

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

SITTING AT BARIADI

CRIMINAL SESSION NO 117 OF 2022

THE REPUBLIC

VERSUS

NZUMBI S/O SITTA ACCUSED

RULING

MKWIZU, J:

This is a ruling on the admissibility of the accused's cautioned statement after an objection by the defence Counsel Mr. Geni Vitus Dudu which is twofold. ***One***, on the voluntariness of the statement on which the defence counsel argued that the accused was never interviewed by the witness before the Court (PW6) and ***second***, that the accused signed the statement after he had stayed in the remand custody for a month suggesting that the statement, if any was recorded beyond the time prescribed by the law.

In essence, the repudiation of the cautioned statement by the accused person necessitates for the conduct of a trial within a trial to determine on only whether the accused gave the statement but also the timing of the recording of the accused cautioned statement if any. In so doing this Court was guided by the decision of the Court of Appeal in **Michael John Mtei vs Republic**, Criminal Appeal No. 202 of 2002 (unreported) where it was observed:

"a trial within a trial should be held to determine not only the voluntariness or otherwise of an alleged confessional statement but also whether or not it was made at all..."

And parties were led to give evidence pursuant to the directive of the court in **Selemani Abdallah and Two others v. The Republic**, Criminal Appeal No. 384 of 2008, (unreported), where the procedure for trial within a trial was explained thus: -

"The procedure entails the following: -

- i) When an objection is raised as to the voluntariness of the statement intended to be tendered as an exhibit, the trial court must stay the proceedings.*
- ii) The trial court should commence a new trial from where the main proceedings were stayed and call upon the prosecutor to adduce evidence in respect of that aspect of voluntariness. The witnesses must be sworn or affirmed as mandated by section 198 of the Criminal Procedure Act, Cap. 20.*
- iii) Whenever a prosecution witness finishes his evidence the accused or his advocate should be given opportunity to ask questions.*
- iv) Then the prosecution to re-examine its witness.*
- v) When all witnesses had testified, the prosecution shall close its case.*
- vi) Then the court is to call upon the accused to give his evidence and call witnesses, if any. They should be sworn or affirmed as in the prosecution side.*

- vii) *Whenever a witness finishes, the prosecution to be given opportunity to ask questions.*
- viii) *The accused or his advocate to be given opportunity to re-examine his witnesses.*
- ix) *After all witnesses have testified, the accused or his advocate should close his case.*
- x) *Then a Ruling to follow*
- xi) *In case the court finds out that the statement was voluntarily made (after reading the Ruling) then the court should resume the proceedings by reminding the witness who was testifying before the proceedings were stayed that he is still on oath and should allow him to tender the statement as an exhibit. The court should accept and mark it as an exhibit. The contents should then be read in court.*
- xii) *In case the court find out that the statement was not made voluntarily, it should reject it."*

To establish its case during trial within a trial, prosecution called one witness and so the defence case. PW1 is AISP Benson, a Police officer, investigator of the case and the recording officer of the statement under scrutiny. His evidence was on how he received the instruction of his senior officer to have the accused who was arrested on 14/6/2017 interviewed in respect of the accusations that he was facing. He said, on the same date that is 14/6/2017 just few minutes after the arrival of the accused at the Police station, took the accused from the CRO to the investigation room where they remained two of them. He introduced himself to the accused and informed him that he is accused of murdering the deceased Machiya Masunga. and invited him for introduction. This witness also told

the court that the accused told him that he is named Nzumbi Sitta, 34 years of age, Sukuma by tribe, peasant, and resident of Mwasiyasi village.

PW1 narrated further that, he informed the accused of his rights including that he may wish to give his statement on his own free will, and that if he proceeds to give his statement it can be used as evidence against him in a court of law. He has a right to call a lawyer or relative to be present during the recording of his statement. This witness said the accused, volunteered to give the statement in absence of any person and that accused signed by fixing his thumb print to signify his understanding of the explained rights and his readiness to give his statement.

