

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**CORRUPTION AND ECONOMIC CRIMES DIVISION**

**AT DAR ES SALAAM**

**ECONOMIC CASE NO. 7 OF 2023**

**THE REPUBLIC**

**VERSUS**

**ABUU SALEHE KIMBOKO**

**RULING**

20<sup>th</sup> and 21<sup>st</sup> February, 2024

**KISANYA, J.:**

The trial in this matter commenced on February 19, 2024, with the prosecution presenting one witness. Before adjournment for the next day's hearing, Mr. Mafuru Moses, the learned State Attorney, informed the Court that the prosecution had filed a notice for additional exhibits under section 289 of the Criminal Procedure Act, Cap. 20, R.E., 2022 (the CPA). The notice stated the prosecution's intention to call Insp. Johari to tender exhibits not listed during the committal proceedings.

The defence confirmed receipt of the notice just before adjournment. However, they indicated that the notice was not reasonable. The Court

directed that the issue of reasonableness of notice be addressed when the exhibit listed in the notice is sought to be admitted.

When the trial resumed on February 20, 2024, Insp. Johari Msirikali appeared as PW3. During her testimony, she requested the Court to receive a court exhibit register. The defence, led by Mr. Nehemia Nkoko, objected, citing a violation of section 246(2) of the CPA and rule 8(2) of the Economic and Organised Crime Control (The Corruption and Economic Crimes Division)(Procedure) Rules, 2016, GN No. 267 of 2016 (hereafter "the CECD Rules"). These provisions require that the statements or substances of the document to be used by the prosecution during the trial must be read over to the accused person at the committal proceedings.

Mr. Nkoko argued that, PW3's statement and the court exhibit register sought to be tendered were not read to the accused at committal proceedings, nor was the same listed. Although the learned counsel admitted to have served with the notice for additional exhibit preferred under section 289 of the CPA, he contended that the document sought to be tendered was not listed in the said notice. He further contested the reasonableness of the notice for additional exhibits, claiming that even if it was listed, the notice was not reasonable within the meaning of section 289(3) of the CPA.

Mr. Nkoko referred to the case of **Simon Dalali @Thomas James vs R**, Criminal Appeal No. 380 of 2020 (unreported), where the Court of Appeal expunged an exhibit not listed during committal proceedings. He argued that the court exhibit register sought to be tendered was not admissible.

In response, Mr. Moses argued that the objection lacked merit. On contention that the statement of PW3 was not read out during the committal proceedings, he submitted that the record shows PW3 as among the witnesses whose substance of evidence was read over at committal proceedings.

With respect to the court exhibit register sought to be tendered, he acknowledged that the document was not read at the committal proceedings but stated that the prosecution had, on the first day of hearing, served the defence with a notice for additional exhibits. The learned State Attorney argued that hearing was adjourned twice in November, 2023 and that, since the notice was served to the defence one day before the date on which the court exhibit register was sought to be tendered; they were notified of the substance of evidence as the document in question was appended to the notice. In that regard, Mr. Moses argued that the notice was reasonable and asked the Court to dismiss the objection.

Mr. Nkoko rejoined, pointing out that the committal record does not show that PW3's statement was read during committal and that, on receipt of the notice, the defence had little time to consult with the accused, who is in custody. Mr. Mabura added that, the reasonability of notice should be determined by considering the time and the circumstances under which the prosecution were acquitted with the knowledge of the exhibit and when they decided to use the same as exhibit as provided for under section 289(3) of the CPA. He argued that since the notice did not indicate when the prosecution became aware of the document sought to be tendered, it was not reasonable and thus, the court exhibit register sought to be tendered was inadmissible.

