

**THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 397 OF 2018

THE DPPAPPELLANT

VERSUS

- 1. JAMES S/O MSUMULE @ JEMBE**
- 2. EMMANUEL S/O NGAILO @ IMMA**
- 3. IZACK S/O NGAILO**
- 4. ANITHA D/O MBWILO**
- 5. UPENDO D/O MLIGO**

.....RESPONDENTS

(Appeal from the Ruling of the High Court of Tanzania, at Iringa)

(Shangali, J.)

**dated the 29th day of October, 2018
in
Criminal Sessions Case No. 84 of 2014**

JUDGMENT OF THE COURT

13th & 15th May, 2020

MZIRAY, J.A.:

In a case which is still pending in the High Court of Tanzania at Iringa (Criminal Sessions Case No. 84 of 2014), the five respondents stand charged with murder contrary to section 196 and 197 of the Penal Code, Cap 16 R. E. 2002 (now R.E. 2019). It is alleged that the five respondents murdered one Alice Mtokoma on 13/5/2012 at Usalule Village within the district and region of Njombe.

The trial commenced on 30/8/2018 before Shangali, J. At the trial each respondent enjoyed legal services of a counsel. The team of advocates who appeared in this case were, Mr. Musa Mhagama for the first accused, Mr. Frank Ngafumika for the second accused, Ms. Tunsume Angumbwike for the third accused, Ms. Doreen Gasper for the fourth accused and Mr. Edwin Swalehe for the fifth accused. The Republic had the services of Mr. Ruziki Matitu assisted by Mr. Yahaya Misango and Mr. Andrew Mandwa, learned State Attorneys.

On 26/10/2018 when the trial of the respondents was still in progress, PW5 D/Cpl Salehe who was the investigator of the case sought leave of the trial court to tender a cautioned statement of the fifth respondent which she gave to the police. The prayer sought received serious opposition from the team of advocates who represented the respondents. In essence, the learned advocates raised four objections. One, the cautioned statement was taken out of the prescribed time contrary to section 50(1)(a) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA); two, that the representative of the fifth respondent was present during the interview but did not sign in all the pages of the cautioned statement; three, the statement was wrongly recorded under

sections 56, 57 and 58 of the CPA; four, the cautioned statement was wrongly certified under section 57 and 58 of the CPA instead of section 10(3) of the CPA. On the other hand, the prosecution argued that all the procedures pertaining to the recording of the cautioned statement of the fifth respondent were followed hence the four points raised were misconceived.

In considering the arguments from both sides, the trial judge at the end sustained three of the objections raised by the defence and declared the cautioned statement of the fifth respondent inadmissible. She rejected it.

The DPP was aggrieved by the decision of the trial court. He lodged this appeal seeking to challenge the decision on two grounds of complaint. However, during the hearing, Mr. Jally Willy Mongo, conceded to the first ground and so this judgment will be confined to the second ground which faults the trial judge for rejecting the fifth respondent's cautioned statement. On that ground the appellant prayed for the decision of the trial court to be nullified, and an order admitting the cautioned statement and the continuation of trial from where it ended be made.

When the appeal was called on for hearing, Mr. Abel Mwandalama learned Senior State Attorney appeared for the appellant assisted by Ms. Edna Mwangulumba, learned State Attorney. On the part of the respondents, like in the trial court, Mr. Musa Mhagama appeared for the first respondent; Mr. Frank Ngafumika for the second respondent and Ms. Doreen Gaspar for the fourth respondent. The third respondent had the services of Mr. Batista Mhelela and Mr. Jally Willy Mongo appeared for the fifth respondent.

Submitting in support of ground two, Mr. Mwandalama criticized the finding of the trial court at page 156 of the record of appeal to the effect that there was no plausible explanation given for the statement to be taken out of the prescribed time. He argued that before reaching that decision, the trial judge was supposed to direct her mind on the provisions of section 50 (2) of the CPA which provides some exceptions to the four hours period prescribed by the law in recording a cautioned statement. The exceptions include, when the accused person is conveyed to the police station; when he requires a relative or advocate to be present at the recording of the statement. He submitted that the cautioned statement could not be recorded on the night of 18/5/2012 when the fifth respondent was

arrested. Similarly, it could not have been recorded on 19/05/2012 because she requested for her relative, one Joshua to be present at the recording of her statement. He argued that the period of waiting Joshua to be available caused the delay in recording the statement and this was one of the exceptions contemplated in section 50(2) of the CPA.

