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

08th & 09th November, 2021

TIGANGA, J

This Ruling intends to determine the objection raised by the defence side over admissibility of a certificate of seizure in which exhibit P3, P4 and P5 were allegedly seized and listed. The objection was taken by the defence when PW8, SP Jumanne Malangahe, one of the police officers in the team which arrested the 2nd and 3rd accused person at Rau Madukani in Moshi Municipality was in the mid of his testimony. The objection was raised when he tendered for admission, the certificate of seizure allegedly drawn by him and witnessed by two independent witnesses one of them being PW3 Anitha Mtalo. That document was objected by the all defence

counsel, but only four of them namely Mr. Nashon Nkungu, Mr. John Mallya, Mr. Frederick Kiwhelo and Mr. Peter Kibatala, learned counsel, submitted for and on behalf of the whole defence team. However, for purpose of making my ruling unnecessarily long, I will combine their arguments in my discussion in this ruling.

Summing up what they submitted, the gist of their objection is that, the document which is sought to be admitted was prepared under a non existing law, that is section 38 (3) of Criminal Procedure Revised Edition 2018 which in their arguments, is a non existing law in Tanzania. It was argued in support of that objection, that there is no amendment effected to section 38(3) in the year 2018, or the law was never revised in that year. The Count was alerted that, the last amendment effected to section 38(3) was in the year 1993, and that the Revised Edition which we currently have in Tanzania is of the year 2019.

It was further submitted that, the law which regulates search and seizure in Tanzania is section 38(3) Criminal Procedure Act [Cap 20 R.E 2019], and that under that law, a seizure certificate is a statutory form, that is why the enabling provision must be cited in those forms.

It was also submitted that even if the prosecution would have resorted to overriding objective principle, to attempt to cure the defect in

the document which they did not do, the principle cannot save the defect. They cited the principle in the case of **Mondorosi Village Council and 2 other vs Tanzania Breweries Ltd and 4 other,** Civil Appeal No. 66 of 2017 CAT – Arusha, (Unreported). According to them, in that case it was held that, overriding objective principle should not be applied blindly, against the mandatory provision of the procedural law. This court was invited to adopt that principle and reject the document.

Further to that, this court was also referred to the persuasive authority of the High Court of Tanzania, in the case of **John Marco vs Seif Joshua Malimbe**, Misc. Land Application No. 66 R.E 2019, Hon Ismail, J. In that case, they specifically referred this court at page 5 of the ruling where it was held to the effect that, non citation or wrong citation of the enabling provision of the law renders the application incompetent.

The court was invited not to confine itself to the authority of the High Court, but also to be guided by the principle contained in the Court of Appeal decisions cited and relied upon by my brother Hon. Ismail, J in that ruling.

A call was made at the end of their submission in chief for the court to reject the document and that since the Republic did not lay foundation

at the beginning or relying on the principle of overriding objective, they were at that stage estopped from invoking the same.

Called upon to reply to the submission in chief, the Republic was represented by the two Senior State Attorney namely Mr. Robert Kidando and Mr. Pius Hilla, who submitted for the whole prosecution team. For similar purposes as I have said here in above, I will consider and summarise them together.

In their submission, they invited the court to find that the objection raised by the defence lacks merits and has no legal base. In their arguments they invited the court to make reference and to be guided by the provision of section 20(1)(a)(b) and (c) of the Interpretation of Laws Act [Cap 1 R.E 2019] which in effects, provides for the modes in which the law can be cited. They submitted that under paragraph (a) of section 20(1), the law can be cited by its short title, while under paragraph (b), it can be cited, by citing the year in which it was passed and its numbers among the Acts of that year or, (c) the chapter number given to the Act in any revised edition of the laws.

It was submitted that in the exhibit sought to be tendered, the short title is there, the year on which the law was passed is also there, and the chapter, that is chapter "20" is also there.

In essence both Senior State Attorney conceded that there is no Revised Edition of 2018 as alleged, and it is true that section 38(3) was amended for the last time in the year 1993, and that there was no amendment effected in the year 2018. It was however submitted in that line of argument that, although the Section 38(3) was not amended in 2018, but the Criminal Procedure Act was in the year 2018 amended by Act No. 7 of 2018. It was therefore submitted that with all features, it cannot be said that, there is no citation of the law as alleged.

