, though the objections in this case have been purportedly raised under the two limbs, of chain of custody and competence, they are all in fact under the limb of competence. However, for easy floor in this decision, I will adopt the style opted by the counsel for both parties in arguing for or against the objection. In that manner, I will start with the limb of chain of custody.

Under the limb of chain of custody, there are a lot of grounds raised by all four defence counsel who represented the whole defence team. However, in my endeavour to resolve the same, I will combine the arguments by each defence counsel on the similar ground raised.

On the general concept of chain of custody, I entirely agree with Mr. Nashon Nkungu, learned counsel for 1st accused who started by reminding the court that, the principle of chain of custody in criminal cases intends to make sure that the exhibit seized should remain the same from when it

was seized up to when it will be tendered in court. It is also the stand of the Court of Appeal of Tanzania in the case of **The Republic vs Shariff Mohamed @ Athuman** & **6 Others** (Supra). The doctrine intends to explain the whereabouts of the evidence at all times from when the evidence was made or seized or dealt with up to when it is tendered in court.

Under this limb of chain of custody, the first complaint raised is that the exhibit sought to be admitted is altered. The complaint is based on the fact that, one of the exhibits that is a red notebook listed as item 8 in exhibit P14, which was seized and committed together with the exhibits sought to be admitted during committal proceedings, has not been tendered in court along with the exhibits which were seized and committed together.

On that point, it has been submitted by the defence that, failure to tender the same affects the chain of custody. The base of that argument is that, the removal of the exhibit in the list was done without following the procedure therefore making the exhibits sought to be tendered to be not the way they were seized.

According to them, the procedure of parting with the exhibit is provided for under section 22(4) of the Economic and Organised Crimes Control Act, [Cap. 200 R.E 2019]. That law requires that if the seizing Police Officer finds that, the exhibits he seized does not relate to the case, therefore will not be used as evidence in court, to return the said exhibit to the owner.

In their view, PW8 did not tell the court where he took the red notebook to therefore failure so to state imputes an assumption that, the exhibit was parted with without following procedure. Therefore, removing the said notebook without following procedures under the law broke the chain of custody of the exhibits as the exhibits are not the way they were seized. In further supporting their argument they cited PGO 229(2) (a), which also gives directives to the Police Officer seizing the exhibit to be responsible for the exhibit up to when he tenders it in court or returns it to the owner.

Further arguing on that ground, they submitted that, the said red notebook was seized because the police believed the item to be connected with the commission of the offence. In their view, the exhibits were supposed to be tendered in court as they were seized therefore tendering

other exhibit leaving the red notebook is tantamount to altering evidence. From the defence team, Mr. Mallya rhetorically asked that, was there content in the notebook which negates the liability against the 1st accused? In their view, that leaves a number of questions unresolved which they asked to be resolved in the favour of the accused person.

They submitted further that, when the search and seizure as well as the consequential listing of the exhibits in exhibit P14 was done, PW8 had three other witnesses who witnessed search, but when PW8 decided to alter the evidence he was alone. In their view, in the absence of the witnesses who witnessed search and seizure, the said action of omitting or excluding such red notebook should benefit the 1st accused. They in the end submitted that, the evidence which is committed to the High Court must as whole be submitted before the High Court.

Arguing against that ground, Mr. Robert Kidando, SSA submitted that, the defence counsel have missed the point on the substance of the provisions of the Exhibit Management Guideline, 2020 and the principle of the chain of custody. In support of his argument he submitted that, PW8 managed to tell the court the reasons why he did not tender the red notebook which is listed as item 8 in exhibit P14. In his opinion the

arguments that non tendering of the said notebook broke the chain of custody finds no refuge especially in the circumstances where the reasons as to why PW8 did not tender the said exhibit has been given. He submitted that section 22(4) of the EOCCA, relates with the return of the seized exhibits, it is never the condition of admissibility.

On this ground, both parties are in agreement that the red notebook was seized and listed as item 8, in exhibit P14, and was not tendered in court when other exhibits seized along with it were tendered. From the evidence, it can be gathered that, PW8 said that, he did not tender the said red notebook after realising that, it was not related to the case. On the other hand, the defence contends that its non tendering is illegal and breaks the chain of custody of the exhibits because failure to tender it is tantamount to altering the evidence.

That is based on the defence view that, once the evidence has been committed to the High Court, that evidence must as a whole be tendered to the High Court. However, this argument has not been supported by any statutory provision or case law providing to that effect. What was said is that, PW8 did not comply with the law requiring him to return the said

exhibit to the owner that is PGO 229(2)(a) and section 22(4) of [Cap. 200 R.E 2019]

With due respect to the defence, I find this point misconceived in that, what we are dealing with here in court is the admissibility of the exhibits tendered in court, not whether the exhibit which has not been tendered was returned or not returned to the owner.

It should further be noted that, section 246 of the Criminal Procedure Act, [Cap 20 R.E 2019], read together with Rule 8 of the Economic and Organised Crime Control (The Corruption and Economic Crimes Division) (Procedure) Rules, 2016, provide that, what is committed from the subordinate Court to the High Court is the information, as well as the statement or documents containing the substance of the evidence of the witnesses whom the Director of Public Prosecutions **intends to call at trial**.

In general terms, it can be said that, at committal, what is committed is the evidence (the statement of the witnesses and the exhibits) which the DPP intends to rely on during trial. That means, it is not mandatory and there is no law which compels the DPP to call all the witnesses whose

statements were committed to the High Court, or to tender all the exhibits listed and committed to the High Court.

Further more, from the law and practice, the DPP may call or tender them all or call and tender few of them depending on how he assesses his case, taking into account the burden and standard of proof as provided under sections 110, and 114(1) read together section 3(2)(a) of the Evidence Act, [Cap. 6 R.E 2019].

That said, it cannot be argued therefore that, a decision of the prosecution not to tender any exhibit committed by the subordinate court to this court, which was seized along with others exhibits, breaks the chain of custody of the exhibits sought to be tendered. Therefore, the provisions of section 22(4) of the Economic and Organised Crimes Control Act, [Cap. 200 R.E 2019] and PGO 229 (2) (a) in as far as the admissibility and chain of custody is concerned, have been cited out of context as these deal with the return of the exhibit to the owner. If the defence really think that the exhibit left may be of beneficial to their case, they are not bared to ask for it and tender it in their defence case. This leads, to a conclusion that, the objection was misconceived and thus, overruled for want of merits.

