

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION**

AT DAR ES SALAAM

ECONOMIC CASE NO. 12 OF 2018

(Originating from Economic Case No. 44 of 2018 in the Resident Magistrate's
Court of Dar es Salaam at KISUTU)

THE REPUBLIC..... PROSECUTOR

VERSUS

SAID SHABANI MALIKITA ACCUSED

RULING

Date of Ruling 30/7/2019

Mashaka, J.

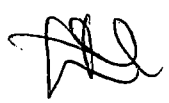
During examination in chief of PW8 who prayed to tender a written statement of one MARTIN LUAMBO in evidence, Learned Counsel Senguji for the accused raised objection. Learned Counsel submitted that on the 09/05/2018, after Martin Luambo got out of the Court, Martin Luambo was arrested by two police officers and since then he has never been seen. That the prosecution knows where the witness Martin Luambo is and cannot come now and pray to tender his statement. They strongly maintain that since Martin Luambo is kept by the Drugs Control and Enforcement Authority (DCEA) who took him that day, they request the Court to order the DCEA to bring Martin Luambo to Court to testify.

Learned Counsel argued that Section 34B of the Evidence Act has explained the type of statements that can be admitted in Court and the conditions under Section 34B(2)(a) - (f) have to fulfil and contain before the



statement can be admitted in Court. That the statement which is to be tendered in Court contravenes Section 34B(2)(f) of the Evidence Act. He explained that if you go to the statement to be tendered, it shows that the person who recorded the statement knew that the witness Martin Luambo could not read and that is why he read over the statement to him. But the declaration which was made by the recording officer does not declare that he read over the statement to Martin Luambo and therefore this statement should not be admitted into evidence because there is no proper declaration as provided by the law.

Referring the case of **Rahim Rashid @ Masangano & 2 Others VS the Republic**, Criminal Appeal No.360 of 2008, CAT at DSM (unreported), the Court of Appeal of Tanzania stated that, all the conditions stipulated in Section 34B(2) of the Evidence Act have to be complied with before the statement could be admitted in evidence. Hence, this statement has contravened the law and should not be admitted in evidence. That the prosecution did not expend any efforts to get Martin Luambo and bring him to court to testify. He argued that PW6 who was recalled to testify stated that, she took the summons to the office of the 'Mwenyekiti wa Mtaa' who endorsed the said summons that Martin Luambo cannot be found. He underscored, it could be relevant if the said PW6 could have sworn an affidavit that Martin Luambo cannot be found and referred the case of **DPP vs. Ophant Monyancha** (1985) TLR 127; where the Court held that efforts should be done to show that the witness could not be found for the tendering of his statement in evidence.

 . That the available evidence shows that Martin Luambo did enter appearance and testified in Court. After he left the Court, he was taken by

two DCEA officers and ever since he has disappeared. That on the 04/06/2018, the prosecution entered nolle prosequi in Economic Crime Case No. 2 of 2018 under Section 91(1) of the CPA, Cap 20 RE 2002 and the accused was discharged. When the accused got outside, he was arrested again and it led to this present case. Learned Counsel submitted that this means the prosecution knows where the witness is, because he testified on that day on issues which went against the interests of the Republic.

That the record of proceedings of Economic Crime Case No.2 of 2018 show that the witness Martin Luambo was to identify the exhibit tendered by the Government Chemist, which he stated that it is not the one. Therefore, the Republic does not want to bring the witness to court so he does not testify to that effect.

Learned Counsel prayed that this statement not to be admitted in evidence and to order the witness Martin Luambo to attend the court and give evidence bearing in mind the seriousness of the offence facing the accused, his client.

In reply, State Attorney Kakula for Republic submitted that on the issues of the arrest of witness, the prosecution knows the whereabouts of the said witness and the Court to order the attendance of the witness, this issue has no merit. That there is no evidence the witness is being held by the Republic or was arrested after the nolle prosequi was entered.

