

**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

R U L I N G

Date of last Order: 22/7/2022

Date of Ruling: 25/7/2022

MGONYA, J.

In the cause of PW24 AX's testimony, particularly when this witness prayed to tender the caution statement of the 14th Accused person herein one **MICHAEL DAUDI KWAVAVA** who testified to have recorded his statement, the said prayer encountered an objection from the Accused Defence Counsel Mr. Majura Magafu to the effect that:

1st that the witness was not arrested and write his caution statement on the mentioned date, ie. on **8th of May 2020** as he was yet to be arrested and became an accused to the case at hand;

2nd that the accused did sign the said caution statement of which is believed to have been written in his absence and later under duress and torture.

It is from the above objections in admissibility of that piece of evidence, the court ordered the trial within trial proceedings. The Prosecution brought two witnesses to prove that the caution statement was recorded was recorded by PW 24 AX, and further the accused was arrested on the 8th May 2020 and his caution statement was recorded and signed by the accused on the same day as the free agent without any force after he has been informed his rights.

The first prosecution witness in the trial within trial proceedings was the substantive witness in the main case who testified as PW 24 AX. Briefly, this witness testified to the effect that he met the accused for the first time at the Kinondoni RCO's office where he was directed to interrogate the accused and recording his caution statement. This witness further declared to have informed the accused his rights and warned him that the statement was to be used before the court as evidence when the need arise.

He further informed him the offence he is charged with and after the accused confirmation, he recorded his caution statement while in good health. At the end of recording his caution statement, the accused is said to have read his statement and confirmed the contents of the statement before he wrote his name and sign at every page of the statement therein.

The witness also denied the fact that the accused was tortured and beaten during the writing and signing of the cautioned statement.

The second witness to the proceedings was the Police Officer who testified before the court to have arrested the Accused one Michael Kwavava on **8th May 2020** after he had called him three days before that date. Briefly this witness informed the court that after the arrival of Mr. Kwavava at the Oysterbay Police Station where he was called, he informed him that he is arrested for Murder.

Defence in these proceedings had only one witness the accused himself, Michael Daudi Kwavava. In the cause of his testimony, the witness testified that he was called by a police officer named Filbert Fulsaba who wanted him to report to the Oysterbay Police Station. However, since it was late, he promised to avail himself on the next day where he went on **12th May 2020**. The witness further testified that, upon arrival he was called by the later, (Filbert) under the trees at the station, the place which is said to be known as garage. It is from there he was tortured, by being beaten and was not given some food until when he was taken to the cell, the women which was not occupied by them. That on the next day on 13th May 2020 he was taken back to the garage and forced to sign some papers whose contents were not in his

knowledge, however he refused. He was again remanded in the cell still being denied food and access to his relative. On the next day, 14th of May 2020, after fearing that he will die out of torture and hunger, he was then taken to the vehicle he decided to sign the said documents. When asked as whether the signature in ID 1 belongs to him, he admitted to be his as he was forced to sign while under brutal torture. The witness further testified to have access to his relatives for the first time when one of his relatives who is also a policeman visited him on that day and bought him some food.

It is further testified by the witness that he stayed at the Oysterbay Police Station for more than one month before he was taken to Mwananyamala Hospital for Covid test before he was arraigned at Kisutu Magistrates Court and later in remand prison where he is todate.

Concluding his testimony, DW1 insisted that he was not called by anyone on 8th of May 2020 neither written any caution statement on the said date.

Submitting on the first objection, Mr. Majura Magafu the learned Counsel submitted that the witness before the court is denying to have been arrested on 8th May 2020 as his memory recalls that he was called by a police officer from Oysterbay Police Station of 11th of May 2020 whereby he responded the call by

availing himself at the Police Station on the next day ie. on **12th May 2020**.

From the foregoing, there are two major issue for determination which have emerged. The first one is whether the 14th Accused person one **Michael Daudi Kwavava** was interrogated and his caution statement recorded by PW24 AX. And second, if the first issue is answered in affirmative, then whether the said caution statement was legally procured from the Accused as a free agent.