As earlier on pointed out, under this limb, a number of grounds of the objection have been raised. For purposes of brevity I would deal with them together. On those grounds, I will start with the complaint that, the movement and storage of the exhibits from one place to another is also doubtful. According to them, the doubt is rooted on the fact that, the law requires a Police Officer arresting or seizing the exhibits to record the movement of that exhibits.

In their view, under PGO 229(4) (c) the particular of the movement of exhibits should be recorded in a Notebook, the requirement being aimed at safeguarding the movement of exhibit to make sure that, the chain is not in any way broken until the exhibit is tendered in court.

It was submitted in support of the objection that, though PW8 said the exhibits were kept in the prosecutors' room, he did not assure the court about the safety of the exhibits when he left them in the room used by the prosecutors. Further more, according to them, PW8 did not tell the court how the exhibits moved from the prosecutors' room to where he was in the witness box.

The other point of objection under this limb is that PGO 226(10), provides that the keys of the exhibit room must be kept by OC station, (OCS) or an officer appointed by him in writing, he said that, PW8 did not say, who is Johnston, was he the OCS or the officer appointed by OCS to keep the exhibit and the keys.

While countering the arguments by the defence, Mr. Kidando, SSA submitted that, even in this ground the counsel have missed the point on the substance of the provisions of PGO 229 (4) (a) and the Guideline in relation to the principle of chain of custody. In support of his arguments, he submitted that, PW8 said in his evidence the way he seized the items, took them to the exhibits keeper of the Central Police Station, whom he identified to be Sgt Johnston, collected them on 15/12/2021 from the said Sgt Johnston, kept the said exhibits in a room he was given at the former CID HQ for some days before he came with the said exhibits in court on 17/12/2021.

Mr. Kidando, SSA argued that, in the premises, the evidence cannot be doubted at this stage, because the evidence by PW8 has not been tested either by cross examination or evidence in rebuttal. He submitted that, at this stage of admission of exhibits, the arguments raised by the

defence have no legal stand point, as they cannot challenge the chain of custody in the situation where PW8 has given evidence of what happened regarding the movement of the exhibits.

Further more, still on the same objection; Mr. Kidando, SSA submitted that, PW8 said it all in his evidence, on how he came with the exhibits in court and where he kept them before tendering the same in court. On that account he asked the court, to revisit the evidence of PW8 on record.

Regarding the arguments that, PW8 did not say who was in control of the room in which PW8 temporary kept the exhibits while here in court, he submitted that, this kind of argument is very weak especially after looking at the role played by PW8 in this case and what the Advocates have complained about.

Concluding on the point, the learned SSA submitted that, this is not an objection as such in the eyes of the law; he prayed the court to disregard it. He further urged the Court to find that, given the nature of the exhibits sought to be admitted, they cannot be easily changed or

tampered with, because the witness has already said how and when he seized them, where he kept them and how he brought them to court.

Regarding the failure to exhibit the notebook showing the record of transfer of the exhibit, the learned SSA submitted that he said the notebook is not the condition of admissibility of the exhibits.

In support of his submission, he cited the case of **Illuminatus Mkoka vs The Republic** [2003] TLR 245 to the effect that, the submission by counsel is not evidence. On the basis of that authority, he submitted that, PW8 has managed to tell the court in his evidence under oath that the exhibits he seized are those he is tendering, therefore his evidence cannot be watered down by the submissions made by the defence counsel, as their submissions are not evidence.

In further buttressing the point, he referred the Court to the authority in the case of **Kennedy Elias Shayo and Another vs The Republic**, Criminal Appeal No. 84/2017 – CAT Arusha, at page 31 & 32 of the judgment. He submitted and asked the court to find that, the exhibit of this nature cannot be easily tampered with and prayed for the court to find that PW8 has proved that in his evidence. He also asked the Court to find

that, chapter three, paragraph 3.8 of the Exhibit Management Guideline, 2020 is not the only part which provides for the principle which guides admissibility; he reminded the court of the existence of chapter three paragraph 3.2 which provides for general principles which guide the court in admissibility of the evidence which are relevance, originality and authenticity.

In his conclusion on the ground of the chain of custody, he asked the court to find that the defence counsel in all their arguments did not allege that the search was not conducted or that the exhibits were not seized, or that the items listed in Exhibit P14 are different from what are being tendered in court. Therefore he asked the court to find that, the objections based on chain of custody have no legal base, they be overruled for the reasons he has given and the court proceed to admit the said exhibits to be evidence in court.

On rejoinder, the defence counsel insisted that PGO 229(2) (a) and PGO 229 (4) (c) are very clear and they intend to make sure that the chain of custody is established; therefore they should be adhered to. According to them, the provisions require that, the movement of the exhibits must be recorded in the notebook. In their view, chapter three, paragraph 3.8 of

the Exhibit Management Guideline, 2020, requires chronological paper trail and that the prosecution has not established the paper trail chain of custody. According to them the oral account of PW8 cannot substitute the paper trail requirement as conditioned in paragraph 3.8 (f) (v) (vii) of the Guideline.

They submitted that, the authority in the case of **Illuminatus Mkoka vs The Republic,** (supra), was also relied upon in the decision of the High Court in the case of **Mayala Mbiti vs The Republic,** criminal Appeal No. 177 of 2019, its principle is very much in support of the defence as held at page 6 that, doubts in establishing chain of custody should be resolved in the favour of the accused person. They asked this court to do similarly in this case.

Regarding the case of **Kennedy Elias Shayo & Another vs The Republic**, Criminal Appeal No. 84 of 2017, they prayed the court to find that, the items sought to be admitted are ones of the items which are easily tampered with, that is why PGO 229(10) was enacted because the legislators anticipated the possibility of the clothes to be tampered with. Therefore PGO 229 provides for special and unique procedure of putting a

mark on the exhibits which are clothes. In their opinion the provision of the PGO 229 (10) is part of pre-trial process of authentication of exhibits.

On the issue of non compliance with the PGO 226(10), they insisted that the keys of the exhibits room must be kept by OC station, or an officer appointed by him in writing, he said that PW8 did not say, who is Johnston, was he the OCS or the officer appointed by OCS to keep the exhibits and the keys.

On whether the accused was prejudiced or not, they submitted that, the PGO is about the public policy, therefore noncompliance with the same affects the whole society and an individual, thereby causing prejudice. In sum-up, they asked for the Court to find that, the chain of custody has not been established.

On these grounds, I find it once again apposite to say a word on this concept of the chain of custody as the concept in criminal law and the law of evidence, Chapter three paragraph 3.8 of the Exhibit Management Guideline, 2020 defines the chain of custody to mean, the sequential order with which a piece of evidence is handled while the case is under investigation. It is the chronological paper trail showing how the exhibits

are collected, handled, analysed or otherwise controlled from seizure to exhibition in Court for admission.

