

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CRIMINAL SESSIONS CASE NO. 13 OF 2021

REPUBLIC

Versus

- 1. KHALID ALMAS MWINYI @ BANYATA**
- 2. RAHMA ALMAS MWINYI @ BABY @ RAHMA ALMAS
IDDI**
- 3. NDUIMANA OGISTE @ JONAS ZEBEDAYO @
MCHUNGAJI @ NDAYISHEMEZE ZEBEDE @
NDAISHIME ZEBEDAYO @ OMARI HASSAN**
- 4. GODFREY PETER SALAMBA**
- 5. CHAMBIE JUMA ALLY**
- 6. ALLAN ELIKANA MAFUE**
- 7. ISMAIL ISSAH MOHAMED @ MACHIPS**
- 8. LEONARD PHILIPO MAKOI**
- 9. AYOUB SELEMAN KIHOLI**
- 10. JOSEPH ALEXANDER LUKOA**
- 11. GAUDENCE JAMES MATEMU**
- 12. ABUU OMARY MKINGIE**
- 13. HABONIMANA AUGUSTIN NYANDWI @ OGISTEE**
- 14. MICHAEL DAUD KWAVAVA**

15. EMMANUEL THOMAS SONDE

16. KELVIN ATHANAS SOKO

17. SAMIA SALEH HUJAT

18. ALMAS SWEDI @ MALCOM

RULING

Date of last Order: 29/4/2022

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MGONYA, J.

In the cause of trial, **PW19 AS** a Police Officer who alleged to have interrogated and recorded the 3rd Accused person caution statement, intending to tender the said caution statement so as to make it part and parcel of the Prosecution case, encountered an objection from the 3rd accused's Advocate, learned counsel Mr. Roman Lamwai. The objection was for the single reason that the accused denied totally to have written the alleged caution statement before anyone.

It is from the said objection, this court ordered the trial within trial proceedings to commence. In these proceedings, Prosecution brought in three witnesses to prove that the caution statement was recorded from the accused as testified by PW 19 AS.

The first witness in the trial within trial proceedings was PW1 IA who is PW19 AS in the substantive proceedings. This witness told the court that on **30/12/2017** he was assigned by

his boss the Director of Criminal Investigation (the DCI) through the Ngara OC CID to record the caution statement of the accused that was handed over to him. It is from there he prepared a room in that respect and later took the accused who was at Kabanga OCD's office for interrogation.

Testifying, the witness informed the court that in interrogation room, he was alone with the accused. Further, before taking his statement the witness told the Court that he introduced himself to the accused, whereas the accused also introduced himself to him as **NDUIMANA AGUSTEE JONAS ZEBEDAYO @ MCHUNGAJI**. Later he explained to him his rights and that he was free to require his relative or an advocate to be present at the time of making his caution statement and that should he make the statement it would be used in evidence before the court. The accused is said to have told the recorder that that he had no relative and was ready to give his statement in their absence. Further, he committed him to sign on the document in that respect. The witness also informed the court that the accused was in good health when took him for interrogation and it is from there he proceeded writing his caution statement from **19:00 Hrs** to **21:00 Hrs**. Later the witness said to have returned the accused to Kabanga OCS where he left and returned on the next day. On **31/12/2017**, during morning hours, the witness testified to have been handled

over the accused and some exhibits which were the accused Voter's card with the accused names of **JONAS NDAISHINEZE ZEBEDAYO** with the accused photograph. Another exhibit was the Burundi National ID "**Karangamuntu**" with accused names **OMARY HASSAN** with the accused photograph on it. Further is the seizure certificate and Tigo and Halotel lines all alleged to have been taken from the accused when he was arrested. Together with those exhibits, the witness informed the court that he was also handled the accused caution statement he recorded and transported him to Dar es Salaam where he was accused for **Murder case**.

At Dar es Salaam, the witness is said to have handled the accused to DCI together with all the exhibits he was handled at Kabanga the accused caution statement inclusive. In concluding his testimony, the witness identified the 3rd Accused person before the court to be the one he wrote his caution statement and transported him from Kabanga, Ngara District Kagera Region to Dar es Salaam.

