

**IN THE HIGH COURT FOR ZANZIBAR
HOLDEN AT TUNGUU
CRIMINAL CASE NO. 85 OF 2022**

DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTOR

VERSUS

1. KASSIM IDRISSA MUSSA ACCUSED PERSONS
2. ABDUL-LATIF ABDALLA WAZIRI
3. AISHA YUSSUF SAID
4. FATMA KOMBO MOH'D
5. ASIA ABDISALAMI HUSSEIN

RULING

DATE OF RULING: 11.5.2023

BEFORE: ISSA, A. A., J

This ruling arises out of the objections raised by the accused persons' advocates with respect to the admission of electronic evidence which are two VAT Returns. These VAT returns were the outputs from the ZRB computers for tax payer Kororoma Limited, and Suleiman Ali Mbarak. The objection was raised by the learned advocates, Mr. Abdalla Juma, Mr. Omar Sheha, Mr. Rajab Abdalla, Mr. Haji Tetera and Mr. Innocent Maico who are representing the five accused persons. The DPP is represented by learned senior state attorneys, Mr. Said Ali Said, and Mr. Shamsi Yassin.

The background to the case is that the accused persons have been charged with various counts of offence under the Zanzibar Anti-Corruption and Economic Crimes Act No. 1 of 2012. The 1st accused person, Kassim Idrissa Mussa has been charged with 74 counts of misappropriation of asset contrary to section 43 (1), 60(1), (2) (a) and 61 and 2 counts of abuse of office contrary to section 53(1) and 61.

The 2nd accused person, Abdul-latif Abdalla Waziri has been charged with 68 counts of misappropriation of asset contrary to section 43 (1), 60(1), (2) (a) and 61 and 2 counts of abuse of office contrary to section 53(1) and 61. The 3rd accused person, Aisha Yussuf Said has been charged with 7 counts of misappropriation of asset contrary to section 43 (1), 60(1), (2) (a) and 61 and 2 counts of abuse of office contrary to section 53(1) and 61. The 4th accused person, Fatma Kombo Moh'd has been charged with 5 counts of misappropriation of asset contrary to section 43 (1), 60(1), (2) (a) and 61 and 1 count of abuse of office contrary to section 53(1) and 61. The 5th accused person, Asia Abdisalami Hussein has been charged with 1 count of abuse of office contrary to section 53(1) and 61.

Mr. Abdalla Juma on behalf of all the accused persons objected to the tendering of those VAT returns for the following reasons. Firstly, he argued that the returns were issued electronically and according to section 73 of the Evidence Act a certificate was needed to prove its issuance. Secondly, he submitted that even if the first argument fails the returns are copies and there is a requirement for certification that it they are true copies, which was not done. Thirdly, he submitted that the exhibit was not named in the preliminary hearing and they do not have it.

Mr. Shamsi in his reply to the objection submitted that it is not necessary to submit the certificate under section 73 (4) of the Evidence Act; even an oral proof is sufficient. He added that the section does not say it is necessary; it only says that it has to be proved that the system was working properly and the witness has proved that ZITAS was working properly. To support his argument he cited a persuasive case of **Freeman Aikael Mbowe and 7 Others V. Republic**, Criminal Appeal No. 76 of 2020 (HC). On the issue of certification of secondary evidence he submitted that the requirement does not apply to the electronic evidence. Lastly, with respect to the third argument he argued that in the preliminary hearing they did mention that they will produce returns though they did not mention the name of the tax payer. In addition, he said that omission does not vitiate the proceedings.

Starting with the issue of the exhibit being not mentioned in the preliminary hearing, this court agrees with the advocates for the accused persons that the returns were

not specifically identified, but they were mentioned that they will be used as evidence. Further, in the documents which were supplied to the court and to the accused persons' advocate in the information those returns were part of the information. Hence, not specifying the particulars of those returns in the preliminary hearing is not fatal to the case. The Court of Appeal in dealing with the issue of prosecution calling a witnesses whose name did not appear in the preliminary hearing had this to say in Leornard Joseph @ Nyanda V. Republic, Criminal Appeal No. 186 of 2017 (Unreported):

“In our view, this practice, (to mention witnesses who are intended to be called by the prosecution’s side) which we commend, is only meant to facilitate effective management of the case and issuance of summons to intended witnesses in order to expedite trials. It does not preclude the prosecution’s right to call a witness who was not named at the preliminary hearing.”

Therefore, failure to specify the exhibit in the preliminary hearing does not preclude the prosecution from producing it as long as the defence were provided with the copies of those exhibits in the information.

Coming back to the main issue; this ruling calls for interpretation of section 73 of the Evidence Act No. 9 of 2016 and our starting point on this matter is the section 73 itself which reads:

“(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer herein referred to as the computer output shall be deemed to be also a document, if the condition mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated herein of which direct evidence would be admissible.

(2) *The conditions referred to in subsection (1) of this section in respect of a computer output shall be the following:...*

(3) *N/A*

(4) *In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following:*

(a) identifying the electronic record containing statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer; or

(c) dealing with any of the matters to which conditions mentioned in subsection (2) of this section relates;

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities, whichever is appropriate, shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.