That process is subjected to the requirement of so many laws, to mention some of them, is section 38 of the CPA, section 35 of the Police Force and Auxiliary Services Act, Cap 322 of the laws, section 22 of the EOCCA and PGO 229. The concept of the chain of custody denotes the normal concept of the chain we know, for we know that, a chain is a series of a linked metal rings joined together, if one of those metal rings is broken, then the chain is said to have been broken.

In the legal context, it is a sequence of all evidence of all people who dealt with the said exhibits from when it was seized up to when it is tendered in court. Therefore the chain of custody cannot be established or be taken to have not been established by a single witness and before the prosecution has closed its case. That is why the Court of Appeal of Tanzania, in the case of **The Republic vs Charles Abel Gasirabo @ Charles Gazilabo & 3 Others** (supra) at page 17 held that,

> *"As regard to the third ground, on the issue of the chain of custody, we are in agreement with Mr. Mbagwa that, the same can be in whatever*

circumstances, conveniently established upon close of the prosecution case and not otherwise. We as such, reiterate what we have said in the ***DPP vs Kristina d/o Biskasevskaja,*** *(supra). We are therefore of the respectful opinion that the learned trial Judge slipped into an error when he found that the chain of custody could have been established at that stage. We thus find the third group of the appeal to have merit as well."*

In the case of **DPP vs Kristina d/o Biskasevskaja,** Criminal Appeal No. 76 of 2016, CAT, Arusha at page 5 and 7, where it was argued and held that;

"Addressing the issue of chain of custody featured in the trial within trial court ruling, the Senior State Attorney briefly stated that, chain of custody cannot be decided by one witness and in the middle of his testimony. He submitted that the issue of chain of custody is resolved at the end of the prosecution case and not before..... we are in agreement with the learned Senior State Attorney that this issue can be in whatever circumstance conveniently established upon close of the prosecution case and not otherwise. On that basis we are of the view that the exhibit was wrongly rejected. The appeal is therefore allowed."

The complaint upon which the defence has based their objections is that there is only oral evidence as opposed to the paper trail or documentation of the chain of custody of the exhibits. On this aspect, I entirely agree that there is no paper trail or documentation. However, it is now the law as indicated in the case of **Abas Kondo Gede vs The Republic**, Criminal Appeal No. 472 of 2017

> *"However, as the Court stated in Joseph* ***Leonard Manyota vs. The Republic,*** *Criminal Appeal No.485 of 2015;* ***Kadiria Said Kimaro*** *(supra) and* ***Chacha Jeremiah Murimi and Three Others vs. The Republic,*** *Criminal Appeal No.551 of 2015 (unreported), documentation will not always be the only requirement in dealing with exhibits. Thus, the authenticity of exhibit and its handling will not fail the test merely because there was no documentation. It follows that, depending on the circumstances of every particular case, especially where the tempering of exhibits is not easy, oral evidence will be taken to be credible in establishing the chain of custody concerning the handling of exhibits."*

The other decision of the Court of Appeal regarding how the chain of custody and the way to establish it is the case of **Anania Clavery Betela**

vs. The Republic, Criminal Appeal No. 355 OF 2017, CAT- Dar es Salaam, while relying on the authority in the case of **Joseph Leonard Manyota vs. The Republic,** Criminal Appeal No. 485 of 2015 (unreported) observed that that:

> *"It is not every time that when the chain of custody is broken then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."*

These are the authorities of the Court of Appeal of Tanzania, the highest court of this country which under the principle of *stare decisis* binds all courts bellow the Court of Appeal, including this court. It should also be noted that, these decisions were given by the Court of Appeal of Tanzania in the above cited and referred to cases while interpreting some provisions of the laws which govern the chain of custody. One example is

that, at page 15 of the decision of **Anania Clavery vs. The Republic** (supra) is PGO 229.

This means therefore that, while these decisions the Court of Appeal was aware of the existence of these provisions of the law above referred. The decisions are the true and current interpretation of all provisions governing the doctrine of the chain of custody. Now from these two sets of authorities one set insisting that the chain of custody cannot be established by the evidence of a single witness, but can *be in whatever circumstance conveniently established upon close of the prosecution case and not otherwise,* the second set being that, *not every time when the chain of custody is broken then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature,* looking at the evidence given by PW8, who said that after seizing the exhibits, he took them and handed them over to the exhibits keeper of the Central Police Station, Sgt Johnston. Although he did not say that Sgt Johnston was appointed by the OCS to keep the keys of the exhibit room, but he said he is the exhibit keeper who definitely was appointed by the appropriate authority. He also said how he collected the said exhibits from Sgt

Johnston and where he kept the same up to when he tendered them in court.

It is obvious that, it is not only PW8 who dealt with the exhibits, there were other witnesses who dealt with the exhibits one of them being Sgt Johnston, therefore it is not proper at this stage to rule that there is no chain of custody established, consequence of which, reject the exhibits at this stage basing on the principle of chain of custody.

Before I wind up, I find it also important to say a word on the two authorities cited to me by Mr. Kibatala learned counsel for the 4th accused, that is **Illuminatus Mkoka vs The Republic,** (supra), which was relied on the this Court in the case of **Mayala Mbiti vs The Republic,** (supra).

I agree with him that the authorities are good laws; however they were made when the court was discussing the substance or probative value of the evidence after assessing the entire evidence by the prosecution, unlike in this case where they are applied to determine the criteria of admissibility of the exhibits. In my considered view, they are prematurely applied as the context in which the principles contained

therein were made differs from the context at hand. I thus find the objections to be devoid of merit and they are hereby overruled.

From there, I now turn to the second limb of the objection that is the competence of the witness and that of the exhibit. On this, limb, I will start with the complaint that, when PW8 was tendering the exhibits he out rightly said that, the exhibits were uniforms belonging to Tanzania Peoples Defence Forces commonly known by its acronyms as (TPDF) and National Service of Tanzania commonly known as (JKT). However, since PW8 has not tendered evidence to prove that he is an expert in identifying the uniforms or items belonging to the TPDF and JKT or that, he took the items to TPDF and JKT for identification and certification by the two armies that the items belongs to them.

Further buttressing the point, the learned defence counsel submitted that, the exhibits sought to be tendered are complex and they are not the ones which any one can just mention or tender, but only the person who is competent. In their view, without such certification from the two armies, the competence of PW8 is questionable, therefore he has no capacity to tender the exhibit and to prove or allege them to be the properties of TPDF

and JKT. Furthermore, it was submitted that, PW8 did not show any unique feature which is inherent.

