

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
ORIGINAL JURISDICTION
CRIMINAL SESSIONS CASE NO. 151 OF 2015

THE REPUBLIC
VERSUS
MARCELINE KOIVOGUI

R U L I N G

11/5 & 12/5/2017

Matogolo J.

This ruling emanates from the objection raised by M/S Hajra Mungula advocate for the accused with regard to the caution statement purported to have been given by the accused.

The learned counsel raised legal point of objection in the following areas;-

One, violation of S.58 of the CPA in recording the accused caution statement. The learned counsel submitted that the requirements of this provision were not complied with as the provision requires that the accused herself must have initiated her statement to be recorded. But in this case it is the police officer (Pw11) who initiated the recording of that statement thus S.58(1)(a) CPA was violated.

Two, That Section 58 make reference to S.53(c) which has the requirement that the accused before recording her statement or before her statement being recorded must be cautioned. This is among the accused's rights. But in the instant case the accused was cautioned under non-existing

law. By reading the caution statement it reads that the accused was suspected for trafficking illicit drug under section 16(1) of the Drugs Act. M/s Hajra Mungula learned Advocate stated that such law is non-existent, the existing law is the Drugs and prevention of illicit Trafficking in drugs Act. That the witness did not say anything to the existing law now, and has no chance to say now. The learned counsel submitted that citing non-existing law it is as good as the accused was never cautioned. She said the way it appears the caution statement is supposed to be recorded under S.57 of the CPA; because it was initiated by the police officer. She went further by stating even if would be recorded under S.57 still it wouldn't meet the legal requirement as it does now show when the caution was given only the time of beginning to record the statement and finish recording is indicated. That the statement does not qualify to be under S.53 or S.57 of the CPA, the learned counsel cited the case of **Mussa Mustapha Kusa & Another v.R** Criminal Appeal No.51/2010 CAT DSM, to support her argument, in which it was held the provisions of the law must be fully complied with.

She also cited the case of **Seko Samwel v.R.** Criminal Appeal No.77/2003 CAT (2005) TLR which is about how recording of statement under s.58 should be.

Three that Pw11 who recorded the accused's statement is also the investigating officer who was investigating the case the act which prejudiced the accused rights because as the police officer she had interest to know what was contained in the case, she cited the case of **Njuguna Kimani & 3 Others Vs. Rep. (1954) EA 316** which discouraged the practice of the investigating officer to record caution statement of the accused on the case he investigate. The learned counsel also referred the case of **R.v. Dhoulkefly Awadh Abdallah**, criminal sessions case No.02/2015 High Court

DSM in which **Njuguna case** was referred and the court refused to admit the caution statement.

Four, there was an issue of language raised by Mr. Memba advocate that the accused does not know English language.

In reply to the objection raised, M/S Paulina Fungameza learned State Attorney submitted in respect of violation of requirements of S.58, she said the requirements of that provision were not violated, the same were complied with. That despite the requirements under S.58(1) that the caution statement to be recorded under that section the same must be initiated by the accused himself, but the section has been amended by the Written Laws (miscellaneous Amendments) Act, No.3 of 2011. By that amendment, through S.15 subsection 4 was inserted immediately after subsection 3. Under subsection 4 of S.58 the investigating police officers are empowered to record caution statement of the accused. It is not necessarily for the accused to initiate recording of the statement. What is important is to inform the accused to read the statement or read the same on her behalf. She said Pw11 therefore complied with the requirements under S 58. With regard to the requirements of cautioning the accused before her caution statement was recorded as the Drug Act cited is non-existent. M/S Paulina learned State Attorney stated that S.53 (a) & (b) requires that the accused should be informed of the offence alleged she committed. There is no requirement that she should also be informed of the Law violated. And that the purpose of S.53 is to enable the accused to know why is under restraint.

By being informed that she was suspected for illegal trafficking in drugs was sufficient and the purpose of the law was fulfilled.

M/s Paulina admitted that their witness Pw11 wrote "Drug Act" but with qualification as she also wrote Cap 95 R.E. 2002 which alone would be sufficient for purposes of citing the law concerned. It was the submission by the learned State Attorney that the accused was properly warned before the caution statement is recorded. The other issue is that as the caution statement was initiated by PW11 the same was supposed to be taken under s.57 of the CPA.

The learned State Attorney submitted that S.57 requires recording of caution statement on the basis of questions and answers. But the statement in this case were not taken on questions and answers basis, but was in narration form.

The learned State Attorney said the cited case of **Mussa Mustapha Kusa v.R.** Cr. Appeal No.51/2010 in which the Court of Appeal judges held that sections 57 and 58 and their requirements are mandatory and should be complied with, she said even themselves have complied to those provisions.

