

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM REGISTRY

AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 119 OF 2016

REPUBLIC

VERSUS

KHAMIS SAID BAKARI

R U L I N G

W.B. Korosso, J.:

The issue at hand is consideration of voluntariness of the cautioned statement of the accused Khamis Said Bakari. It should be understood that this arose due to the fact that during the testimony of PW12, Asst Inspector Wamba, when the Principal State Attorney Ms Monica Mbogo prayed to tender the cautioned statement of the accused. The defence counsel objected to the admissibility of the said statement advancing two reasons. First, that the accused has never made the statement and second that the accused was never informed of his rights as testified by PW12.

Upon the Court making a finding that the accused has repudiated the statement, a trial within trial was ordered to proceed. The purpose being for the Court to determine whether the said statement was made, and if the statement was made whether it was taken voluntarily. The issue of whether the accused person was

informed of his rights prior to the taking of the statement will be an issue considered when determining the voluntariness of the statement.

In the trial within trial, the prosecution called two witnesses and tendered the cautioned statement of the accused person which was admitted as Exh.ID-P1 and the defence called one witness the accused. The gist of the evidence of the prosecution was as testified by PW1 and PW2, on the 3rd of November 2012 at 7.30 hrs, PW2, D/Sgt Wamba (although referred to as DCpl by PW1 Makole Bulugu) arrived at the Julius International Airport Dar es Salaam and informed PW1, that he had been directed by the Commander of the Anti Drug Unit- SACP Godfrey Nzowa to take the statement of the accused person. That, PW2 requested PW1 and other officers to leave the office so that he can proceed to take the statement.

PW2 testified that, when he was left with the accused person Hamisi Saidi Bakari and that he ensured the two of them were alone and sitting. That he was satisfied that the accused person was healthy and had taken his breakfast. That he introduced himself to the accused person and informed him of what charges he was facing, that of trafficking in narcotic drugs. That the interview started at 8,00hrs and ended at 9.00hrs, when he invited back the police officers including PW1 who had gone to the nearby office, that is interpol. This fact of the duration was also alluded to by PW1. PW2 stated that in taking the accused statement he had informed the accused that he his rights, such as the right not to give a statement and that if he gives a statement it may be used as evidence against his in court and the accused had consented to making the statement and signed the caution in the statement and the witness also signed.

PW2 also averred that he had informed the accused person that he had the write to have a relative, friend or lawyer during the taking of the statement and the accused had stated he did not need the presence of anyone apart from himself and the statement should be taken. PW2 stated that the statement was taken in

the form of narration vide section 58 of the Criminal Procedure Act, Cap 20 RE 2002. That thereafter PW2 narrated with his handwriting everything the accused informed him and after finishing he handed what he had written to the accused who read it and confirmed that it was what he state and signed and PW2 certified and signed. PW2 further stated that on the 6th of November 2012 in the evening, at the headquarters of the Anti Drug Unit, Kurasini he was directed by SACP Nzowa to take the additional statement of the accused, which he proceeded to do. First by finding a room which was conducive to taking such a statement. That after taking the accused to the room, he gave the accused his rights reminding him of his rights and the accused agreed to proceed without a friend relative or advocate and was willing that his statement be taken. PW2 took the additional statement of the accused and recorded and thereafter on completion gave it to the accused to read and after both of the m signed.

On the other hand, DW1 the accused denied seeing PW2 on the 3rd of November 2012 at JNIA, on the said day he had been at JNIA and in the evening was taken to Central Police. That he had seen PW2 on the 6th of November 2012 while at Central Police where PW2 had arrived with a document which he directed the accused to signed informing him the document related to consideration to bail for the accused. That up to that date he had no idea why he was under arrest. The accused said he had originally refused to sign the document but had to sign it after being forced to do so and being promised to be granted bail. He also refused having stated anything at the ADU offices at Kurasini. Therefore totally denying having knowledge or making the said statement- Ex. ID-P1. The accused also stated that at no time was he informed of any of his rights as testified by PW2.