Still on that point, **Mr. Mallya**, Advocate, for the 2nd accused submitted that, the exhibits were not properly identified by PW8, in that the items sought to be admitted are seemingly military items, and in military they have their particular names. However, PW8 did not name them by using their proper names, therefore the accused were not properly informed for their proper naming is important.

He gave example that, the item which in military terms is called Ponjoo, its English name is a rain coat, therefore in his view, the rain coat and Ponjoo is one and the same item. He went ahead and said that, what PW8 identified to be ponjoo, are not actually ponjoo but are sleeping bags. Therefore, PW8 has not identified them the way they were supposed to be named. He named them wrongly.

The Court was reminded that, the exhibits tendered by PW8 are those listed in exhibit P14 in which there is no sleeping bags listed and even in the testimony of PW8 he did not mention and identify the items as sleeping bags. He submitted further that, the naming of the exhibit is very

important because before a witness has tendered exhibits, he must show that he has knowledge of the same.

Furthermore, he said the evidence by PW8 that the items are properties of TPDF, without explanation as to why he reached to that conclusion is also an indication that the witness has no knowledge of the exhibit.

Further insisting on the competence of PW8, it was submitted that, PW8 did not lay foundation to make himself and the exhibits competent. Their contention is that PW8 said conclusively that, the items are the property of the TPDF and JKT but has not told the court the base of that conclusion. He has not laid a foundation that TPDF and JKT are the only armies which use these items in the World or given peculiar feature or code to differentiate these items, with those used in other countries in the World. They asked the court to find that PW8 has failed to lay a foundation which would have justified his competence and the competence of the exhibits for them to be received in evidence. In his view, the exhibits and the witness are both incompetent, therefore the exhibits be rejected for the reasons given.

While responding on the ground of the competence of PW8, in tendering the exhibits at hand, as raised by defence counsel, Mr. Kidando submitted that, PW8 is a competent witness to tender all the exhibits sought to be admitted. According to him PW8's competence is derived from the job he did, as the search and seizure officer of the said items. He submitted that, at this stage of admission there is no need to show expertise in the identification of the items, what is important is that, PW8 is the seizing officer of the exhibits, therefore he has knowledge of the same sufficient for tendering the exhibits.

According to him, at this stage of admission, it is enough to identify the exhibits by colour and physical appearance as PW8 did. It is his submission further that, PW8 went as far as showing the marks X/HB which he labelled, for purposes of assisting him to identify the items. He said on the allegation that PW8 did not say at what stage he put the mark or label X/HB he said that the witness said, he did so after the seizure and the signing of the certificate of seizure was over.

Regarding the argument that, the items sought to be admitted may be found at any place and that PW8 was required to show that items were identified by TPDF or JKT, before saying conclusively that the items were

the properties of TPDF or JKT, therefore he be declared to be incompetent he submitted that, that is not the domain of admissibility and it is not the requirement of the law.

Regarding the arguments by Mr. John Mallya went as far as submitting that, what PW8 named as rain coat is the rain ponjoo and the one he named as a ponjoo are just sleeping bags.

Mr. Kidando, SSA, asked the court to find that, the learned defence counsel have misdirected themselves on the following grounds; first that, the issues which they raised are factual; they cannot be relied on at this stage of admissibility, because these facts were supposed to be brought by way of evidence. Second, by his acts of giving names to the items the counsel is giving evidence in disguise, therefore his submission cannot substitute the evidence given on oath by PW8.

He submitted further that, the issue of the competence of the witness has already been dealt with by the Court of Appeal in **The Republic vs Charles Abel Gasilabo @ Charles Gazilabo and 3 Others,** (supra) showing the conditions for a witness to be termed as competent. In his

view, PW8 has met the criteria as in his evidence; he has managed to establish his competence.

Regarding the complaint that there are no unique features which is inherent shown, he submitted that the term inherent features is strange as the case of **The Republic vs Charles Abel Gasilabo @ Charles Gazilabo and 3 Others**, the terminology used is unique feature as opposed to inherent features. However, he submitted that, the witness has shown unique features, of the colour and the physical outlook as well as the mark he put on the exhibit that is X/HB which features in his opinion are enough for admissibility purpose. Therefore, it is his submission that all objections basing on the competence have no merit he prayed for the same to be overruled.

I have passed through the arguments raised by the counsel for the defence with exception of the allegations that, there is no authentication especially of peculiar features shown by PW8 in identifying the exhibits, the rest of the points and arguments are factual issues which go to the probative value of the exhibits which are not the domain of admissibility. For example the allegation that the witness cannot tender the exhibits

because he did not prove his expertise in identifying the military uniforms, is a factual issue going to the value of the exhibits.

The issue whether the exhibits are the properties of TPDF or JKT, and cannot be found anywhere else is also a factual issue which also goes to the value of the exhibits. Last is the issue of the nomenclature of the items as raised by Mr. Mallya, that those which PW8 named as rain coat are actually the ponjoo while those he named as ponjoo are actually sleeping bags, is also a factual issue needing proof by the evidence, and if I may add, even the counsel himself did not say the base of his so naming them.

For that reasons, I find the issue need either evidence in rebuttal or contradiction in cross examination; it therefore goes to the value of the substance of the evidence which is not the domain of admissibility. They are therefore overruled for being misconceived.

Regarding authentication, especially identifying the exhibits by peculiar features, it should be noted that according the authority in the case of **The DPP vs Shariff Mohamed @ Athuman,** (supra) it was held *inter alia* that;

> *"Evidence may be authenticated in three ways; by identification of unique feature, by identification of a feature that has been made unique or by establishing a chain of custody."*

In his evidence, PW8 said he identified the exhibits by their colour, outlook and the mark X/HB which he himself put on the exhibit. From the above authority and interpreting the decision in the context of the case at hand, then, it can be correctly held that, the mark X/HB is what the authority above in the case of **The DPP vs Shariff Mohamed @ Athuman,** (supra) refers to as "*the feature which has been made unique*".

Now how legal is this feature, will be discussed in the next topic where a discussion will also be made regarding the complaint that it was encrypted in the absence of the witnesses who witnessed the search and seizure. Otherwise with the evidence of PW8, on the identification of the unique features, and the fact that PW8 was the officer who conducted search and seized the exhibits, then he has knowledge of the exhibits in terms of the authority in the case of **The Republic vs Charles Abel Gasilabo @ Charles Gazilabo** (Supra), citing with approval the decisions of the case of **DPP vs Murzai, Pirbakhishi"@ Hadji and 3 Others**, (supra) and **Hamis Said Adam vs Republic,** (supra). Therefore in light

of the above, PW8 is competent to tender the exhibits. This objection lacks merit and it is overruled.

The other objection raised by the defence under this limb of competence was that, except the exercise book, listed in exhibit P14 as item 7, the rest of the exhibits were not listed during committal proceedings as required by section 246 of the CPA [Cap 20 R.E 2019], therefore they were tendered without complying with the law, that is section 289 of CPA, (supra).

To support this objection, the defence counsel submitted that, under section 246 of the CPA, for the evidence to be tendered at trial, it must have been committed during committal proceedings. If the same has not been committed, then it must be tendered upon compliance with the requirement under section 289 of the CPA (supra), which deals with additional witness.

The defence counsel asked the court to construe the term reading of statement or substance of evidence, as used in section 289 of the CPA, to encompass the exhibits which were not listed at committal. In their

arguments they submitted that, since there is no compliance with section 289 of the CPA, then the exhibit be rejected.

To support that argument the case of **Ronjino Ramadhani@ Ronji & Others vs The Republic**, Criminal Appeal No. 75 of 2019 at Dar es Salaam, at page 10, was cite, which held *inter alia* that, unless notice of additional witnesses has been issued in terms of section 289 of the CPA, that evidence should not be received.

In their view, failure to list the exhibit at committal is prejudicial. The law is clear that, the exhibit or evidence which was not committed at committal by the subordinate court cannot be tendered at trial unless the procedure under section 289 of the CPA is complied with. Further more they submitted that, neither at page 32 nor at page 33, the items sought to be admitted were listed.

Last, they strongly prayed for the Court to find it important to reconcile between its earlier rulings and the mandatory requirement of the PGO. In the end he asked the court to reject the exhibit because the prosecution abrogated a number of laws as listed here in above.

In response thereto, Mr. Kidando, learned SSA, for the Republic, submitted that, the ground has no legal base because the said exhibits are not new, as they were there since when the committal proceedings was conducted and the evidence was read in court in accordance with rule 8(2) of the Economic and Organised Crimes Control (The Corruption and Economic Crimes Division) (Procedure) Rules, of 2016, GN 267 of 2016 (The Rules).

According to him, this is shown at page 32 and 33, of the committal proceedings as reflected in the committal bundle. He submitted further that, exhibit P14 in which the items are listed, shows that the items were really listed, and the said exhibit P14 was read as reflected at page 32 and 33 of the committal proceedings. Further to that, it is his argument that, even when committal proceedings was conducted, the prosecution informed the court that, the Republic would have physical exhibits to rely on during hearing.

He argued that, according to the law, what they were supposed to do, in compliance with the law was to read all the evidence contained in the statement of all witnesses and all documents which the prosecution intended to use as evidence in court. Therefore the substance of the

evidence was read when the reading of the contents of exhibit P14 was done. He submitted that, it was not the requirement of the law to list the said exhibits.

Further more, he said the requirement to list the exhibits is made a necessity during preliminary hearing in terms of rule 15, of the Rules of this court, and that was done in the preliminary hearing conducted by this Court on 10/09/2021. He submitted that, the case of **Ronjino Ramadhani@ Ronji & Others vs The Republic** (supra) is distinguishable as the circumstances of the case at hand is not the same. Therefore the Republic was not supposed to invoke section 289 of the CPA, to bring such evidence. By way of conclusion he submitted that; rule 8 of the Rules of this court is self sufficient; therefore cannot use section 246 of the CPA. He submitted asking the Court to overrule the objection for lack of legal base.

In rejoinder submission made by the defence on that ground, they submitted that, what is listed at items 10 of the list of documentary exhibits in the committal proceedings is a certificate of seizure. Therefore there is no list of the items sought to be admitted. He insisted that, there is

no procedure for tendering additional evidence which was adopted and followed.

He asked the court to make cross reference of the same committal proceedings at item 5, where another certificate of seizure was listed in which a pistol was seized. However, that pistol is also listed as item 18 in the list of the exhibits. In his view, that raises a question as to why did the prosecution not list these items separately, and why this double standard.

Further countering the allegations that the prosecution listed the said exhibits during preliminary hearing, he submitted that, preliminary hearing and committal proceedings are two different procedures with two different purposes. He submitted that, failure to read and list evidence at committal has the consequences provided in the case of **Ronjino Ramadhani@ Ronji & Others vs The Republic** (supra) that the items which are not listed at committal cannot be relied upon and tendered in evidence.

Looking at the totality of the evidence by PW8 and the submissions by the counsel, I find no dispute and in fact parties are in agreement that, the exhibits sought to be tendered were not listed during committal proceedings. The complaint is that, non listing of the exhibits abrogates

section 246 of the CPA, which requires all evidence to be relied upon at trial, must have been committed. Now, reading between lines the provision of sections 246(2) of the CPA, read together with Rule 8(2) of the Rules of this Court, that is GN 267 of 2016, the committing court is required to read and explain or cause to be read and explained to the accused persons in a language they understand, the information, brought against them, as well as the statements or documents containing the substance of the evidence of witnesses whom the DPP intends to call at trial.

By plain interpretation, it is enough for the committal court to read the information, the statements containing the evidence of the witnesses and the documents containing the substance of the evidence which the DPP intends to rely on during trial. The law does not make it as a condition that the documentary or physical exhibits be listed.

Even section 289 of the CPA, provides that;

> *"289.-(1)* ***No witness whose statement or substance of evidence was not read at committal proceedings*** *shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness."*

This provision also prohibits the calling of the witness whose statement or substance of evidence was not read at committal proceedings to testify in court. If the prosecution require calling him then, they should issue reasonable notice to the defence of intention to call such witness, and the court under subsection (3) shall decide on the reasonability of the notice thereby granting leave for the additional witness to be called. The provision has nothing to do with the listing or non listing of the physical or documentary exhibits at committal.

Although the defence raised this objection, they are aware that, the provisions which are alleged to be violated do not directly provide for what they claim. That is why the defence counsel asked the court to construe the sections to encompass the exhibits which were not listed at committal.

With due respect, that is asking the court to step into shoes of the legislature, as had the legislature intended to widen the application of the provision and encompass the listing of the exhibits as suggested by the defence counsel, it would have done so itself.

On that point, I tend to agree with the learned Senior State Attorney that, the requirement to list the exhibits is under rule 15 of the Rules of

this Court, i.e G.N No. 267 of 2016 and it is a must that it be done during preliminary hearing.