State Attorney contended that Learned Counsel is not a witness to prove that and the statement made could be of relevance if backed up by any evidence or affidavit sworn by the same. He strongly submitted that, the prosecution does not know the whereabouts of the said witness, that is why efforts were done to go to the office of the local government and the



'Mwenyekiti' stated that they do not know where he is and it led to their decision to conduct a by-election. That those are the efforts done by the prosecution and even the cited case did not expound to what extent should the efforts be done. So, going to the local government office and seeing the 'Mwenyekiti' was enough efforts done by the prosecution.

Further, Learned State Attorney explained that according to the notice of objection filed by the Learned Counsel for the accused shows that they know the witness cannot be found because of the words used "*take notice at the hearing of the Economic Crime Case No.12 of 2018 on 07th March 2019 or on any subsequent date to which the hearing of the case may be adjourned the accused one Said Shabani Malikita intends to object the production of the written statement of Martin Luambo as he is in the hands of the prosecution*". That they know the witness cannot be found but the allegations that he is in the hands of the prosecution are just mere suspicions, with no basis.

That though it was submitted the witness who served summons was required to swear an affidavit, State Attorney maintained that PW6 did all the efforts to get and serve the summons and came to court and testified under oath, hence has more legal weight than the affidavit. He concluded that this ground is baseless.

On the ground that the Court to issue an order to compel attendance of Martin Luambo, State Attorney clarified that the Court has to issue an executable order and PW6 testified before the Court that the witness MARTIN LUAMBO cannot be found. If only the witness is far abroad, then the Court can issue such order but emphasized the witness cannot be found.



On the provision guiding such statements is Section 34B of the Evidence Act and that all the provisions of Section 34B(2)(a) - (f) have to be complied with. Learned State Attorney submitted that the prosecution has complied with the provisions of Section 34(B)(2)(a) - (e) except (f). That there is no place on this statement that Martin Luambo did not know how to read and the Defence did not state that Martin Luambo does not know how to read. But the Defence has drawn inference from the words of his declaration and it does not mean that he does not know how to read. That the provision (f) is for a person who does not know how to read and inference should not be drawn on this matter. That the provision is silent on when the witness should have his statement be read to him.

State Attorney concluded and prayed the statement of Martin Luambo be admitted in evidence.



In rejoinder, Learned Counsel Senguji submitted that an inexecutable order is an order which contravenes the law and cannot be executable, and expounded that the order they are requesting is the Court to order the DCEA to look for, get the witness and be brought to testify before the Court. That they can do that and prayed to the Court to order the DCEA to look for and expend efforts to get Martin Luambo. Further he submitted that when you serve summons, you bring back the summons with an oath that the witness could not be found and not by endorsement. That if such an oath was made then the Court would have issued substituted service. Learned Counsel prayed to remove the wording 'on substituted service' and submitted that, no efforts were done to get hold of the said witness.


On the notice of objection filed, he stated that it was in simple language and the witness is in their hands and they know his where about.

They do not know where the witness is, but the prosecution knows where he is.

On the provisions of law, Counsel underscored this statement has contravened Section 34B(2)(f) of the Evidence Act, because Martin Luambo stated that the recorder of the statement read over to him and it shows that it was read, therefore there should be a declaration by the recorder who did not state so as required. Hence, there is no declaration by the recording officer that he read over the statement to Martin Luambo. Learned Counsel argued that if the recorder knew that the witness could read and write, he could have let Martin write and read own statement. He emphasized that this statement should not be admitted in evidence and the prosecution to bring Martin Luambo to testify in Court.

Having heard the objection raised by Learned Counsel for the accused and the reply by Learned State Attorney for the Republic, the main issue for determination is whether the statement of MARTIN LUAMBO has fulfilled the requirements and conditions set out under section 34B (1) and (2) of the Evidence Act, CAP 6 R.E. 2002 to be admitted in evidence.

The prosecution has prayed to the court to admit a written statement of one MARTIN LUAMBO, a prosecution witness who cannot be found after they got information from 'Mwenyekiti wa Mtaa' that his whereabouts are unknown and that information was put down in writing on the back of the summons , which was to be served on said witness.



On the issue raised by Learned Counsel for the accused that the Court to order the DCEA to look for, get the witness and be brought to testify before the Court; that, no efforts were done to get hold of the said witness.