Reverting to the authorities cited by the defence, they submitted that, the case of **Mondorosi Village Council** (Supra) is distinguishable as the circumstances in that case is different from the one at hand, according to them, the case was dealing with an omission to include in the record the letter, which requested the documents which would have been a yardstick for measuring the validity of the certificate of delay. In their opinion, in that case, it was necessary because the omitted document was going as far as determining the jurisdiction of the court, unlike in this case where the omission to write 2019 does not go that far.

Regarding for the decision in the case of **John Maro Vs Seif Joshua Malimbe**, (Supra), the case based on non or wrong citation of the law and the consequences there at, and it concerned the formal

application moving the court for orders, unlike the matter at hand, where the document at scrutiny is merely a certificate of seizure sought to be tendered as evidence, making the authority distinguishable with the case at hand. In their opinion, wrong or non citation becomes relevant where the motion document, moving the court for orders is considered unlike in this matter where the issue is admissibility of the document.

It was further submitted that, throughout the submission by the defence counsel, there is nowhere in their arguments where it is alleged that there was non compliance with the law. It was argued that, the principles governing admissibility of the documents are clear and settled in our jurisdiction. They cited the case of the **DPP vs Sharifu Mohamed @ Athuman and 6 Other**s, Criminal Appeal No. 74 of 2016, CAT – Arusha, in which according to them, at least three criteria were set at page 7 of the judgment which are:- (i) Relevance of the exhibit or evidence (ii) Materiality and (iii) Competence. It was submitted that, the objecting Counsel did not touch any of these criteria.

By way of insistence on the point, they argued that, on admissibility, the threshold is the following questions, whether the exhibit is admissible as evidence?, the other question is, is the witness tendering it competent to do so?, and last is the exhibit relevant to the case at hand. It was

submitted that, short of these requirements, the objections become extraneous matters, which do not serve any purpose. According to them PW8 had passed the admissibility test as he laid a foundation that he was a competent witness to tender the exhibit.

It was submitted the other way round that, the certificate was not only made under a single law, it was also made under section 35 (1) of the Police Force and Auxiliary Services Act, [Cap 322 R.E 2002] which is required to be read together with Section 38(3) of the CPA [Cap 20 RE 2019].

It was submitted therefore that the arguments fall short of the quality to challenge the admissibility of the said document. In their opinion the objection raised has no merit, they invited the court to overrule the objection and admit the seizure certificate.

In rejoinder, the defence counsel submitted that, the provision of Section 20(1)(a)(b) and (c) is very much in support of their arguments as the same is there to save people in different scenario. It was submitted that the person needs to choose one mode of citing, but if he takes risk of citing full citation, then he must cite it properly. It was submitted that the wrong citation has the effect of prejudicing their client's rights. The fact that, their submission based on non citation of the law, means that their

objection based on non compliance with the law. By way of reminder to the prosecution team, they submitted that, the admissibility principle is not confined to three criteria, there are other criteria one of them being whether the evidence was legally obtained or not. If the said evidence is not legally obtained therefore it affects the competence.

It was submitted further that, the document sought to be tendered is statutory document, it is not a free style document, it was therefore supposed to be prepared basing on the proper law which creates it.

The court was urged not to confine itself within section 20(1) alone but also section 20(3) of the said Cap 1, which provides that a citation or reference must be according to the copy of that written law as printed by the Government printer. It was also submitted that reference to Section 35 of the Police Force and Auxiliary Services Act to the form means that, the law must be read together, where one of the law does not exist then, the second law cannot have effect.

In their considered view, there is no foundation made or laid by the witness as alleged by the counsel for the prosecution, because had there been any foundation, the witness would have told the court why he cited the non existing law.

In furthering their argument on the point, they submitted that, what the prosecution counsel are doing is actually to amend the document which is sought to be admitted which is not allowed in law.

By way of conclusion it was submitted that section 20(1) cannot help because, the prosecution counsel have not said in those mode, which one had the said document adopted. Is the citation in short title, long title or year and number or chapter and year of revision? Therefore, the document cannot stand.

Regarding the principle in the case of **Mondorosi Village Council** (Supra) and **John Marco vs Seif Joshua Malimbe** (Supra), it was submitted that, the cases give general principle which this court needs to make reference. As although the facts of the case are different but the principles therein are useful.