While winding up on this point, I would like to remind the parties, that the Court of Appeal of Tanzania while interpreting the provision of sections 246(2) and 289(1) of the CPA, in the case of **The DPP vs Sharif Mohamed Athuman, & 6 Others (supra)**, at Page 6 it held *inter alia* that;

> *"The basic prerequisites of admissibility of evidence in a court of law are relevance, materiality and competence. The General rule is that, unless it is barred by any rule or statute, any evidence which is relevant, material and competent is admissible."*

In this case, there is no statutory law, or case law principle which bar the admission of the physical exhibits on the ground of non listing of the same at committal. The objection is therefore overruled for being devoid of merits.

Still under that limb of competence, Mr. Mallya, Advocate, submitted that, on 23/08/2021, when committal proceedings was conducted, the paper pinned in the exercise book listed as item 7 in exhibit P14 was not

part of that exhibit and they were not supplied with the paper pinned in exercise book "Five Star". Further more, he said that, the same was not listed in the list of the exhibits during committal. In his view the evidence contained therein is not genuine, he asked the court to term it as the altered evidence, therefore should not be admitted.

Replying to that objection, Mr. Kidando, SSA submitted that, according to the proceedings of Kisutu RM's court at item 12, at page 33 of the committal proceedings, that exercise book "Five Star" was listed and its content was read. He insisted that, they made the copy of all documents; there is no any part of that exercise book which was not committed. Furthermore looking at the copy they had, that part with pin was also committed and the court will find that, the said part was committed. It is his strong argument that, the point cannot be used to reject this exhibit which PW8 has asked to tender here in court. He asked the same to be overruled for want of merits.

Looking at the nature of the objection, there is no way you can decide it without going to the record of committal proceedings to ascertain if really the said pinned paper was part of the committal bundle. I was also invited to do so by the learned Senior State Attorney who said that, the

said exercise book with all its contents was committed as indicated in the committal proceedings dated 23/08/2021 at page 33 of the proceedings item 12 as "one exercise book marked Five Star brand".

Further to that, on going through the committal bundle, I found a copy of the exercise book "Five Star" with copies of the papers in it, which has some drawings similar to those in the exhibit, exercise book which is objected. This being a court record, it is supreme and cannot be impeached on the mere submission by the party. On that aspect the cases of , **Halfani Sudi vs Abieza Chichi** [1998] TLR 527, as relied upon in the case of **Nestory Ludovick vs Merinan Mahundi**, PC. Civil Appeal No. 95/2020 High Court Dar es Salaam, **Hon. Massabo, J**. in which it was held *inter alia* that;

> *"Court record being serious document should not be lightly impeached as there is always presumption that court records represent accurately what happened.... Allowing the impeachment of court records on flimsy grounds would lead to anarchy and disorder in the administration of justice and ultimately prevent dispensation of justice."*

After all the complaint has come only from one Advocate, this raises an assumption that, the records supplied to other accused persons are complete. That being the case, I find the objection to have no merits; it is hereby overruled for want of merits.

The other objection under the limb of competence is based on the provision of PGO 226(2) (c) which subjects the process of search and seizure to a permit issued by the Magistrate, it was the arguments by the defence that, in this case, it has not been said as to whether PW8 had the permit of the Magistrate before he conducted search. There is also no evidence that, after the search, PW8 reported to the Magistrate which procedure intended to validate search, therefore its non compliance invalidate the search. Having so submitted, he asked the court to reject the exhibits for the reasons given.

On that ground, Mr. Kidando, SSA, submitted in reply that, PGO 226(2) accommodates, PW8 as one of the officer capacitated to enter the building and conduct search because he is one of the investigating officers of this case. Therefore the search he conducted was permitted by law despite the fact that in his evidence PW8 did not show that before search or after he reported to the Magistrate.

Regarding the failure to report to the Magistrate, he submitted that in the case of **The DPP vs Freeman Aikael Mbowe and Another,** Criminal Appeal 420/2018, at page 34 CAT- Dar es Salaam, the Court of Appeal of Tanzania, was called upon to interpret the provision of section 38(2) of the CPA, which provide similar to PGO 226(2)(c), held that, non reporting to the Magistrate does not invalidate search.

He asked the court to note that, in this decision the court was not even at admissibility stage, it was after the exhibit had been admitted in court, so it was dealing with the weight of the evidence. For that reason, he prayed this court to find that, the argument has no weight at all therefore the objection be overruled.

In rejoinder on the point, the defence counsel submitted that PGO 226 (2) (c), requires the search report to be made to the Magistrate not otherwise, since in this case there is such a non compliance, that non compliance invalidates search.

Distinguishing the authority in the case of **Freeman Aikael Mbowe & Another vs The Republic** (supra), it was submitted that, the issue of taking the report to the Magistrate was made by way of passing and even

in the decision the Court of Appeal of Tanzania held that, failure to report to the Magistrate would not impeach the said evidence. In his view, the case is distinguishable because it does not deal with admissibility but impeachment.

Wile resolving this ground of objection, I entirely agree that PGO 226(2)(c) requires search to be sanctioned by the order or warrant of the Magistrate and if the search has been conducted under section 38(1) of the CPA without warrant, then section 38(2) of CPA, requires that as soon as practicable, a report needs to be made to the Magistrate containing the ground on which the search was conducted and the result of the search so made.

I have passionately considered the submissions made by both parties on the objection, from them; I learn that there is no warrant sought and obtained before the search, as directed by the PGO 226(2)(c), neither is there any report made after the search as directed by section 38(2) of the CPA.

Now, on this non compliance I have been referred by the prosecution side to the authority in the case of **Freeman Aikael Mbowe & Another**

vs The Republic (supra) that the, as of now the, non compliance is not fatal and does not invalidate search. However, the defence distinguished the case authority on the ground that, the dicta was made by way of passing and in the decision, the Court of Appeal held that failure to report to the Magistrate would not impeach the said evidence. Therefore the case is distinguishable because it did not deal with admissibility but impeachment.

I agree that, what was in contest in the case cited herein was not the interpretation of section, 38(2) of the CPA. However, the court did so when referring to the decision in the case of **Vuyo Jack vs The Director of Public Prosecutions,** Criminal Appeal No. 334 of 2016 (unreported). In that case the provision of section 38(2) was interpreted and on it the Court of Appeal held *inter alia* that;

> *"We also considered if the failure to submit Exhibit P7 to the magistrate in terms of section 38 (2) of the CPA, did impeach that piece of documentary evidence. Our answer is in the negative, because the use of word "shall" is not always mandatory but relative and is subjected to section 388 of the Criminal Procedure Act - See BAHATI MAKEJA VS THE REPUBLIC, Criminal Appeal No. 118 of 2006*

(unreported). As such, we disagree with the learned Principal State Attorney to expunge Exhibit P7 having been satisfied that, the failure to submit it to the magistrate did not impeach the creditworthiness of such document in which the appellant did acknowledge to have been found with narcotic drugs in his motor vehicle which is supported by Exhibit P13 which was not entirely faulted by the appellant be it in his evidence or written submissions."

