

**IN THE UNITED REPUBLIC OF TANZANIA JUDICIARY
IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM
COMMERCIAL CASE NO. 86 OF 2013**

AFRISCAN GROUP TANZANIA LIMITED PLAINTIFF

VERSUS

DAVID JOSEPH MAHENDE DEFENDANT

RULING OF THE COURT

K. T. R Mteule, J

This is a ruling on objection raised by the plaintiff's Advocate Mr. Rutabingwa, against tendering of exhibits attempted to be done by additional witness Jaribu S. Bahati who was testifying following the directives given by the Court of Appeal for taking additional evidence. The document was a forensic report with Ref No. FB/DOC/LAB/1/2020 with its forwarding letter dated 30/4/2020 concerning examination of disputed signatures.

In the Court of Appeal, the defendant filed an application under Rule 36 (1) of the Tanzania Court of Appeal Rules seeking for directives of taking additional evidence in this suit. The application was allowed and at the instance of the defendant, two witnesses have been called to provide such additional evidence. One of these additional witnesses is Inspector Jaribu Sebastian Bahati. During exhibit tendering session, the witness



Jaribu Sebastian Bahati. During exhibit tendering session, the witness tried to tender a copy of a letter by the Director of Criminal Investigation addressed to Director General of Prevention and Combating of Corruption Bureau (PCCB) accompanied by a document examination report. In this process, Mr. Mbamba, the defendant's counsel told the court that the Court of Appeal took judicial notice of these documents because one of them went to the office of the Chief Justice. This being the case, according to the defendant's counsel, under Section 67 (1) (a) (ii) of the Evidence Act, CAP. 6 R.E. 2019 (The Evidence Act), these documents do not need examination, but this court is required to just take them as additional evidence.

Mr. Rutabingwa, raised objection against the prayer for admission of the documents focusing on the following:

- That the Court of Appeal did not direct that the exhibit should not be examined.
- That the witness is not competent to tender the document for not being neither the maker nor the addressee
- That the documents cannot be admitted for non compliance with the procedure to tender secondary evidence and public document

Starting with the competence of the witness, the Mr. Rutabingwa submitted that the witness was not competent to tender the documents because he was neither its maker nor its addressee. According to Mr. Rutabingwa, the maker of the forensic investigation report was one ASP Maria Njenga while the letter was signed by ACP Kenyela hence these are the only persons competent to tender the respective documents.

On the acceptability of the documents, Mr. Rutabingwa submitted that the documents are photocopies which are not acceptable in evidence and the fact that the Court of Appeal directed the taking of evidence does not change the legal requirements of evidence admission. He contends that the fact that the document is in the office of the Chief Justice does not justify acceptance of photocopies.

Mr. Rutabingwa argued further that the documents are not properly certified because being public documents written to PCCB and copied to the IGP, only these two institutions or the maker who is the DCI can certify them in accordance with Sections 83 (a) (iii) and 85 (1) of the Evidence Act which prescribe admission and certification procedure and the fees to be paid.

Mr. Rutabingwa challenged the certification done by a private advocate to these documents which in his opinion it is not allowed for public documents. In his opinion, section 67 (1) (a) (ii) cited by the defendant's counsel refers to a person out of reach or not subject to court process while the instant matter does not cover any of the two situations. He concluded that the tendering of the exhibit has not met the required procedure and they should not be admitted. He disputed existence of any fact to substantiate that the documents are in the office of the Chief Justice.

In rejoinder, Mr. Mbamba reiterated what he stated earlier making reference to page 8 and 12 of the judgment of the Court of Appeal in

Civil Application No. 459/16 of 2020 in which the court directed taking of this additional evidence. It is the contention of the defendant's counsel that the Court of Appeal was satisfied that the document qualified to be taken as additional evidence and therefore there is no need to examine as we just need to comply with the Court of Appeal order.

The counsel for the defendant continued to re-join that the witness is competent to tender the documents in the spirit of the Court of Appeal decision in **DPP vs Minzai Pirbakhaishi, Criminal Appeal No. 493 of 2016 pgs 6, 7 and 8**, since the witness testified to have been involved in the investigation and come across the documents in his official duties.

From the parties' submissions I construe the following to be issues in dispute which this court need to determine:

1. Whether the directives of the Court of Appeal waived the plaintiff's opportunity to examine the document intended to be tendered as exhibit by the additional witness.
2. Whether the Witness is not a competent person to tender the documents.
3. Whether the procedure to tender the documents as exhibits has been complied with.

In addressing the first issue on the consequence of the directives of the Court of Appeal in exhibit examination, I will hereunder quote the words of Their Lordships Justices of Appeal given in their Ruling:



"Consequently, we direct the High Court to take additional evidence relating to Document Examination Report with Ref: No FB/DOC/LAB/01/2020 dated 28/1/2020 disowning the previous examination report. Thereafter, the High Court should certify such evidence to this Court and together with a statement of its own opinion regarding Credibility of the Witness who adduced the additional evidence in relation to the exhibit to be tendered. Moreover, the High Court should ensure that all the parties in this case together with their advocates are in attendance at the time when such evidence is taken."

From the wording of the Hon. Justices of Appeal this court is assigned the following specific duties:

1. To take additional evidence relating to Document Examination Report with Ref: No FB/DOC/LAB/01/2020 dated 28/1/2020 disowning the previous examination report.
2. To certify such evidence to the Court of Appeal and together with a statement of its own opinion regarding Credibility of the Witness who adduced the additional evidence
3. To ensure that all the parties in this case together with their advocates are in attendance at the time when such evidence is taken

With regards to item 1 above on taking the procedure to be used in taking the additional evidence, the Hon Justices of Appeal did not provide a specific procedure to guide such "taking of the evidence." To



put the matter in a right perspective, it is vital to note that the Court of Appeal gave this direction after having invoked **Rule 36 (1) (b) of the Court of Appeal Rules** which provides: -

"36.- (1) On any appeal from a decision of the High Court or Tribunal acting in the exercise of its original jurisdiction, the Court may:-

(a) Re-appraise the evidence and draw inferences of fact; and

(b) In its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.

(2)N/A

(3) When additional evidence is taken by the trial court, it shall certify such evidence to the Court, with a statement of its own opinion on the credibility of the witness or witnesses giving the additional evidence, when evidence is taken by a commissioner, he shall certify the evidence to the Court without any statement of his own opinion on the credibility of the witness or witnesses.

(4) The parties to the appeal shall be entitled to be present when any additional evidence is being taken but that evidence shall not be taken on the presence of any assessor."

From Rule 36 (3) the only guide on how the evidence shall be taken by the trial court is the certification by trial court and its opinion on credibility of the witness as already directed by the Justices of Appeal in



the Ruling. No specific directives as to how the actual taking of evidence should be conducted.

I have read the provision of Section 67 (1) (a) (ii) of the Evidence Act which Mr. Mbamba submitted that under it, the documents should not be examined. It provides:

"67.-(1) Secondary evidence may be given of the existence, condition or contents of a document in the following evidencecases-

(a) when the original is shown or appears to be in the possession or power of-

(i) the person against whom the document is sought to be proved.

(ii) a person out of reach of, or not subject to, the process of the court; or

(iii) a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it;"

From the above quoted words of Section 67 (1) (a) (ii) nothing is there to address the taking of additional evidence. By reading this provision, it is apparent that it does not provide that admission of additional evidence goes without examination. This being the case, I will focus on what is already directed by the Hon. Justices of Appeal in their Ruling and take the evidence in a normal practice and procedure already guided in our legal practice while taking into account the uniqueness of the matter at hand which is coupled with Court of Appeal directives. I

therefore don't agree with Mr. Mbamba that the court do not have to, at all, get opinion from the other side on the exhibit admission including cross examination.

The **second issue is whether the Witness is not a competent person to tender the documents.** Mr. Rutabingwa did not cite any provision to support his assertion. From the decision in the case of **Mizrai and Others** cited by Mr Mbamba the Court of Appeal has described the test to identify competent person in tendering exhibit, thus:

"The test for tendering exhibit is therefore whether the witness has the knowledge and he possessed the thing in question at some point in time albeit shortly."

In the strength of this decisions, it is a jurisprudential position that it is not mandatory for documentary evidence to be tendered by only the maker or addressee of such document. In the witness statement, the witness stated how he came into possession of the document. Since it is not in dispute that the witness once in time possessed the documents and that he is conversant with them, I find the witness to be competent to tender the documents. Mr Rutabingwa's objection on this point is baseless.

The last issue is **whether the procedure to tender the documents as exhibits has been complied with.** Mr. Rutabingwa's objection is premised on two scenarios. The first one is the document being not original, and the second one, the documents being public document



improperly certified contrary to Sections 83 (a) (iii) and 85 (1) of the evidence Act, hence cannot be admitted.

To start with the first scenario, the procedure to tender secondary documentary evidence is guided by Section 68 of the evidence Act, which requires notice to produce to be issued to the person in control of the original document. Mr. Mbamba maintained that since the documents are in the office of the Chief Justice and since it is an order of the Court of Appeal to admit it, the court should just accept it. As earlier said in this Ruling, it brings to the attention of this court the uniqueness of the matter at hand where the taking of evidence is directed by the Court of Appeal. I take this as falling within the situation where the court may invoke the proviso to Section 68 (g) of the TEA which gives the court a discretion to decide "in any other case in which the court thinks fit to dispense with the requirement of notice to produce". Accordingly, taking the nature of this matter, I hereby dispense with such a notice to produce.

On the issue of certification, I agree with Mr. Rutabingwa that public documents have been given specific procedure of certification coupled with fees payment in accordance with Section 83 and 85 of the Evidence Act. For clarification, these provisions are quoted hereunder:

"83. The following documents are public documents-

(a) documents forming the acts or records of the acts of-

(i) the President of the United Republic;

(ii) official bodies and tribunals; and



(iii) public officers, whether legislative, judicial or executive;

(b) public records kept in the United Republic of private documents."

84. All documents other than public documents are private. Certified copies of public documents

85.- (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person, on demand, a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of the copy that it is a true copy of that document or part thereof, as the case may be, and such certificate shall be dated and subscribed by the officer with his name and official title, and shall be sealed if the officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies.

(2) Any officer who in the ordinary course of his official duty is authorised to deliver copies of public documents shall be deemed to have the custody of those documents within the meaning of this section.

From the above provision, certification need to be done by the authorised officer and that the certification done by private advocate is not in compliance with the appropriate procedure.



Generally, the provision of Sections 53 and 83 do not categorically state whether lack of proper certification and fees payment renders the document completely useless in evidence. In my view, it suffices to order the party intending to use such evidence to ensure that proper certification is obtained, and appropriate fees paid.

From the above analysis, I find the witness competent to tender the exhibit. Considering the uniqueness of this case, I dispense with the requirement of notice to produce under Section 68 (g) of the Evidence Act and find the document admissible without such a notice. I further order the Defendant to find the proper certification of the document and pay the necessary fees before the submission of the record to the Court of Appeal.

Dated at Dar es Salaam this 08th Day of December 2021



A handwritten signature in blue ink, appearing to read "K.T.M.", positioned above the printed name.

KATARINA. T. REVOCATI MTEULE

JUDGE

08/12/2021