PW1 narrated further that accused had told him many things but of relevant here is that he confessed to have murdered the deceased Machiya Madata Masunga on the night of 24/3/2017 at around 21.30 hours by pounding him with a hoe handle. That at around 1.00 hours he took the deceased body and hide it in a nearby bush disclosing the reason for the killing as the dispute on who to administer the estate of his late grandfather. That after he had hidden the deceased body in the bush, accused told said, he went back at his home where he stayed up to 18/4/2017 when he ran to Migato Village within Itilima District to a traditional healer for medication on how to escape arrest after the discovery of the deceased body where he stayed until his arrest.

After the recording, PW1, said, he gave the accused his statement to read but he learnt that he is illiterate. He then personally read out the statement to the accused for him to verify its correctness. And that the

accused again fixed his thumb print in each page of the statement after he had acknowledged that it contains the correct version of his own statement followed by PW1's signature on the said cautioned statement. At the end, accused was returned to the police lock up, and the statement was filed in the case file. PW1 said he also notified his in charge of the confession made by the accused leading to the taking of the accused to a justice of the peace for recording his extra judicial statement on the following date. PW1 was specific that the accused's statement was recorded from 15.15 hrs. to 17.30 hours of 14/6/2017.

In his affirmed defence during trial within a trial, accused said he was arrested in June 2017 in a date he doesn't remember. He stayed at Migato Ward offices for two days, taken to Nkololo police where he also stayed for two days before he was conveyed to Bariadi Police station. His evidence went further to disclose that though he was on several occasions taken out of the police remand custody by PW1 for interview, PW1 had recorded very few things as most of the time he would ask him questions without recording a word. That he was engaged in a total of six interviews on which very few statements were recorded by PW1. Admitting having inserted his thumb print on the statement, the accused said, he only signed the statement after being threatened that he would remain in Police remand custody forever. And that he was later in July 2017 taken to a Justice of peace where he again signed an empty white paper. He generally retracted the cautioned statement that it was not his.

I have curiously evaluated the evidence by parties above. I do not find anything valuable in the defence evidence to disassemble the prosecution's evidence in respect on **when** and **how** the accused's cautioned statement was recorded. As testified in defence, the accused

was arrested in June 2017. This witness did not only fail to mention a date of his arrest but also his evidence is silent on whether the date of his arrest mentioned by the prosecution is different from the date that he thinks he was arrested leaving the court without any fact lessening the value of the prosecution evidence.

Regarding on how the statement was recorded, Pw1 spoke it all. He said, the statement was recorded on 14/6/2017 the same date on which the accused was arrested after he has volunteered to give his statement and that he was on the following date taken to a justice of the peace for recording his extra judicial statement. This evidence was as well left intact by the defence evidence in a trial within a trial.

Contrary to the raised preliminary point of objection that accused was never interviewed by PW1, DW1 did not, in his defence deny being interviewed by PW1. While confessing to have been interviewed by PW1 the investigator of his case, PW1's evidence was that PW1 had in a total of six interviews that he held together recorded very few words.

And speaking on how he signed the cautioned statement, DW1 firstly said he signed the cautioned statement after he was threatened that he would remain in remand custody forever and later changed the story alleging that he only fixed his thumb print in an empty white paper when taken before the justice of the peace in July 2017. And when asked if he had any grudges with PW1 so as to concoct evidence against him, DW1 said no.

This evidence as said before is not only skinny but has left the prosecution evidence intact. The prosecution evidence in a trial within a trial has without doubt established that accused volunteered to give the cautioned statement which he personally signed by fixing his thumb print and that

it was made immediately after his arrival at Bariadi police station on 14/6/2017. I find the objection baseless.

As a result, the objections are overruled. The cautioned statement herein is found admissible having complied with the required legal provision. It is so ordered.

Dated at BARIADI, this 22nd day September 2022




E.Y. Mkwizu
Judge
22/09/2022