From the wording of the Court of Appeal it means a mere non compliance does not affect the evidence, i.e creditworthiness of the exhibits. The Court in a way was embracing the prejudice principle which at this particular stage is not easy to ascertain. It is up to when the whole case is heard and that can be assessed at the time of assessing the value of the exhibit after looking at it along with other evidence. For that reasons and on the basis of the authority herein above the objection is also found to be devoid of merits. It is overruled.

The other point of objection under the limb of competence is that, the exhibits have not been labelled as required by PGO 229(8). On this, it was submitted by the defence that labelling of exhibit is an important matter and the labelling which is referred is the one which intends to distinguish one exhibit from the other. In their opinion, the model of

labelling which PW8 used is not known in law. This is because PGO 229(8) provides that, labelling should be by attaching the exhibit label, (PF. 145) to each exhibit, and with regard to the clothing exhibits, PGO 229(10) requires the label to be "a tie on label" which shall be attached to the clothing. Since the mark of X/HB purportedly put by PW8 is not in accordance with the provision of the PGO 229 (10), they prayed the court to find that there is no labelling made.

To cement on that legal requirement, the defence counsel also cited the Judiciary Exhibit Management Guideline, 2020, Chapter Three paragraph 3.8 (f) (iv) which provide that, the exhibits must be labelled, coded or sealed. They further referred to paragraph 3.8 (f) (v) of the same chapter and the same paragraph of the Guideline, which insists on the recording of the transfer of exhibits from one place to another or from one person to another, the aim being to ensure the control of the exhibits since when it was seized and tendered in court.

Last on that point, is a reference to paragraph 3.8 (g) of the same chapter which insist that all procedures in respect of the chain of custody must be adhered to.

They submitted that PGO was enacted to control the police in exercise of their powers and to control prejudice. Therefore they should not be violated. It was submitted in that regard that, the "Overriding Objective" principle did not mean to wipe out the mandatory provisions of the PGO.

While replying, the learned Senior State Attorney submitted that, the exhibits which are sought to be admitted were labelled X/HB by PW8 himself and it is obvious that labelling intends to assure the court and the person tendering the exhibits that, the exhibits are the same as seized. The learned Senior State Attorney further submitted that, labelling done by PW8 is enough and complied with the provision of chapter three paragraph 3:8 (f) (iv) which mentions three things that is labelling, coding or sealing of the exhibit. He submitted that the objection has no merit the same be overruled.

Gazing on the objection and the submissions made in support of the objection, it is true that PGO 229(8) provides for the requirement of the investigating officer to attach the exhibit label to each exhibit, when it comes to his possession. He is required to do so, on the methods which differ depending on the nature and type of the exhibit. With the exhibit of

clothing nature, PGO 229 (10) requires a label to be "a tie on label" which shall be attached to clothing which is done by passing the string through a button hole or a piece of thread attached to the side of the garment clear of any evidence of stains or marks. The position of label on the clothing shall be such that, when the garment is folded the label hangs on the outside so that and can be seen without unfolding the garment.

Where the exhibits relates document PGO 229 (11) requires that, exhibit label shall be attached to documents with paper clips, pins shall not be used. Documents shall be folded marked with numbers or other inscription.

What should contain a label is provided under PGO 229(14) that the registered number on the exhibit label shall be a case file or Minor Offence Docket number. In addition the exhibit register serial number will also be entered on the exhibit label.

From the above provisions, and to say least, the exhibits which were labelled X/HB written on the exhibits themselves cannot be said to be labelled within the meaning of PGO 229(8), (10), (11), and (14). Looking at it, i.e X/HB it is more of a mark than a label.

Even taking it as a mark and that it intended to assist for the identification of exhibit as the learned SSA wants this court to believe, it would have been tolerated under the principle of overriding objective, had the same been put in the presence of the witnesses who witnessed search, and therefore reflected in the list of the exhibit P14. The fact that the same was put by PW8 himself and alone after the seizure exercise has been closed and the witnesses of search had already signed the seizure certificate, shows that the exhibits are not in the state they were seized, thus affecting the competence of the exhibits and the admissibility thereof.

Still under the limb of competence, the other ground of objection is the failure of the seizing officer to issue receipt as required by chapter three, paragraph 3.8 of the Exhibit Management Guideline, 2020, issued by the Judiciary of Tanzania which required the Police Officer conducting search and seizure to issue receipt acknowledging the seizure of the things. On that, he also referred the court to section 22 (3) (b) of Economic and Organised Crimes Control Act, [Cap 200 R.E 2019] which also requires the issue of official receipt with signature of the owner after seizure.

According to them, it is also a requirement under PGO 226(2) (d) as part of authentication of seizure for the seizing officer to issue the receipt of seizure. It was submitted that, PW8 did not tell the court how he complied with the law and did not tender the copy of the receipt he issued to the 1st accused. For the prosecution's failure to lead PW8 to give evidence to that effect, or to tender the copy of the receipt if he really issued it leads to the assumption that, he did not issue receipts.

The counsel reminded the Court that, although the Court has already decided that, not every noncompliance of the law invalidates the evidence. He prayed the court to find with regard to these exhibits that there is a lot of violations which should not be condoned.

Mr. Kidando did not dispute the fact that the seizing officer did not issue receipt after seizure, but informed the Court that, PW8 tendered the seizure certificate, i.e exhibit P14 and gave a copy of the same to the 1st accused. He acknowledged the provision of Chapter three of the Exhibit Management Guideline, 2020, paragraph 3.8 (f) (i) read together with section 22(2) (b) of Economic and Organised Crimes Control Act, (supra) require the officer seizing the property to issue the receipt on the items seized.

However, in his view, since exhibit P14 has similar contents with what is supposed to constitute the receipt, he asked the court to find that, what constitutes the certificate of seizure is similar to what constitutes the receipt. In lieu thereof, he asked the court to find that, the existence of exhibit P14 proves that the provisions cited herein above have not been violated. Therefore by whatever names be it receipt or seizure certificate, he submitted that the prosecution has met the legal requirement.

To cement on his argument, he referred the Court to Part II "A", (d) where you find the provision of section 38 – 45 of the CPA, he asked the court to interpret the seizure certificate to mean receipt as provided under section 22 of the Economic and Organised Crimes Control Act, (supra). He asked this court to invoke the provision of section 20(1) of the Economic and Organised Crimes Control Act, (supra) to resort on the use of the CPA section 38-45 of the CPA, because the law is not self sufficient on that area.