(5) *N/A*

(6) *N/A*

Section 73 as we have seen above started with a non-obstacle clause. It forms a complete code for the admissibility of electronic evidence; it does not depend on other provisions in its interpretation of the admissibility of the electronic evidence. Further section 73 (1) clearly stipulates that the provision deals with secondary evidence of the electronic evidence and not the original. The following words have been used: *“any information contained in an electronic record which is printed on a*

paper, stored, recorded or copied in optical or magnetic media produced by a computer herein referred to as the computer output”.

Therefore, the conditions which were mentioned under subsections (2) to (6) are applicable to those computer outputs and they are not applicable when the original is produced. For instance, when a laptop computer, a tablet, a cellphone is produced in court by a person using those devices there is no necessity of applying those conditions particularly as in this case a certificate which is required under subsection (4). But when the computer output is produced which is a secondary evidence, the conditions stipulated in section 73 has to be satisfied before they are admitted in court.

The second question is what is an electronic record. Fortunately, section 2 has defined electronic record as follows:

“electronic records means a record created, generated, sent, communicated, received, or stored by electronic means.”

There is no doubt that the VAT Returns are electronic records which were generated by ZRB computers. This definition removes a confusion which was existing with regard to what is an electronic record. For instance, a letter which has been typed in a computer and printed using a printer, and later sent to another person. The question is whether the said letter is an electronic record and section 73 is applicable? The answer is no; the letter is not an electronic record and should be dealt with as any other documentary evidence. The above definition is very clear; that letter was not intended to be a record or to be precise no record was created. What is produced in court is what has been physically sent to another person.

But if the same letter in the computer is sent to another person using e-mail. That letter will become an electronic record because once you sent it through e-mail, you create a record in the yahoo or hotmail account or whatever platform you are using. Hence, it is recorded electronically. Further the transmission to another person is also done electronically. Therefore, e-mail will be subject to section 73 as electronic evidence.

Now, looking at section 73 (4) which is the subject of the objection raised; the issue in controversy first is whether the certificate mentioned in this subsection is necessary and what is its effect if not produced. Secondly, whether a certificate has to be obtained when an original record of the electronic record is produced. Fortunately, these controversies also emerged in India where section 73 originated. In fact, section 73 is a verbatim reproduction of section 65B of the India Evidence Act, 1872. The Supreme Court of India in **Arjun Panditrao Khotkar V. Kailash Kishanrao Goratyai**, a case decided in July 2020, had the opportunity of putting to rest the controversies surrounding section 65B (4) which is *pari materia* to our section 73(4).

The Supreme Court differentiated the original record which is contained in the computer and the secondary copies that are made from the primary electronic record. The court held that a production of a certificate shall not be necessary when the original electronic record is produced. The original electronic record can be adduced directly as evidence if the owner of the computer/tablet/mobile phone steps into the witness box and established that the device where the information is first stored is owned/ operated by him. If the the computer where the electronic record was first stored happens to be part of a computer network/system and it is not possible to bring such a network/system physically to the court, then secondary copies can be produced along with the certificate stipulated by section 65B(4). Further, the Supreme Court said the obligation to produce certificate by section 65B(4) is mandatory and not voluntary and is a condition precedent before secondary copies of an electronic record can be admitted.

This view of the Supreme Court of India is adopted by this Court, and the Court is not persuaded by the case **Freeman Aikael Mbowe V. Republic** (supra) for two reasons. Firstly, in the case of **Mbowe** the High Court was dealing with section 18(2) of the Electronic Transaction Act, Chapter 442 of the Laws of Tanzania. The wording of this provision is different from the wording of section 73 of the Evidence Act. Secondly, the Electronic Transaction Act is the law which is not applicable in Zanzibar at the moment. Therefore, it is the finding of this court that production of the certificate is mandatory before the said VAT returns are admitted in evidence.

Hence, the admission is refused at this moment and the DPP is allowed to seek the certificate from the proper authorities.

In case of difficulties in getting the certificate our laws contain various provisions which can be used in facilitating the party in obtaining the certificate. These provisions include section 181 of the Evidence Act. Order XIX Rule 6 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar and Section 132 of the Criminal Procedure Act No. 7 of 2018 which empower the court to order for the production of any document or thing during the course of the trial. If the competent person/entity refuses to grant the certificate the party who wishes to rely on the electronic record can apply to the court for an order to produce the requisite certificates.

It is so ordered.

(Sgd) ABDUL-HAKIM A. ISSA
JUDGE
11/5/2023

COURT

This ruling was delivered in open court on this 11/5/2023 in the presence of Mr. Said Ali Said and Mr. Shamsi Yassin, the learned state attorney for the DPP and in the presence of Mr. Abdalla Juma, Mr. Omar Sheha, Mr. Haji Tetere, Mr. Rajab Abdalla, Mr. Hassan Kijogoo and Mr. Innocent Maico, the learned advocates for all the five accused persons.

(Sgd) ABDUL-HAKIM A. ISSA
JUDGE
11/5/2023

I certify that this is a true copy of original

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DEPUTY REGISTRAR
HIGH COURT, ZANZIBAR