It is has been averred before this court by Mr. Magafu that the witness PW 24 AX cannot tender ID 1 purported to have been the 14th Accused caution statement since the accused has never been interrogated by the witness nor any other person. Further, if at all he signed the said document, it is a fact that he did so as he was under duress by being tortured by the police officer called him at Police Oysterbay on **12th May 2020** and not on the **8th May 2020**.

In determining this point, I have to admit that the two cases before the court both from the Prosecution and that of the Defence have two distinct narrations of which all the witnesses thereto have testified under oath. However, it is time to decide as to why one of them is to be relied more in admissibility or otherwise of ID 1 before this court.

It is a fact that before the 14th Accused person was marked as an accused in 2020, as from the day the event of murder in this case took place, Mr. Kwavava was taken to be a Prosecution witness in this case. That was a situation. It is also not denied that there must be a change of circumstances which led the change of his status from the witness to an accused. I don't want to go into detail on this point as this court is not an investigative agency. Moreover, there is no rule which denies the investigative organs to change the person's status for whatever reason, as from the accused to the witness and *vice versa*. Before the court there is already the evidence that there was a change of circumstances out of investigation which led to the change of Mr. Kwavava's status from being the Prosecution witness to become an accused as well elaborated by the PW2 in these proceedings. The witness narrated clearly as to why they have to changed his position in this case. If that is the case them, up to this stage where the accused is in this serious case, there is no way that he can escape writing the cautioned statement. This is a capital offence of which the statement of an accused has to be recorded that is why it is called a cautioned statement.

Further on the day the accused was arrested and his statement recorded, be it on 8th of May or on 12th of May 2020, the testimony of **PW1** and **PW2** to these proceedings corroborates

each other. While PW2 states to have arrested the accused, DW1 herein on 8th of May 2020, **PW1** testified before this court too to have been called by the Kinondoni RCO to his office on 8th May 2020 and directed him to interrogate DW1 and write his cautioned statement. Moreover, the same statement indeed reads 8th May 2020 dully signed by both **PW1** and **DW1** herein on that material date.

As I am still gauging the weight of Prosecution case and that of the Defence in this case, **Section 112** of the Evidence Act provides that:

"The burden of proof as to any particular facts lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."

It is the 14th Accused person who denies to have been arrested on the 8th May 2020 and claims to have been arrested on the 12th May 2020. If that is the case, he wishes the court to believe that he was arrested on the 12th May, he had room to call witnesses to testify on the same. It is in his testimony that, when he was called by the person with the name of Filbert, he had informed his son that he was called to report to the Police station. If that was the case, DW1 could have called his son to testify on this fact. However that was not the case. Further he could have also called

his relative who visited him at the Police Station on the 14th May 2020 and rescued him by buying some food after having the 4 days without the same. At least these two witnesses could have rebutted the Prosecution testimony before the court.

It is from the above observation, and the reasoning, I am of the firm view that indeed the DW1 was arrested, interrogated and written his cautioned statement and finally signed the same on 8th May 2020 and not otherwise.

Another point of objection is that before signing the Cautioned statement, DW1 was heavily tortured. I have nothing to disbelieve PW1 and PW2 in these proceedings who are persons without any interests to serve against the accused. The accused admitted that he did not know these witnesses before and submitted no reason at all to tell the court why PW1 and PW2 would have told lies against him on the cautioned statement to be tendered. Further on torture allegations, the same I still believe that the above Prosecution witnesses being vetted officers and with no ill motive against the accused, they can never torture the accused without any reason. I say so because, the accused himself stated to be affected by the torture which resulted into a swollen face, and feet. Adding to that, on the fact of being denied food, it cannot be denied that through all that he could have been very weak. Still in this he

has a witness to testify on this as he saw him at the station and brought him food after four days. However, that was not the case.

In the end result, **the objection against the tendering of the cautioned statement is overruled and it should be admitted in evidence. The accused narrated his statement as a free agent after he was informed his rights.**

It is so ordered.

Ruling delivered in the presence of the parties and both sides counsel in open court.



L.E. MGONYA

JUDGE

25/7/2022