I entirely agree with the defence that, a number of laws makes it a requirement that seizure of items resulting from a search conducted in the building, vessel, carriage, box, receptacle, or place- then the seizing officer must as a matter of law issue a receipt acknowledging the seizure of the

things. To mention few laws which impose such a duty to the seizing officer, I will start with section 38(3) of the Criminal Procedure Act, [Cap 20 R.E 2019] which provides that;

> *"(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing* ***shall issue a receipt acknowledging the seizure of that thing,*** *bearing the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."* [Emphasis added.]

The other provision which impose such duty to the seizing officer is section 35 (3) of the Police Forces and Auxiliary Services Act Cap 322 R.E 2002] which provides in a similar wording like CPA, that;

> *"(3) Where anything is seized in pursuance of the powers conferred by subsection (1), the officer seizing the thing* ***shall issue a receipt acknowledging the seizure of that thing*** *bearing the signature of the owner of the premises, and those of witnesses of the search if any".* [Emphasis Added.]

Further more section 22(3) (b) The Economic and Organised Crimes Control Act Cap 200 of the laws provides,

"(3) Where anything is seized after a search conducted pursuant to this section, the police officer seizing it, shall–

> *(ii)* ***issue an official receipt evidencing such seizure and on which the value of the property*** *as ascertained and bearing in addition to his signature, the signature of the owner of the premises searched and that of at least one independent person who witnessed the search;"* [Emphasis added.]

While PGO 226(2)(d) also provides that;

> *"Where anything is seized in pursuance of the search the officer seizing the thing* ***shall issue a receipt acknowledging the seizure of that thing,*** *bearing the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."* [Emphasis added.]

Last is the provision of Exhibit Management Guideline, 2020 chapter three, paragraph 3.8 (f) (i) which provides that the officer seizing the article has to issue a receipt acknowledging seizure of the thing.

As earlier on alluded, the prosecution did not dispute PW8 to have not issued the receipt, but asked the Court to find that, since the content of the receipt resembles that of certificate of seizure, then the existence of exhibit P14 proves that the provisions cited herein above have been complied with. Therefore, by whatever names be it receipt or seizure certificate, the learned Senior State Attorney submitted that, the prosecution has met the legal requirements.

In rejoinder, the defence asked the court to reject the invitation posed by the learned Senior State Attorney, to take the certificate of seizure as the receipt; the reason of that argument being that, the certificate of seizure and the receipt are two different documents issued for two different purposes. While the certificate of seizure intends to seize the exhibits, the receipt intends to acknowledge the seizure of the items.

Responding on what Mr. Kidando, SSA had submitted that, PGO has no relationship with admissibility; they submitted that the same provides for the conditions to be followed in the whole process of seizure and storage of the exhibit before being admitted in court. It was submitted that, the PGO relates with admissibility as it was enacted as part of the pre

admission authentication process, therefore failure to issue receipt under PGO 226 (2) (d) is fatal because it is part of authentication.

On the issue as to whether, the certificate of seizure is the same as receipt, the Court of Appeal of Tanzania in the case of **Andrea Augustino @ Msigara and Another, vs The Republic**, Criminal Appeal No. 365 of 2018, CAT-Tanga, called upon to hold the certificate of seizure issued after the police officer had seized the exhibits, to stand as the receipt required to be issued by the seizing officer to acknowledge the seizure of the things, in terms of section 38(3) of the CPA, the Court of Appeal held *inter alia* that;

> *Following the above section and taking into account that in the case at hand no receipt issued by PW2 and PW3 there is no doubt that the procedure was flawed.* ***Again as rightly put by Mr. Kibaha the interpretation of the word receipt given by Mr. Mauggo is unfounded as there is no way the Certificate of Seizure or Seizure Form can be equated to the receipt.*** [Emphasise added]

That being the position of the law, I entirely agree with the defence counsel on the submission that though the two documents, that is

certificate of seizure and the receipt to be issued after seizure somehow have similar contents, they are two different documents designed for two different purposes and they carry different meaning as indicated herein above.

Now that being the case, what is the remedy? The answer is in the case of **Mustafa Darajani vs The Republic,** Criminal Appeal No. 277 of 2008 CAT-Iringa, which cited with approval the decision of **Patrick Jeremiah vs The Republic,** Criminal Appeal No.34 of 2006 CAT-(Unreported), in which the Court of Appeal of Tanzania, faced with the question of non compliance with section 38(3) of the CPA, it held that;

> *"Upon completion of the search, if any property is seized, a receipt must be issued, which must be signed by the occupier or owner of the premises and the witness around, if any as required under section 38(3) of the CPA. Failure to comply with section 38(3) of the CPA is a fatal omission."*

That said, I find failure to issue receipt to be fatal as indicated herein above, to the extent of affecting the competence of the exhibits thus affecting the admissibility.

In the normal course I would have ended here, however I feel indebted to respond to the invitation made by Mr. Kibatala, learned counsel for the 4th accused that, the Court find it important to reconcile its earlier rulings and the mandatory requirement of the PGO and to reject the exhibits because the prosecution have abrogated a number of laws.

Replying on the prayer for the court to reconcile its previous decisions with the provisions of the PGO, the learned Senior State Attorney submitted that, the invitation is alien and does not exist in our legal system. He submitted that, there is nothing like reconciliation of the decision of the Court. In his opinion that kind of prayer cannot be entertained by the court because courts must give decisions on issues which are actual and which have been brought procedurally before it. He submitted that, our courts have been consistent, and have been deciding basing on the law, and decisions of the superior courts. He asked the court to turn down the invitation because it has no legal base.

I have compassionately considered the invitation, and went back to my previous rulings in this case. Surely I find nothing to reconcile, I have all the times been deciding basing on the laws as interpreted by the courts of records of this country, I have been very elaborately considering every

issue raised, and whatever decision I made had both factual and legal reasoning. Some parties may not be happy with them, but as long as they are not reversed by the superior court of our land, they are still the valid decisions with nothing to reconcile, to say least.

In the fine, basing on the findings on each objection raised, I find two objections namely **failure to label the exhibit** and **failure to issue receipt after seizure of the exhibits**, to have merits, they are upheld basing on the reasons given herein above. The exhibits sought to be tendered were unprocedurally seized, consequently, they are rejected as such.

It is accordingly ordered.

DATED at **DAR ES SALAAM** this 10th day of January, 2022

J.C. TIGANGA

JUDGE