It is a principle of law that where an accused person objects to the admission of an alleged confession, a trial court must first make an inquiry or go through a trial within trial to establish its voluntariness before accepting it as evidence see ***Twaha Ali and 5 Others V R., Criminal Appeal No. 78 of 2004***

(unreported) and ***Paul Maduka & Four Others V R., Criminal Appeal No. 110 of 2007*** (unreported).

It is trite law that the best evidence in a criminal trial, is that of an accused person who confesses to have committed the crime. It is equally settled law, however, that such a confession should not be readily inferred or taken for granted. In a criminal trial, therefore, as far as alleged confessions are concerned, the prosecution has a duty of proving that: The confession has been made properly and legally made, voluntarily and recorded correctly as held in the case of ***Athumani Rashid v R Criminal Appeal no. 138 of 1994***, CAT Mwanza. In effect meaning that, *the accused, by his conduct or words, made a statement, and that the statement or conduct amounting to a confession was made freely and voluntarily.* The standard of proof, it must be pointed out, is that of proof beyond reasonable doubt in both instances.

The Court will address itself on three issues, first whether the statement was made and second whether the statement was voluntary- and the accused was informed of his rights prior to the taking of the statement. On the first issue, with the evidence of PW1 who had witnessed the arrival of PW2 on the 3rd of November 2012 at 7.30 hrs at JNIA where the accused was in under custody, and also witnessed PW2 request all officers to leave the room so that he can interview the accused person. PW2 testified that he took the statement of the accused person under section 58 of CPA. The accused on the other hand denies any knowledge of the statement, alleging that he was pushed to sign a document he did not know on the 6/11/2012.

The Court carefully watched PW1 and PW2 when testifying, and found them to be truthful and credible witness. Even under cross examination. The issue of PW1 stating PW2 was a D/CPL at the time, this Court does not find in any way derogates the evidence of PW1 because it could be caused by misunderstanding and he was adamant that personally he believed PW2 was a D/CPL at the time

and it does not go to the root of the issue on hand to warrant discrediting of this evidence.

Evaluating the evidence of DW1- the accused, this Court has failed to understand how a person, can sign a document such as a cautioned statement and confuse it with a document relating to him being granted bail. Exh. ID-P1 is headed "*Karatasi ya Maelezo*". On the first page you have "*Maelezo ya Kukiri/Ungamo*" and below that there is a signature purporting to be of the accused beside the name Khamis Said. The accused has not denied the signature there, saying he signed it knowing it was for bail. The signatures are on every page and after the caution and at the end of the statement. Also the contents of the statement therein are matters which cannot be stated by someone without the knowledge of what transpired. There was a certification (*Uthibitisho*) at the end of the statement which was signed by both the recording officer and the appellant (again by a thumbprint). PW1 stated that the accused had admitted to the killing of the taxi driver. Exh. IP-1 provides a narration of the plan, process and execution of the plan to kill. At no point does the accused disassociate himself. Therefore from this we find that the statement was made by the accused person and taken by PW2.

The next question which is critical is whether the confession was voluntarily. Evidence has been provided that the accused was provided with rights, and he agreed for the statement to be taken. At the same time it is curious how where there one repudiates a statement, then there could be an argument that he was not informed of his rights. Since if as stated by the accused he was just given the statement to sign which he did not know the contents then by implication there would not be an opportunity to be informed of his rights. From reasons that led to the Court finding that the statement was made by the accused person, therefore the Court also finds that, from the evidence of PW2 and Ex ID-P1, there is nothing to lead the Court to doubt the evidence that the accused was provided

and informed of his rights and agreed to make a statement knowing it could be used against him in Court, he signed the caution which has the said statement and the accused from the evidence meted in Court waived enjoying the right to have a relative or advocate stating he did not need one and the statement should be taken in their absence. The Accused person evidence that he was tricked to sign the statement thinking it was a document which will lead to grant of bail does not hold water for reasons we have already stated hereinabove suffice to say, as also contended by the accused himself, this court finds that this was just a floating defence without any substance. wI therefore proceed to overrule the objection raised by the defence and find the cautioned statement of the accused to be voluntarily and therefore admissible. ?



A handwritten signature in black ink, appearing to read "Winfrida B. Korosso".

Winfrida B. Korosso

JUDGE

12th June 2017