Having considered the submissions from both parties, the issue for determination is whether the court exhibit register is admissible as evidence. The defence have counsel contended that it is not admissible due to a failure to comply with section 246(2) of the CPA and rule 8(2) of the CECD Rules. Since the matter is before this Court, the applicable provision is rule 8(2) of the CECD Rules, which requires the committal court to read and explain, or cause to be read and explained to the accused person, information as well as



the statements or documents containing the substance of the evidence of witnesses whom the prosecution intends to call at the trial

It is a settled position of law that the purpose of that requirement is to inform the accused of the substance of the prosecution's evidence against him and enable him to prepare his defense. This stance is supported by the case of **Republic vs Raymond Adolph Loius and 6 others**, Economic Case No. 1 of 2019, cited with approval by the Court of Appeal in **Remina Omary Abdul vs R**, Criminal Appeal No. 189 of 2020 (unreported).

It is also an established principle in this jurisdiction that, for this purpose to be achieved, the witnesses whose statement or a document containing the substance of their evidence was not made known to the accused during the committal proceedings should not be called by the prosecution or tendered at the trial. For instance, in the case of **Simoni Dalali** (supra) referred to this Court by the defence counsel, the Court of Appeal expunged a cautioned statement whose content was neither listed nor read at the committal proceedings for contravening section 246(2) of the CPA, which is a replica of rule 8(2) of the CECD Rules.

Mr. Nkoko has contended that the statement of PW3, who has prayed to tender the court exhibit register, was neither read nor listed at the

committal proceedings. I was then inclined to go through the record of the committal proceedings. Having done so, I have noticed that PW3 is on the list of the intended prosecution witnesses whose substance of evidence was read over to the accused person. However, I agree with the defence counsel that it was not specifically recorded that what was read over and explained to the accused person is the statement of PW3 and other witnesses intended to be called by the prosecution.

That aside, the wording of section 289(1) of the CPA is clear that a witness who cannot be called by the prosecution at the trial is one whose statement or substance of evidence was not read over at the committal proceedings. Since it is on record that the substance of evidence of PW3 was read at the committal proceedings, I am of the view that the prosecution was justified in calling her at the trial.. Thus, that PW3 was not called in contravention of the law.

As for the court exhibit register sought to be tendered as evidence, parties are at one that it was neither listed nor read over to the accused person at the committal proceedings. Mr. Moses has argued that the court exhibit register in question is admissible because the notice for additional exhibits was duly served to the defence side under section 289 of the CPA.

For clarity, I find it appropriate to reproduce the provision of section 289 of the CPA cited in the notice. It provides:

*"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.*

*(2) The notice shall state the name and address of the witness and the substance of the evidence which he intends to give.*

*(3) The court shall determine what notice is reasonable, regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness's evidence and determined to call him as a witness; but no such notice need be given if the prosecution first became aware of the evidence which the witness would give on the date on which he is called.*

*(4) For the purpose of this section, "substance of evidence" includes substance contained in a document, record or any other tangible object."*

It is clear that the above provisions offer a way to admit evidence that was not read over and explained to the accused or listed during committal proceedings. See also of **The DPP v. Sharif Mohamed @ Athuman and 6**

**Others**, Criminal Appeal No. 74 of 2016 (unreported), when the Court of Appeal had this to say after noticing that the documents intended to be tendered in court were not listed or read out at the committal proceedings:

*"Our understanding of the provisions of the section 246 (2) of the CPA is that, it is not enough for witness to merely allude to a document in his witness statement, but that the contents of the document must also be made known to the accused person (s). If this is not complied with, the witness cannot later produce that document as an exhibit in court. The issue is not on the authenticity of the document but on non-compliance with the law. **We, therefore, agree that unless it is tendered as additional evidence in terms of section 289 (1) of the CPA, it was not receivable at that stage**"*  
(Emphasize supplied).

However, for additional evidence to be admitted under section 289 of the CPA, the following conditions must be met; *one*, the prosecution must give reasonable notice in writing to the accused or his advocate of the intention to call such a witness; and *two*, the notice must state the name and address of the witness and the substance of the evidence they intend to give.