In addition, the learned Senior State Attorney argued that it was impracticable in the circumstance of the case to record the fifth respondent's cautioned statement within four hours while the investigation was still in progress. He argued that the nature of the case, its complexity and the fact that PW5 and his team of investigators sometimes were to move from one place to another, were among the other reasons which impeded the cautioned statement in controversy not to be taken in time. To reinforce his argument, he referred us to the case of **Yusufu Masalu @ Jiduvi and 3 others v. R**, Criminal Appeal No. 163 of 2017 (unreported).

When probed by the Court on the issue of extension of time, the learned Senior State Attorney replied that, the law is silent on whether the cautioned statement can be recorded at night time, although the law does not exclude the four hours at night time.

The learned Senior State Attorney rested his submission by arguing that, the reasons advanced by PW5 on the nature of the case and complications in the investigation and the request of the fifth respondent to have her relative present were sufficient reasons to warrant the cautioned statement to be recorded out of time. He thus prayed for this Court to allow the admissibility of the fifth respondent's cautioned statement as an exhibit.

In reply, Mr. Mongo conceded to the first ground of appeal. On the remaining ground, he expressed his position that he was supporting the findings of the trial judge. He insisted that the cautioned statement was taken out of the prescribed time and there was no extension sought and obtained. He agreed that once the accused requires his/her relative to be present then the computation of time will be suspended until his relative is present as stated under section 50(2) of the CPA. He argued that the prosecution cannot benefit from the exception under section 50(2) of the CPA because on 20/5/2012 when Joshua arrived, the statement was to be recorded that very morning but for unknown reasons the statement was taken from 3.00 pm to 4.00 pm, which was outside the time of four hours prescribed by the law. On the alleged complications in the investigation of

the case of the nature, his response was that there was nothing in PW5's evidence to suggest that there were some complications involved in the investigation. He also wondered why the statement was not recorded on the night of 18/5/2012 when the meeting was convened and the fifth respondent was in that meeting. He argued that the allegation that PW5 had the task of interrogating other suspects does not fall under the exceptions in section 50(2) of the CPA. For the above reasons he prayed for the Court to dismiss the appeal.

The other learned advocates were also afforded the opportunity to respond but they all supported the submissions of Mr. Mongo.

In rejoinder, Mr. Mwandalama repeated and insisted that the nature of the case and the complications involved in the investigations disabled PW5 from recording the cautioned statement of the fifth respondent in time. He therefore reiterated his prayers.

Upon going through the arguments from either side, the disturbing issue for us to decide is whether the trial judge was on the right track to reject the cautioned statement of the fifth respondent for the reason that it was taken outside the four hours period prescribed by the law which

starts running from the time of her arrest. Section 50(1)(a) of the CPA requires a cautioned statement to be recorded within a period of four hours reckoned from the time of the arrest of a suspect. However, section 50(2) of the CPA gives exceptions for such a statement to be admitted. The said section is couched in the following words:-

" In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence-

(a) While the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;

(b) For the purpose of –

(i) enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer;

(ii) enabling the police officer to communicate, or attempt to communicate with any

person whom he is required by section 54 to communicate in connection with the investigation of the offence;

(iii) enabling the person to communicate, or attempt to communicate, with any person with whom he is, under this Act, entitled to communicate;

(iv) or arranging, or attempting to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an interview with the person under restraint or while the person under restraint is doing an act in connection with the investigation;

(c) while awaiting the arrival of a person referred to in sub-paragraph (iv) of paragraph (b); or

(d) while the person under restraint is consulting with a lawyer.”