The learned State Attorney however stated further that even though, non-compliance to some of the requirements contained in the sections cannot make the statement invalid if the requirement not complied with does not go to the roots of the matter. She said this was held by the Court of Appeal in the case of **Yustus Katoma v.R.** Criminal Appeal No.242/2006 CAT at Mbeya. The learned State Attorney also stated that the cited Case of **Seko Samwel v.R.** is not applicable to the case at hand as it was about the caution statement taken under S.57 and the court held that the statement was not confession as it was initiated by the police officer. But she said the caution statement under discussion was recorded under S.58 so the **Seko Samwel** case is distinguishable to the case at hand. Even though

she said the decision of that case was rectified in the case of **Ramadhan Salum v.R.** Criminal Appeal No.5/2004 in which it was held that the difference is that the statement recorded under S.57 resulted from questions and answers. But the statement recorded under S.58 is through narration.

As to the objection relating to the investigating police officer to record accused statement, the learned State Attorney submitted that is allowed. She said there are provisions in the CPA, including S.50(2) which is about the period during which the accused caution statement should be recorded recognize the investigating police officer can record caution statement. But through amendment Act No.3/2011 the investigating police officer is mentioned to be the one who record caution statement of the accused. But the learned State Attorney challenged the defence counsel for her reliance on the decision of **Njuguna s/o Kimani case** decided by the Court of Appeal of East Africa which was decided before our Criminal Procedure Act Cap.20 RE 2002 was enacted, which was enacted in 1985.

That the case was about murder where the accused caution statements were officially recorded three months after their arrest. Before their caution statements were officially recorded, the investigating officer was interrogating the suspects orally, after three months then their statements were recorded. That act therefore suggests that the investigating police officer had sufficient facts and there was a possibility of manufacturing the statement that is why the court held that it was not advisable for the investigating police officer to record caution statement. Despite that situation, the cautioned statements were not rejected because of being recorded by the investigating police officer. The statements were not admitted because the accused were tortured. She said as we have our own legislation which permits police investigators to record accused

statements, the decision in **Njuguna Kimani case** cannot supersede our laws.

M/s Paulina submitted further that similar decision was referred in the case of **Thabo Hamza Mining v.R.** Criminal sessions case No.29/2015 H/C DSM but she quickly say that decision is not binding to this court.

The learned State Attorney concluded her submission by stating that the accused's caution statement was recorded according to the law and there is no any provision of the law violated she prayed for the objection to be overruled.

In rejoinder M/S Hajira Mungula learned advocate stated that the heading to the caution statement has heading which shows that the statement was taken under S.58 of Cap.20 R.E. 2002. There is nowhere an amendment Act No.3/2011 is indicated that the named amendment is subject to the provision of S.53(c) which is about rights of the accused to be explained to him before the caution statement is recorded.

The amendment does not touch S.58(1) on the statement which is made by the suspect himself. It means the requirements under S.58(1) are intact despite the mentioned amendment. The caution statement was not recorded according to law as far as S.58(1) is concerned. With regard to S.53 of the CPA the learned counsel rejoined that the caution statement does not indicate existing law under which the offence accused is facing was committed.

The accused therefore was warned under non-existing law, which is as good as the accused was not warned.

The learned counsel also added that while raising that objection they also raised that the time the caution was made is not indicated and the prosecution did not respond to it meaning that they have conceded.

On the issue of non-compliance to legal requirement under S.58 and the decision in **Seko Samwel case** that makes the caution statement invalid only when the matter go to the roots of the case. She said although the prosecution stated that the decision in **Njuguna case** is of 1954 but the case was cited in **Dhoulkefly** case which also referred the case of **Issa Muhidin v.R** at page 14 which talked about effect of the investigating officer to record the accused caution statement. That is a 2008 case.

With regard to S.50 of the CPA to recognize investigating officer to record caution statement, the learned counsel said, the same does not apply under the circumstances of the case at hand. The applicable section is 53, and recording is under S.57 or S.58. M/s Hajra prayed to this court not to admit the caution statement. That is what was submitted by the learned counsels.

I will start with the last point of objection, which was raised by Mr. Yasin Memba learned counsel that the accused does not know English. This appear to be more factual than legal. However the prosecution decided to reply to it and stated that the accused know English that is why even during preliminary hearing this issue was not among the disputed facts. M/s Hajra Mungula learned counsel did not rejoin to it, which probably means she conceded to what the learned State Attorney has stated. And I take it to have been conceded and thus no need to dwell much discussing it and I leave it there.