Further he submitted that when you serve summons, you bring back the summons with an oath that the witness could not be found and not by endorsement. A preliminary objection is to be based on a point of law and not fact, that is contravention of a provision of law. However, Learned Counsel for the accused has not stated which provision of law has been contravened. This point of objection is baseless.

On the main issue, let me reproduce the provisions of section 34B of the Evidence Act, CAP 6 R.E. 2002, which reads as follows:

"(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be a witness, shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.

(2) A written statement may only be admissible under this section:

(a) where the maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he is not identifiable or by any operation of the law he cannot attend;

(b) if the statement is, or purports to be signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be



liable to prosecution for perjury if he wilfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being tendered in evidence;

(f) if, where the statement is made by a person who cannot read it, it is read to him, before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read."

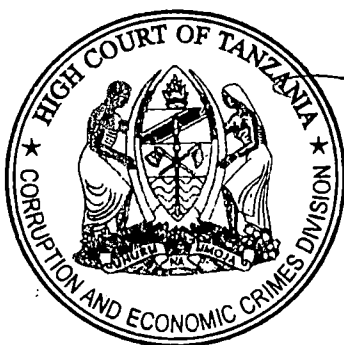
It is very clear that provisions of section 34B (2) of the Evidence Act are cumulative and all the paragraphs from (a) to (f) have to be satisfied. For a statement to be admissible all the conditions set out in section 34B (2)(a) to (f) of the Evidence Act must be complied with, this was held by the Court of Appeal in Tanzania in the cases of **Hamisi Mhina Vs Republic**, Criminal Appeal No. 83 of 2005, CAT at Tanga (unreported) and **Rahim Rashid @Masangano and 2 Others Vs The Republic(Supra)** which are binding upon this Court. As correctly submitted by Learned Counsel for the accused that section 34B(2)(f) of the Evidence Act was not met and Learned State Attorney conceded that section 34B(2)(f) of the Evidence Act has not been complied with. I had the opportunity to go through the typed copy in the statement of MARTIN LUAMBO which is marked C1 and the declaration of the witness reads '*Mimi Martin Luambo hayo ndiyo maelezo yangu ni sahihi kama nilivyoeleza, nimesomewa hakuna neno lililoongezwa au*




kupunguzwa hayo ni leo 29/08/2017 followed by his name and signature. Then a declaration by the officer PW8 who recorded the said statement followed and reads '*Mimi D/Sgt Juma Suleiman Afisa wa mamlaka ya DCEA nathibitisha kuandika maelezo ya Martin Luambo kwa usahihi kama alivyoeleza hapo leo tarehe 29/08/2017 hapa Kinondoni Mt. wa ufipa saa 4.50 usiku*' and he signed.

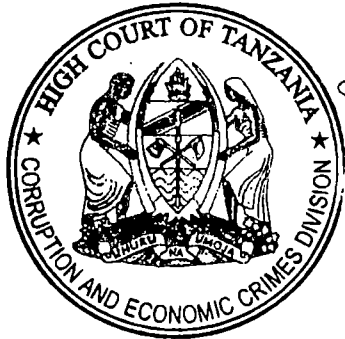
From the said statement of Martin Luambo, the declaration of the recording officer PW8 who recorded and read over the statement to the witness as declared, failed to make a declaration to the effect that he so read the statement to the witness. There is no such declaration as required under section 34B (2)(f) of the Evidence Act. Though it is not established that Martin Luambo could not read, but it is not in dispute in the declaration of Martin Luambo, he declared that the statement was read over to him obviously by PW8 recording officer and it was upon PW8 to make a declaration that he read over the statement to Martin Luambo. Hence the statement of Martin Luambo did not comply with all the conditions stipulated in section 34B (2) of the Evidence Act, Cap 6 R.E. 2002. Objection raised by the Counsel for the accused is with merit.

Consequently, the statement of Martin Luambo is not admissible in evidence because the condition under section 34B (2)(f) of the Evidence Act, Cap 6 R.E. 2002 was not fulfilled.




L. L. MASHAKA
JUDGE
30/07/2019

The ruling was read and delivered in the presence of State Attorney Batilda Mushi, the accused and Counsel Senguji for the accused.



L. L. Mashaka
JUDGE
30/07/2019