The second Prosecution witness was the PW2 IB. This witness testified before the court that he was OC CID at Ngara in the year 2017. Whereby in August 2017 he received instructions from the DIC to arrest a criminal who committed Murder at Dare Salaam and ran to his country Burundi by the mane of **NDUIMANA AGUSTEE JONAS ZEBEDAYO @**

MCHINGAJI. The witness informed the court that after hearing the name it came to his knowledge that it was the same person they were also looking for some other offences, but they were yet to arrest him. The witness informed the court that on **30/12/2017**, while at his work station at Ngara, he received information from one of the Police informers that on the said night there will be robbery that will include the above mentioned suspect. It is from there they set up the track at the highway from Burundi to Tanzania at Nzaza Village at Tanzanian side where they successfully arrested the above accused person who introduced himself as **PASTOR ZEBEDAYO AGUSTEE**. It is at that stage the witness said they conducted the body search to the accused and obtained accused Voter's card with the accused names of **JONAS NDAISHINEZE ZEBEDAYO** with the accused photograph. Another exhibit was the Burundi National ID "**Karangamuntu**" with accused names **OMARY HASSAN** with the accused photograph on it. Further is the seizure certificate and Tigo and Halotel lines. Later they prepared the Seizure Certificate in that respect where the same was signed by Police Officers and the accused himself. Later the witness testified to have taken the accused to Kabanga Police Station for custody and interrogation and caution statement recording. The witness identified the 3rd Accused person before the court to be the accused he was handed and dealt with.

The 3rd Prosecution witness is a Police Officer alleged to be Kabanga Police Station OCS who confirmed to have been handled the accused person at the station and handed him to the Police Officer who was sent by the DCI from Dar es Salaam to interrogate and take the accused statement on **30/12/2017**. The witness also informed the court that he was the one who registered the accused in the Detention Register after he had written his caution statement. At registration, the witness said the accused introduced himself to him as **NDUIMANA JONAS @ MCHUNGAJI**. This witness also conformed to have taken out of the custody the accused and handed over the same to OD CID together with the above-mentioned exhibits, the accused caution statement inclusive so that he can be transported to Dar es Salaam where his charges are. This witness also identified the 3rd Accused person before the court to be the accused he was handed and dealt with. That was the end of Prosecution case.

The 3rd accused before the court **NDUIMANA AGISTEE @ JONAS ZEBEDAYO @ MCHUNGAJI @ NDAYISHEMEZE ZEBEDE @ NDAISHIME ZEBEDAYO @ OMARI HASANI** testified as **DW1**. He told the Court that his name is **NDUIMANA NAYUBAHE VICTORY** and that he was arrested at Burundi on 18/12/2017 at the market at his business place where he sells alcohol.

Testifying in respect of him being interrogated and recorded the caution statement as alleged by the Prosecution witnesses above, the witness totally denied to have been arrested in Tanzania neither interrogated nor recorded any caution statement as alleged. Further that he doesn't deny the fact that he was arrested, but by the Burundi Authority and transported to Dar es Salaam for another personal or rather Family issue. Further later he was arraigned at Kisutu on **23/2/2018** where it was the 1st time that he was informed that he was accused of Murder.

It suffices to say that the accused totally denied the fact that he was arrested by Tanzanian Police, arrested and detained at Kabanga Police Station before he was transported to Dar es Salaam.

He refuted all the evidence regarding his identity as identified by the Prosecution witnesses and the fact that he is associated with the offence of Murder in Tanzania.

I have given due consideration the evidence adduced by both the Prosecution and the accused regarding the authenticity of the caution statement alleged to have been recorded from the 3rd Accused person herein. In his evidence the accused totally denied the fact that he wrote the caution statement which was admitted before the court as **ID1**. I have failed to believe the accused testimony on this aspect on the basis of the testimonies

of **PW1 IA, PW2 IB and PW3 IC** for the reasons that the Prosecution witnesses testimonies corroborated each other from the time the accused is said to have been arrested to the time he was transported to Dar es Salaam hence his presence in this court for the offence charged. Together is the evidence of his IDs that were found in his possession. The said exhibits particularly which had his photographs speaks for themselves. Had it been that the accused was brought to Tanzania by the Burundi Authority for personal issue, then he shouldn't have been found himself in this situation. Further for the nature of the offence that he is charged being **MURDER**, it is impossible for the caution statement not to have been taken from him.

In examining the accused names, despite the fact that he has been referred to different names, the name **NDUIMANA**, has often appeared in both Prosecution and Defense testimonies particularly in the **ID1** and when he introduced himself before the court in these proceedings. It is from this fact, the accused herein cannot run from his own shadow.

I have nothing to disbelieve Prosecution witnesses who are person without any interest to serve against the accused. Those witnesses admitted not know the accused before his arrest and further interrogation and recording his statement. I don't see any reason as to why they should have used their time and energy

in collaboration with the State to incriminate the accused for this serious offence.

In the end result, **the objection against the tendering of the caution statement is overruled and I hereby proceed to admit the same for evidence as prayed.**

It is so ordered.



L. E. MGONYA

JUDGE

29/4/2022