Then going to the next point from the bottom, on the issue of Pw11 recording the caution statement of the accused at the same time she was investigating the case. According to M/s Hajra Mungula, the accused was prejudiced and the reason is that as the investigating police officer had interest to know what was contained in the case. She supported her

argument by citing various cases such as **Njuguna Kimani case** supra, **Dhoulkefly Awadh Abdallah case** in which the **Njuguna case** and the case of **Iddi Muhidin @ Kibatamo v.R** CR. Appeal No.1101/2008 were referred.

On the other hand the Republic has argued, this is allowed as there are provisions of the Criminal Procedure Act on which the investigating police officers are recognized and can record caution statement. But in the amendment Act No.3/2011 the investigating police officer is mentioned to be the one who record caution statement of the accused.

Starting with Section 50 the relevant part which M/s Paulina learned State Attorney has mentioned as recognizing the investigating police officer in recording caution statement is S.50(2). The same reads as follows:

*"2 in calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while **the police officer investigating the offence refrain from interviewing the person** to do any act connected with the investigation of the offence."*

The provision relates to the period permissible for the accused who is under restraint after been arrested can be interviewed which means during the period his caution statement is taken.

But the learned State Attorney also cited Act No.3/2011 which mention the investigating police officer to be one of persons who can record accused caution statement. The named law amended section 58 of the CPA by inserting subsection 4 after subsection 3.

The same reads as follows:-

“(4) subject to the provision of paragraph (c) of Section 53, a police officer investigating an offence for the purposes of ascertaining whether the person under restraint has committed an offence may record a statement of that person and shall:-

- (a) Show the statement to the person and ask him to read it, or
- (b) Read the statement to him or cause the statement to be read to him and ask whether he would like to add or correct anything from the statement”

From the above quoted provision as well as subsection 2 of S.50 of the Criminal Procedure Act, it is clearly explained that the investigating police officer is permitted to record or take caution statement of the accused even in the case he is investigating. M/S Hajra learned counsel has argued that S.50 does not apply in the circumstances of the case at hand and said the applicable section is 53. But S.53 laid down conditions which are to be fulfilled before the accused is interviewed or his caution statement is taken and does not preclude the investigating police officer from recording the accused caution statement. And she did not explain how s.50 does not apply in this case.

The learned advocate has relied on the decision of **Njuguna Kimani** case, which was also relied up on by this court in the case of **Dhoulkefly Awadh Abdallah**.

However I subscribe to the position explained by M/s Paulina learned State Attorney that the circumstances of that case, which lead to the court to decide that it is not advisable for the investigating police officer to record accused caution statement are different to the case at hand, as it is explained that the accused statements were recorded after a prolonged period, three

months but the investigating offence was interviewing the accused always without recording their statements, it is for that reason there was fear that he had already knowledge of the fact of the case and could simply manufacture the statement. But the situation in the case at hand is different.

I have gone through the decision of this court, in **Dhoulkefly Awadhi Abdallah** but for the reason explained above I cannot hesitate to depart from that decision as I am not bound by it the same remain as persuasive. There is nothing wrong therefore for the investigating police officer to record the accused person caution statement provided that he comply with the law relating to recording of accused caution statement. This objection therefore has no merit. As to whether Pw11 in recording the accused cautioned statement she violated S.58 of the CPA for recording the statement instead of letting the accused herself to write after she has supplied her with writing materials. It is a common ground that S.58(1) has such a requirement where the accused has volunteered her statement to be recorded. It is also not in dispute that the accused in the case at hand did not write her statement as directed under S.58(1) of the CPA. Because of that the defence counsel has raised objection for the caution statement to be admitted because that provision of the law was not complied with. On the other hand the prosecution does not agree with the defence counsel. Despite the fact that there is such legal requirements, but that section has been amended by inserting subsection 4 after section 3 which empowers the police officer to record the accused statement and not the accused himself can write his statement.

Apart from that added subsection 4, which I have quoted here in above. The rest of section 58 as was submitted by M/s Hajra learned counsel

remained intact. The center of complaint which is alleged to be violated is subsection 1. The same reads:

"58(1) where a person under restraint informs a police officer that he wishes to write out a statement, the police officer

- (a) Shall cause him to be furnished with any writing materials he requires for writing out a statement, and*
- (b) Shall ask him, if he has been cautioned as required under by paragraph (c) of section 53, to set out at the commencement of the statement the terms of the caution given to him, so far as he recording them."*

This was the position of the law even before the introduction of subsection (4). But subsection (4) has introduced a scenario in which the police officer may record the accused's statement provided that he complies with the conditions laid down in section 53(c).

M/s Hajra learned counsel has argued that subsection

- (1) Was left undisturbed and therefore should be complied with.