In the case of **R. vs Harry Msamire Kitilya and Others**, Economic Case No. 4 of 2019 (unreported), this Court (Banzi, J.) listed the contents of the notice for additional documents as in the present case when it held:

*"...the notice for preferring additional documentary evidence must at least contain the following:*

*(a)Name of the intended document,*

*(b)Substance of the evidence on the intended document;*

*(c)Name of the witness in respect of whom the intended document is featured in his statement which was read out and explained to the accused person during the committal proceedings; and*

*(d)The time when and the circumstances under which the prosecution became acquainted with the nature of the statement and determined to bring in as additional evidence."*

I am persuaded by the above-stated position and hold further that, the fourth requirement, which is premised on section 289(3) of the CPA, is crucial for the court to consider whether the notice is reasonable or otherwise.

In the present case, the name of the document sought to be tendered was duly stated in item 1 of the notice as "Drug Control and Enforcement

Authority Court Exhibit Register". Thus, Mr. Nkoko's argument that the document evidence sought to be tendered was not listed in the notice is meritless.

On the second requirement, the substance of the court exhibit register sought to be tendered was not explicitly stated in the notice. However, the copy of the document was appended to the notice itself. Therefore, I am of the view that, the substance of the document sought to be tendered was effectively communicated by appending the copy of the document to the notice.

Regarding the third requirement, the notice stated that the intended additional exhibits, including the court exhibit register, would be tendered by Insp. Johari. Given that the substance of Insp. Johari's evidence was recorded to have been read and explained to the accused person, I find that the third requirement was complied with in the notice.

The bone of contention is whether the fourth requirement which give rise to the question whether the notice is reasonable has been met. Mr. Mafuru contended that the notice is reasonable because it was served one day before the date on which the additional document was sought to be tendered as evidence. However, I respectfully disagree with the learned State

Attorney. As stated in this ruling and rightly argued by Mr. Mabura, the issue of whether the notice is reasonable is determined by the criteria set out under section 289(3) of the CPA. It is not determined by looking at the time at which the notice was served on the defence side. I am supported by the case of **Harry Msamire Kitilya** (supra), in which this Court emphasized that:

*"According to subsection (3) of section 289 of the CPA, as stated above, it is the discretion of the Court to determine what notice is reasonable. Besides, the law guides the Court in that regard, where it expressly provides "**regard being had to**" and proceeds to set out three criteria, namely, (i) the **time when** the prosecution became acquainted with the nature of the intended documentary evidence, (ii) the **circumstances under which** so became acquainted, and (iii), when they **so determined** to call evidence as additional evidence. The reasonableness of Notice is not merely determined based on the span of time upon which the same was given to the accused person(s), but on those criteria as expressly set out under the law.*

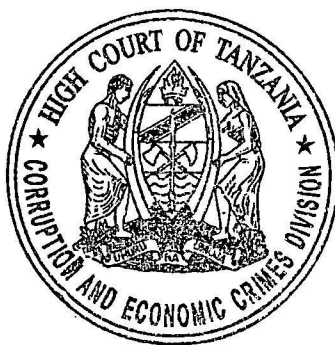
In the instant case, neither the time when nor the circumstances under which the prosecution became acquainted with the nature of the court exhibit register and determined to bring it in as additional evidence were stated in the notice for additional exhibits. It was not sufficient for the notice to state


that PW3 shall tender the exhibits, which were not listed during the committal proceedings, without indicating the time when and the circumstances under the exhibit came to the knowledge of the prosecution and resolved to tender the additional exhibit.

Since the notice for the additional witness did not include the criteria set out by the law, I concur with Mr. Mabura that this Court cannot determine the reasonability of the notice. Consequently, the court exhibit register is inadmissible for contravening rule 8(2) of the CECD Rules, unless there is a notice for additional exhibits complying with section 289 (2) and (3) of the CPA.

It is so ordered.

**DATED** at **DAR ES SALAAM** this 21<sup>st</sup> day of February, 2024.



  
**S.E. KISANYA**  
**JUDGE**