It was prayed that, the document are statutory document, they must bear the provision upon which they are made, failure so to do renders the same defective and cannot be cured. They prayed for the objection to be upheld as raised and document to be rejected as prayed in the submission made in support of the objection.

I should start from the outset, that the objection raised by the defence was straight forward, it based on the tendering of the document

which was predicated under the non existing law. I have noted in the arguments that, some have widened the scope of the objection by importing novel issues of admissibility and statutory interpretation. However, although I commend both parties for the submissions made in support and against the objection, I will nevertheless confine my ruling as possible as I can, to the original trait but I will refer to them and their jurisprudential value in this country. Therefore such confinement should not for any reasons be misinterpreted.

From the arguments above, it is trite that, and parties are in agreement that section 20(1)(a)(b),(c) and (3) of the Interpretation of the Laws Act, [Cap.1 R.E 2019] gives various modes on how the law can be cited in this country.

It has also been agreed that, search and seizure exercise is regulated by section 38 of the Criminal Procedure Act, [Cap. 20 R.E 2019] and section 35 of the Police Force and Auxiliary Services Act, [Cap. 322 of the Laws of Tanzania]. The specific subsection for preparation and issue of certificate of seizure being subsection (3) of both provisions respectively, the subsection require the police conducting search to issue the document. It is also not disputed that the form constituting that certificate must be made under the two subsections mentioned above; therefore it is a

statutory document which needs to conform to the requirements of the law.

From the arguments here in above, the gist of objection is that the document sought to be admitted cited the non existing law. To appreciate what the document is actually presenting, I find it imperative for purposes of clarity and easy reference to reproduce the controversial part of the form as couched in swahili language.

"HATI YA KUCHUKUA MALI"

(Imetolewa chini ya kifungu 38(3) cha Sheria ya Mwenendo wa Makosa ya Jinai Sura ya 20 ya mwaka 1985, iliyorekebishwa mwaka 2018 na kifungu cha sheria ya Jeshi la Polisi na Wasaidizi Sura ya 322 iliyofanyiwa marekebisho mwaka 2002).

Of interest, is the underlined part, which is **"iliyorekebishwa mwaka 2018."** This is the part of the form which raises controversy. It is this part which counsel have some times referred to it, to mean "Revised Edition of 2018" while at the other time, construing it to mean "As amended in 2018".

Closely looking at the arguments, up to when parties finalised their submissions, it was not resolved what the actual meaning of the phrase

was. However, seemingly, majority are suggesting that the phrase mean, "Revised Edition of 2018" instead of "As amended in 2018".

The question that arises, is whether the court should also be taken by that wave of the uncertainty? In my strong view, the court should not remain in that state of uncertainty, it is important for the court to be sure of what we are actually dealing with. The quick assistance of the meaning of the phrase can be to consult a credible standard Swahili-English Dictionary to ascertain what the word "**iliyorekebishwa"** mean.

From the available resources, I have managed to access and refer, the **Swahili-English Dictionary by the Institute of Swahili Research (TUKI) of the University of Dar es Salaam, 2001 Edition**. I have not managed to get the word "iliyorekebishwa", I think on the simple reason that, it is not a word which stands alone, like a verb or noun. What I managed to get is the word **"rekebisha"** a verb, which means **"Adjust"** or **"Amend"** and **"rekebishwa"** which means **"Adjusted"** or **"Amended".** This means **"iliyorekebishwa"**, literally mean; **"which was adjusted"** or **"which was amended"** or **"As amended".**

Therefore from the above exposition, and in the present context, I find that, the exhibit in question, does not refer to the **Revised Edition of 2018,** but refer to the law **"as amended in 2018".**

From the submission of both parties, there is no dispute that section 38(2) of The Criminal Procedure Act was never amended in the year 2018, as the last amendment to that section was effected in the year 1993. What is therefore vivid is that, the form has cited the law by its short title by mentioning the Criminal Procedure Act, the same has also cited the chapter number that is Cap. 20, but has erroneously cited it as amended in the year 2018 while in fact there is no such amendment on the section cited.

Now the question remains what are the consequences, this can be termed as wrong citation of the law. As submitted by the counsel for the defence, generally wrong citation of the law renders the motion advanced defective. In their opinion, the defectiveness is fatal and renders the document to crumble. I entirely agree with the general principle in the case of **John Marco vs Seif Joshua Malimbe,** that wrong citation of the enabling provision renders the application incompetent. Although this is a general principle, it does not apply similarly in every circumstance, for the simple reasons that its application depends on a number of the factors.