Perhaps it is important for us to ask ourselves as to the purpose of introducing subsection (4) in section 58 and leaving the whole section undisturbed for the meaning that no any subsection was repealed while subsection (4) is inserted. I had a deep thought on that scenario, and it is my considered opinion that every amendment which is made to the existing law is made with a purpose and the purpose of inserting subsection (4) in S.58 was done with a purpose to cure the mischief which existed before. I am not persuaded by the argument put forward by the learned defence counsel that despite introduction of subsection (4) subsection 1 of S.58 must be complied with as it is. I believe, and I think I am right so to say that subsection (4) was introduced to supplement subsection (1) which means

that the two sections can be applied together. Where the accused has not volunteered for his statement to be recorded, then the police officer under S.58 (4) may record his statement. If so it cannot be said that Pw11 while recording caution statement of the accused violated the law, there is no any violation made, Pw11 acted within the ambit of the law. This objection by the defence counsel also lack merit. For that case, it cannot be said that the caution statement was supposed to be made u/s.57. That can be done only where the recording is by questions and answers.

Next I have to discuss the issue relating to citation of the law under which the offence alleged to be committed by the accused is founded. It is argued by the learned defence counsel Hajra that Pw11, just wrote "Drug Act" Cap.95 of R.E.2002. To her that law is non-existent. I have to state from the outset that this argument has no merit. The reason is that, as it was correctly submitted by the learned State Attorney what Pw11 was required to do before recording the accused statement is to let the accused know the accusation levelled against her. This does not go to the extent of informing her the provision of the law which was violated. Section 53 is very clear on this as the requirements is for the accused to be informed of his rights including the right to be informed of the allegation giving rise to his arrest. The police officer who recorded accused statement apart from stating Drug Act but she mentioned Cap. 95 RE 2002 which, as M/s Paulina State Attorney has stated that alone suffices to be a proper citation of the law. It is therefore not correct as the learned defence counsel has submitted that by not stating the full name of the law/Act is as equal as the accused was not warned. She was properly warned and in compliance to S.53(1) of the CPA. There is the argument that in the accused caution statement does not show when the caution was given, only the time of

beginning to record the statement and finishing is what is indicated. The prosecution did not respond to this, as it was correctly submitted by the learned defence counsel, this may be taken that they have conceded.

If so the question to be resolved is what is the effect of such omission.

It is a cardinal principle of law that not every violation of the law in recording accused caution statement may make the statement invalid it is only the violation which go the roots of the case. It was held so in the case **Yustas Katoma v. R** Criminal Appeal No. 242 of 2006 CAT at Mbeya.

On the other hand it is an established principle that the provisions of the law are there to be complied with, and that police officers cannot choose which legal requirements they have to comply with and which they should not. This was held in the case of **Mussa Mustapha Kusa v.R** Criminal Appeal No.51/2010.

But also one have to think of the purpose of such requirement of indicating time of cautioning the suspect and the effect of not indicating such time in the accused caution statement. In the caution statement under consideration the time when accused was cautioned is not indicated. Only the time when interview commenced and when ended is indicated. The requirement to indicate the time when accused is caution is found under S.57 (2) (d) of the CPA which reads:-

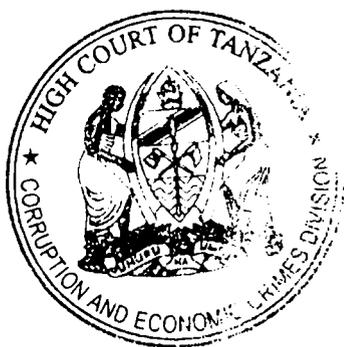
"57(2)(d) whether a caution was given to the person before he made the confession and, if so the terms in which the caution was given, the time when it was given and any response made by the person to the caution."

But the statement in question, was taken under S.58 of the CPA. In this section I do not see any corresponding provision with the requirement to record the time of caution.

Even though what is important to ask ourselves is what is the effect of not indicating such time of cautioning the accused, and if there is an omission to indicate time how is the accused affected, if the time of interview is indicated. In the accused caution statement the time when interview started and when ended was clearly shown. It is my understanding that the purpose of indicating the period when interview started and when ended is to make sure that the accused is not kept too long while being interviewed after his arrest, the act which will prejudice him. However I do not think indication of time when the accused is cautioned has that meaning, and I do not see any harm if the period for interviewing him is indicated.

Although the prosecution did not reply to that point which was raised in the objection, in my opinion that alone cannot affect the validity of the caution statement taking into account the purpose of recording caution statement, which is to find out whether or not the accused confesses to the alleged committed offence.

In upshort, and as I have explained above the objection raised by the defence lack merit. The same is hereby overruled, the caution statement of the accused Marceline Koivogui is admitted as exhibit P10.



F.N. Matogolo
F.N. Matogolo
Judge
12/5/2017