

**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 @ NDAYISHHEMEZE ZEBEDE @
NDAISHIME ZEBEDAYO @ OMARI HASSAN**
- 4. GODFREY PETER SALAMBA**
- 5. CHAMBIE JUMA ALLY**
- 6. ALLAN ELIKANA MAFUE**
- 7. ISMAIL ISSAH MOHAMED @ MACHIPS**
- 8. LEONARD PHILOPO 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

Date of last Order: 18/05/2022

Date of Ruling: 18/05/2022

R U L I N G

MGONYA, J.

This is a ruling in respect of trial within trial that need raised for the same to be conducted after the caution statement of accused No. 13 one **HABONIMANA S/O AUGUSTIN NYANDWI @ OGISTEE** was intended to be tendered as part of the prosecution evidence by PW 23 AW, a police officer that was instructed to take the accused's caution statement. The defence Counsel Mr. Roman Lamwai for the accused raised an objection that the accused person has never been interrogated nor a caution statement written from him. The accused is charged of the offence of murder contrary to **section 196 and 197 of the Penal Code Cap. 16 [R. E. 2019]**.

The Prosecution brought in three witnesses to prove that the caution statement was recorded by the accused unlike the objection raised by his Counsel.

The first witness was PW 1 ID a police officer that testified to have taken the accused's caution statement as instructed by his superior where as he reported at the place where the accused was in custody and proceeded in writing his caution statement. In the beginning after knowing that the accused person was not conversant in Kiswahili. He then reported the same to his superior and an interpreter was located so as to ease the writing of the caution statement and to protect the accused rights so as justice should have seen to have been done. After an interpreter arrived PW 1 states to have questioned the interpreter and satisfied himself the two understood each. It is after such satisfaction that the exercise of taking the caution statement by complying to the law the caution statement was the taken.

The second witness that is PW 2 IE in trial within trial stated that he is a peasant and a businessman. He further informs this Court that he was called by the OCS of the Kabanga police station and was asked if he knows Kirundi and if he could translate from Kirundi to Kiswahili and viseversa. His answer was in the affirmative that he is capable of translating between the two languages. He was asked to go to the police station and upon arrival he was taken to a room where he was informed of what was to take place and that his role that he played was to interpret from Kirundi to

Kiswahili and viseversa. He also testified to have heard and interpreted to the accused accordingly all that the interrogator wanted him to know and understand. At the end of writing the caution statement the whole statement was read out to the accused and the same was translated to him of which he admitted that was what happened and they were all required to sign at each page of the caution statement.

It was also the testimony of PW 3 IF a police officer whereby he testified to have been ordered by the Director of Criminal Investigation to conduct an arrest of a suspect whereas the name of the suspect and other relevant information was supplied to him. It was after that he located an informer and shared the information of the suspect and the same assisted in locating the suspect. It was PW 3's testimony that he was later informed of the suspect's movement after he was located by the informer. He then left the office with a driver followed the directions of the informer until the arrest was successful and the suspect was handed over to the OCD of Ngara District. Upon searching the suspect he found with him in his possession an identity card that belonged to him with his name and photo. It was after the arrest he was also tasked to transfer the suspect from Kabanga to Dar es Salaam of which the same was executed. Upon arrival the accused, his ID and certificate of seizure

were handed over at Mbweni Police Station while the envelope which contained the accused's caution statement was handed over to Kinondoni RCO.

In response to the prosecution case the sole defence witness one HABONIMANA S/O AUGUSTIN NYANDWI @ OGISTEE, informed this Court that he was hijacked in his Country at Kamenge District Bujumbura Region in Burundi by unknown persons and that he fainted. Later on after gaining consciousness he found himself in a room where he was all alone and was informed that he was at Dodoma in Tanzania and was brought to Dar es Salaam by also unknown persons. Basically the defence witness refuted the evidence of the prosecution that he was interrogated and his statement taken on **15/08/2018**.

From the above one issue may be deduced, whether the accused caution statement was ever interrogated and his caution statement written?

I have given consideration of the evidence adduced by both the prosecution and the accused with regards to the caution statement prayed to be tendered before the court as part of the prosecution evidence of which the accused has strictly and totally denied before this Court that the same was ever written. The prosecution states that orders to arrest that accused were given on

the reason that he was alleged of a criminal offence. Efforts were made to make sure that the accused was arrested and after his arrest a caution statement was written in compliance to the requirement of the law. And that the accused was also transported to Dar es Salaam to for the offence charged and along him was also his caution statement that was also brought to Dar es Salaam.

I have considered the prosecution witnesses testimonies before this Court and have not located any cause or need for these witnesses to testify against the accused. The witnesses all together state to have seen the accused for the first time in the cause of his arrest and caution statement writing. PW 2 the interpreter also stated not to have ever known the accused before. From the records the arrest of the accused who is a Hutu by tribe and a resident of Burundi originated from the office of the Director of Criminal Investigation. Pw1 and PW 3 before this Court were police officers that accelerated the prior stages of charging the accused. Further all the three-prosecution witness worked independently having a specific task which I find hard to believe that there was any conspiracy in offending the accused.

Finally, I have noted in these proceedings while the accused was defending himself on the issue as to whether he wrote the caution statement as alleged or not, he decided to totally deny to

have been involved in any way with the caution statement writing, be it at Kabanga or elsewhere. In the case ***of LEONARD JOSEPH @ NYANDA VS. REPUBLIC, Criminal Appeal No. 186 of 2017 CAT 2020 at Dar es Salaam (Unreported)*** it was observed that:

"Perhaps we should add that the Appellant's defence that general denial was dully considered but it did not impress the two counts below. We are not surprised; as general denial is inherently a weak defence it is negative and self-sewing".

I respectively support the above observation as in these proceedings too, I have to rule out that the total denial defense by the Defence witness who is the person alleged to have written the caution statement at Ngara, did not overrule the testimony of three prosecution witnesses as the same corroborated each other and makes sense under the circumstances. As I have clearly heard the Defence witness that he is before the court alleged to have been involved in the offence of Murder, it is hard to believe that under the circumstances where he is charged with such a capital offence, this is the third year that he has never been interrogated nor write any caution statement in that respect. There is no any exception nor mistake that will occur under the given circumstances to

abscond the accused of this category of offence not to be interrogated nor writing his statement for the offence charged.

From what I have reasoned above, I am satisfied that the accused before the court by the name of **HABONIMANA AUGUSTIN NYANDWI @ OGUSTEE** indeed was interrogated and his caution statement dully recorded by the PW1 ID in these proceedings on 18th August 2018 respectively.

In the event therefore **the defense objection is hereby overruled and the said caution statement is respectively admitted for evidence as prayed.**

It is so ordered.



L. E. MGONYA

JUDGE

18/5/2022