While the citation of an enabling provision in any motion documents confers the court the powers and jurisdiction to entertain the motion and grant the orders sought, see **Edward Bachwa and 3 Others vs The Attorney General, and Another,** Civil Application No. 128 of 2006 as cited with approval with, **Marmo Slaa @ Hofu and 3 Others vs R,** Criminal Application No. 03 of 2012 in which it was held that, "wrong citation of the law, section, subsection has the effect of not to move the court to do what it is asked to do". Citation and issue of the document under section 38(3) and 35(3) of the Criminal Procedure Act, and The police Force and Auxiliary Services Act, has different purpose all together, as held by the Court of Appeal in the case of **Shabani Said Kindamba vs R,** Criminal Appeal No. 390 of 2019, which cited its previous decision in the case of **Selemani Abdallah vs R,** Criminal Appeal No. 354 of 2008 in which it was held that, "the purpose is to minimise complaint of fabrication and that the seized items comes from the purported place or person".

This means, the case of **John Marco vs Seif Joshua Malimbe** (supra) is distinguishable in the circumstances of the case at hand.

It should also be noted that, the current position of the law is that, not every non citation or wrong citation of the law crumbles the motion. The introduction of overriding objective principle as introduced by the

Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT No. 8 of 2018] which now requires the Courts to deal with cases justly, and to have regard to substantive justice; the new principle of the "prejudice" has been enunciated. A mere complaint by a party to the case that there is non citation or wrong citation of the law or even non compliance of the law is not enough, that person needs to go a step further, and establish that he was prejudiced by such non citation or wrong citation or non compliance.

One of the good example is the case of **Ally Ramadhani Shekindo and Another vs R**, Criminal Appeal No. 532 of 2017, decided on 11th December 2019, in that case, the appellant was convicted of an offence of gang rape, but the charge sheet charged him with an offence of gang rape contrary to section 131A(1) and (2) of the Penal Code while it was supposed to cite section 130(1) and (2)(a) since section, 131A(1) and (2) gives explanation of gang rape without creating the offence, the Court of Appeal agreed that there was such failure to cite the law properly but went ahead and *inter alia* held that;

> *".... However, the question we ask ourselves is whether the appellants were prejudiced from such failure to cite section 130(1) and (2)(a) of the Penal Code in the sense that, such omission prevented them to comprehend the nature and gravity of the*

offence of gang rape they were facing and disabled them to prepare their defence.

After alluding on a number of its previous decision, some of which are **Charles Mkande vs R,** Criminal Appeal No. 270 of 2013 (unreported) **Jamal Ally @ Salum vs R**, Criminal Appeal No. 52 of 2017 (unreported) the Court of Appeal held *inter alia* that, recently the court has taken different stance on defective charges and non or wrong citation of the law, that as long as the accused has not been prejudiced, the non or wrong citation is curable under the provision of section 388(1) of the Criminal Procedure Act, [Cap. 20 R.E 2019]

On that very subject, I have also been persuaded by the decision of my Senior brother Hon. Mdemu, J in the case of **Francis Kashambi Masanja and 4 Others vs The Republic**, Criminal Appeal No. 21 of 2021 High Court of Tanzania at Shinyanga (unreported) who held in the similar manner.

There is no dispute that there is a factual and logical difference in weight and consequences between failure to cite the proper provision, or citing the wrong one in the charge sheet, or chamber summons or a notice of motion (motion document) and on a document like seizure certificate, while the former seeks for the substantive orders determining the case,

the later seeks to eliminates the possibilities of fabrication, and maintaining the chain of custody. If with the former as serious as it is, non citation is curable unless the person pleading it establishes that he was prejudiced, there cannot be a way for the latter not to comply with the standard set in respect of the former.

For that reasons, as there is no evidence that wrong citation has in any way prejudiced the accused, I find the objection to be wanting especially in the circumstances where the accused have the chance of cross examining the said witness on the document. The objection is therefore overruled for the reasons given, the document a certificate of seizure is admitted and marked exhibit, P11.

It is accordingly ordered

DATED at **DAR ES SALAAM** this 09th day of November, 2021

J.C. Tiganga

Judge

09/11/2021