IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISRTY)

AT TANGA

CRIMINAL REVISION NO. 2 OF 2021

(Arising from the Order of Hon. Mchauru – SRM on 17/11/2020 in RM Criminal Case No. 40 of 2019 before RM Court of Tanga)

DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT

-VERSUS-

DANIEL MARTIN MSAGATI.....1ST RESPONDENT

NOEL LAMECK MWAKITUBU.....2ND RESPONDENT

RULING

Date of last order:27/10/2021

Date of ruling: 16/11/2021

AGATHO, J.:

This application for revision stems from the ruling of the Resident Magistrate's Court of Tanga in Criminal Case No.40 of 2019 dated 17/11/2020. In that case the 1st and 2nd Respondents are charged with armed robbery c/s 287A of the Penal Code [Cap 16 R.E 2019].

As apparently visible in the affidavit of Applicant's counsel Winlucky Mangowi, State Attorney as well as on record that the case before the Resident Magistrate's Court, on 02/07/2020, the Republic prayed to tender by PW7 the caution statement of the 1st accused person (1st

respondent). In the prayer the 1st accused objected that the signature in the said caution statement was not his. The Court decided to conduct the inquiry. And on 17/11/2020 the Hon. Magistrate delivered a ruling. He ordered that the signature, thumb print samples of the 1st accused be taken to the handwriting expert for scientific/forensic examination to determine whether the signature is of the 1st Respondent.

It was that ruling emanating from the inquiry that prompted this application for revision. The Republic was dissatisfied with the ruling because they thought it was improper ruling. It was the Mr. Joseph Makene learned state Attorney's argument that what the Court sought to determine at that stage is whether the caution statement should be received in evidence as exhibit or be rejected. He submitted further that what the Hon. Magistrate ought to have done was to admit or reject the said caution statement. Looking at the ruling (on page 3) the Magistrate did not rule on whether the caution statement is admitted or not.

Mr. Makene went on arguing that, the Magistrate's order that the handwriting expert should examine the 1st accused person's signature (thumb print) is erroneous because when the result of such examination is out then the Court will have to make another ruling as to whether the caution statement is admitted or not.

At this juncture I should restate the position of law regarding inquiry. In the case of **Masanja Mazambi v R [1991] T.L.R 200** the Court of Appeal of Tanzania held at page 200 that:

> *"... a trial within trial **(inquiry)** has to be conducted whenever an accused person objects to the tendering of any statement he has recorded. That is as to why and when inquiry is conducted..."* Emphasis in bracket and bold is mine.

In our jurisdiction, the law governing inquiry originates from Common Law. The celebrated case of **Tuwamoi v Uganda [1967] EA 84** is informative on the retracted confessions. It was stated in that case that when objection is raised as to admissibility of a cautioned statement or confession is retracted or repudiated on allegation that it was made involuntarily then the Court should conduct a trial within trial if it is at the High Court or conduct an inquiry in case of subordinate Court. As it can be grasped in the case of **Hatibu Gandhi and Others v R [1996] TLR No. 12**, Tanzania Court of Appeal, the purpose of trial within trial or inquiry is to determine the truthfulness of the cautioned statement, and whether it should be admitted in evidence. Under section 27(2) of the Evidence Act [Cap 6 of R.E 2019] the onus lies on the prosecution to prove

that any confession made by an accused person was voluntarily made by him. This voluntariness may be proved by the accused person's signing of the cautioned statement or attaching of a thumb print. That signifies his assent to its content.

In the present case the inquiry was set in motion because the 1st Respondent (1st accused) objected that the signature (thumb print) in the cautioned statement is not his. This may be construed to mean that what is contained in the cautioned statement is not his confession and hence should not be admitted in evidence. This is what is found under section 27(3) read together with section 29 of the Evidence Act [Cap 6 R.E 2019]. It should be emphasized that during inquiry the Court focuses on admissibility and not weight of evidence. The latter issue is to be determined during evaluation of evidence. As it was held in the case **D.P.P. v Regina Karantini and Another Criminal Appeal No. 110 of 1988 CAT at p.5** (unreported) that the statement may be admissible but not reliable.

Since in the instant case the Court was at a stage of determining admissibility of the cautioned statement, it would have restricted itself to considering whether the disputed signature is relevant to the fact in issue and whether on the balance of probability the evidence adduced by the

prosecution during the inquiry proved that the signature is that of the first accused. Therefore, I am of the view that to seek handwriting expert opinion sounds far-fetched. And doing so would seem to stretch the trial process beyond admissibility of the caution statement. However, it is not impossible to admit evidence and during evaluation to accord it less weight. As per section 7 of the Evidence Act [Cap 6 R.E 2019] if relevancy of fact is not drawn, then the fact (evidence) is inadmissible.

At this point I would like to refer to the Chief Justice's Exhibits Management Guideline, issued in September 2020, at pages 11-12, especially on page 12 item or step (j). It provides that "...*the Court will then deliver a ruling on a trial within trial or inquiry.*" Thus, after the inquiry the Court must rule whether the document is admitted as exhibit or not. It ought not to include another process such as to subject the same to forensic examination, as it was done in the present case. While practically it is possible to do so but the law does not say so.

For the foregoing reasons and by virtue of revisionary powers conferred upon this Court under section 372 of the Criminal Procedure Act [Cap 20 R.E 2019], and in as far as the inquiry is concerned, I find the proceedings and ruling to be irregular. I consequently quash the inquiry done and the

so-called ruling is set aside. I order that the trial Court expediently conduct the inquiry afresh and make the ruling in accordance with the law.

DATED at **TANGA** this 16th Day of November 2021.

U. J. AGATHO
JUDGE
16/11/2021

Court: The ruling to be delivered by the Hon. Beda Nyaki Deputy Registrar.

U. J. AGATHO
JUDGE
16/11/2021