Among the exception given is that stipulated under sub section (b) (iv) and (c) of section 50 (2) CPA on which a suspect can demand for his relative or lawyer to be present during the interview. In the instant case, on 19/5/2012 the fifth respondent demanded from PW5 for her brother in law one Joshua to be present and for that reason the interview was rescheduled to 20/5/2012. When Joshua arrived on that day the interview was conducted and the cautioned statement of the fifth respondent was taken at 15:00 hours ending at 16:00 hours. Mr. Mongo has queried why the statement was not taken on the night of 18/5/2012 when the arrest was made or in the morning hours of 20/5/2012 when Joshua arrived. On this issue, we tend to agree with the argument of the learned Senior State Attorney that the prevailing circumstances could not have allowed for the statement to be recorded on the night of 18/05/2012 because PW5 had to rush and look for the other suspects upon being tipped by the fourth and fifth respondents of the other people who were implicated in the alleged murder. On the assertion that the cautioned statement was out of time for being taken at 15:00 hours on 20/5/2015, we do not agree with this assertion because the record is silent as to when Joshua arrived at the police station. The argument by the learned advocate for the fifth

respondent that Joshua arrived in the morning is a mere speculation because the same is not supported by the record of appeal.

Another reason for the delay advanced by the learned Senior State Attorney is that due to the nature of the crime and the complications involved in the investigations of this case, it was impracticable to take the cautioned statement of the fifth respondent within the prescribed time i.e. within a period of four hours upon the arrest of the suspect. We find that his argument has merit because, as reflected at page 135 of the record, upon the arrest and interrogation of the fourth and the fifth respondents, the two revealed to PW5 that there were other suspects involved who were resident of Utiga village. PW5 had to rush to this village for further investigations. That task in our view was involving and we think that where an investigation involves more than one suspect scattered in different areas, such work becomes difficult and indeed it complicates the investigations. This Court, under exceptional circumstances has considered complications in investigation as a valid ground to take a cautioned statement of a suspect outside the prescribed time. (See **Yusuph Masalu @ Jiduvi and 3 Others v. R** (supra) and **Chacha Jeremiah Murimi**

and 3 Others v. R., Criminal Appeal No. 551 of 2015 (unreported). In the latter case we observed that:-

"However, the nature of the matter being of high public interest and taking into account the complications in its investigation and having looked at the cautioned statements in issue, which contains information relevant to the fact in issue, there is no way, the way they are, can be said that the omission to comply with the provisions of section 50 of the CPA and lack of certificate amounted to an irregularity which goes to the root of the matter so as to invalidate the cautioned statements in question. What was contravened was procedural matter which does not affect the weight attached to the substance in the cautioned statement. Also we looked as whether the failure to record the said cautioned statements within a period of four hours prejudiced the appellants."

Also, in **Nyerere Nyague v. R.**, Criminal Appeal No. 67 of 2010 (unreported) we observed that:-

"It is not therefore correct to take that every apparent contravention of the provision of the CPA automatically leads to the exclusion of the evidence in question."

Considering what we have discussed above and based on the authorities cited, we are of the settled view that the cautioned statement of the fifth respondent was wrongly rejected by the trial court. The appeal is therefore allowed.

Having allowed the appeal, we order for the record to be remitted to the trial court for the admission of the cautioned statement of the fifth respondent as exhibit for the prosecution. Further to that, we direct for the continuation of the trial to where it ended prior to the appeal. We are aware that the trial judge has ceased jurisdiction upon her retirement in the public service hence we further direct that the record be placed before another judge to complete the trial.

Taking into consideration the nature of the offence and the fact that the respondents are in remand custody, a quick disposal of the case is necessary.

Order accordingly.

DATED at **IRINGA** this 15th day of May, 2020.

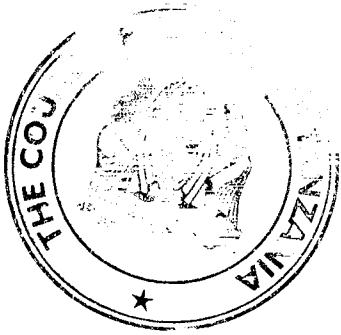
R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 15th day of May, 2020 in the presence of Mr. Abel Mwandalama, learned Senior State Attorney for the Appellant/Republic and Mr. Jally Mango holding brief of Mr. Mussa Mhagama for the 1st respondent Mr. Frank Ngafunika for the 2nd respondent, Mr. Batista Mhelela for the 3rd respondent, Ms. Doreen Gaspar

for 4th respondent and Mr. Jally Willy Mongo for 5th respondent is hereby certified as a true copy of the original.




E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL