

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA SUB-REGISTRY)
AT ARUSHA**

CRIMINAL SESSION CASE NO. 63 OF 2022

REPUBLIC

VERSUS

- 1. ABDALLAH ATHUMANI LABIA @BROTHER MOHAMED**
- 2. ALLY HAMISI KIDANYA**
- 3. ABDALLAH MAGINGA WAMBURA**
- 4. RAJABU PIRI AHMED**
- 5. HASSAN ZUBERI SAIDI**
- 6. ALI HAMISI JUMMANNE**
- 7. YASIN HASHIM SANGA**
- 8. SHABANI ABDALLAH WAWA**
- 9. IBRAHIM LEONARD HERMAN @ABUU ISMAIL**

RULING

23^d & 24th May 2023.

Rwizile J

1. P17 is the Government Chemist Analyst. He did a Laboratory examination of physical exhibits to wit, 11 nails, a delay safety fuse, a detonator, and remains of the black bag which were the subject of the explosion that occurred at Arusha Night Park Bar on 13th April 2014. He tendered before this court, the same exhibits for the prosecution.

2. Mr. Richard Mayota learned counsel for the 7th accused raised an objection that the same should not be admitted because they were not listed among the exhibits at the Committal Proceedings. This objection prompted a rival argument between the parties.
3. Replying to the objection, Mr. Nassoro Katuga, learned Senior State Attorney did not dispute that the physical exhibits were not listed during committal proceedings. He eloquently however argued that the letter dated 22nd April 2022 which was sent to this court contained the information and the list of physical exhibits.
4. It was the Attorney's view that the committal proceeding was conducted under section 246(2) of The Criminal Procedure Code, [Cap 20, R.E 2022]. He argued the spirit of the law in committal proceedings is to inform the accused of the nature of the evidence that will be tendered in court and the physical exhibits as well were stated in the statement P-17. It was his further argument that the statement was read at the Committal Proceedings and listed at the Preliminary Hearing. He said, if the committal proceeding has gaps, in practice the same is to be returned to the subordinate court for ratification, and cited the case of **The Republic v Halfan Bwire Hassan & 3 Others**,

Economic Case No. 16 of 2021, High Court of Tanzania (Corruption and Economic Crimes Division) at Dar es Salaam, page 39-40

5. He further submitted that section 246(2) of the CPA does not make it mandatory that exhibits must be listed. The witness is competent, the exhibit is relevant and these are the test the court should consider and cited the case of **DPP vs Sharifu Mohamed & 6 Others**, Criminal Appeal No. 74 of 2016, Court of Appeal of Tanzania, at Arusha, Page 6 and the case of **Ester Jofrey Lyimo v The Republic**, Criminal Appeal No. 23 of 2020, Court of Appeal of Tanzania, Dar es Salaam on page 11 to 12.
6. When rejoining, Mr. Peter Madeleka, counsel for the 1st, 2nd, 4th, and 7th accused cited the case of **Mussa Ramadhani Magae v The Republic**, Criminal Appeal No 545 of 2021, Court of Appeal of Tanzania at Dar es Salaam, page 13 to 18. He went on to submit that, the provision of section 246(2) of the CPA is in mandatory terms, thus the court should deal with the dictates of the law, and the position of the law in this aspect is settled in the case cited. He said, according to the decision of the Court of Appeal, physical exhibits not listed at the

committal proceedings cannot be made part of the record at the trial.

He asked this court to sustain the objection and reject the exhibits.

7. Adding to what has been submitted, Mr. Sylvester Kahunduka, Counsel for the 1st accused, cemented that, the case of **Mussa Ramadhani Magae**, (supra) on page 16, the court was dealing with physical exhibits and the same as well ought to be read at the committal proceedings and the court expunged them. He thus prayed the exhibits to be rejected.
8. Commenting on the case of **DPP v Sharifu Mohamed** (supra), the learned counsel was of the view, the same should be distinguishable. Lastly, he said, the letter sent to the Registrar is not a committal proceeding and the court should not condone illegality. He submitted the court should not be blamed since the prosecution had the duty to inform the court that the exhibits were not listed. He prayed for the same to be dismissed.
9. Mr. Lectony Ngeseiyan counsel for the 2nd accused, stated that the principle in the case of **Sharif Mohamed**(supra) should not be followed. In the case **of DPP v Christina B**, Criminal Appeal No. 76 of 2016, on pages 6 and 7, the issue is on the witness and not the

documents, and are not objecting to the witness to tender the document, here exhibits are inadmissible because they are not listed at the Preliminary Hearing.

10. Mr. Yoshua Mambo, counsel for 3rd accused added that, based on the case **Michael Maige v The Republic**, Criminal Appeal No. 222 of 2020, the Court of Appeal of Tanzania at Mbeya, on pages 9 to 10 supports the decision of the **case of Mussa**, hence the exhibits be rejected.

11. Having heard rival submissions of both parties, it is important to note that, the spirit of the criminal procedure Act as the law of procedure is to ensure the accused person is fairly tried. The right to a fair trial is recognized nationally and internationally as a fundamental and indispensable aspect of proper and well-functioning criminal justice. It encompasses many valuable minimum norms that should not only be recognized but also strictly observed in the administration of justice. It, therefore, ranges from pre-trial to post-trial stages of the proceedings. And I have to say, a fair trial is the only way to prevent miscarriages of justice.

12. The law as I have said, provides that before criminal cases are tried before this court, they should pass through a committal process. The committal proceeding is a pre-trial process and entails two very crucial stages. These include, reading to the accused person, the substance of the evidence that the prosecution intends to call at the trial, and the second stage is to list the documents as well as physical exhibits if any that the prosecution intends to rely on at the trial. This is clearly envisioned under section 246(2) of the CPA. It plainly reads as follows;

Upon the appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial.

13. Inferring from the law, it is therefore mandatory for the committal proceedings to not only read and explain to the accused person the information brought against him but also to read and explain the substance of the statements or documents containing in the substance of the evidence to be relied on by the prosecution. This comprehends,

listing down physical exhibits to be produced at the trial. Coached in mandatory terms, the law should not be compromised.

14. The case before me is that, indeed physical exhibits to be tendered were not listed and therefore not explained to the accused persons at the committal proceedings. The record shows exhibits were not indeed stated anywhere in the committal proceedings. It is clear to me as submitted by the prosecution, the same were listed in the information filed to this court. They as well appear to have been stated in the report that P17 prepared and were read at the committal and in the same way, in the statement of P17 recorded at the police station, also read during the Committal proceedings.

15. The spirit of the objection is that admitting the same in evidence when in fact were not listed during the Committal will be taking the accused persons by surprise which is against the principles of a fair trial. When the prosecution asked this court to dismiss the objection, I was referred to the case of **The Republic v Halfan Bwire Hassan & 3 Others** (supra), where this court when faced with a similar situation dismissed the objection and admitted the exhibits in evidence. It was the prosecution's submission as well that since it is not the requirement of

the law to list down exhibits then it is prudent to apply the case of **Ester Jofrey Lyimo v The Republic** (supra) to cure the mischief.

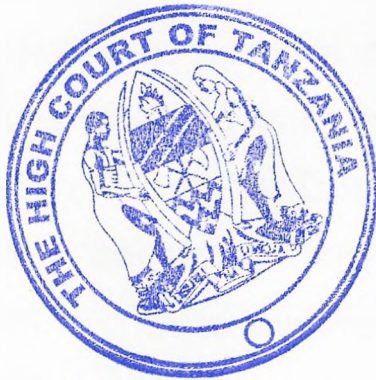
16. I have read both cases. I tend to agree with the defence that the case of **Hassan Bwire** is not binding on this court but as well it is no longer the position of the law, while the case of **Ester Jofrey Lyimo** is distinguishable because the substance of the alleged evidence was read to the accused person in the cautioned statement.

In **Michael Maige v Republic** (supra), the Court of Appeal expunged from the record, physical exhibits, which though listed at the preliminary hearing but were not listed during the committal proceedings. The decision, in that case, was followed in a more recent case of **Mussa Ramadhani Magae** (supra). In this case, the court gave a detailed analysis of the subject matter. It considered not only the case of **Ester Jofrey Lyimo** (supra) which the prosecution cited and the case of **Michael Maige** (supra). It was therefore satisfied that the prosecution, may in order to deal with the physical exhibits not listed during the committal proceedings, apply section 289(1) of the CPA to cure the anomaly. The relevant holding of the court reads;

The position above was restated in the case of Michael Maige v. Republic, Criminal Appeal No. 222 of 2020 (unreported), where the Court confronted a similar challenge of failure to list at the committal proceedings, the gold metal detector machine, a real/physical exhibit intended to be produced by the prosecution side at the trial. In that case, the Court dealt with the import of section 246 (2) of the CPA and held that failure of the prosecution to list it as among the intended prosecution exhibits during committal proceedings or to pursue the remedy provided by section 289 (1) of the CPA providing room for prosecution side to seek leave to call additional evidence was in contravention of mandatory requirements of section 246 (2) of CPA rendering the exhibit to have been improperly admitted and thus liable to be expunged.

17. It is therefore settled that an exhibit not listed during the committal proceedings should not be admitted. Similarly, in this case, it is safe to hold that there is no room for this court to admit any exhibits that were not listed down during the committal proceedings. This, therefore, I have no hesitation to hold, is an incurable irregularity, since it contravenes the law. The prosecution had one remedy that is to have the dictates of section 289(1) of the CPA which allows calling for additional evidence at the trial. Since the prosecution has failed to do

so until this stage, that window is closed. The objection is therefore sustained and the exhibits are hereby rejected.




A. K. RWIZILE

JUDGE

24.05. 2023