

**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: 3/8/2022*

*Date of Ruling: 4/8/2022*

**MGONYA, J.**

On the 1<sup>st</sup> of August 2022 when the 27<sup>th</sup> Prosecution witness (PW27 BA) testified to have interrogated the 5<sup>th</sup> Accused person herein one **CHAMBIE JUMA ALLY** and further recorded his caution statement, when further prayed to tender the said caution statement, his prayer encountered imperative points of objection from the mentioned Accused's Advocate **Mr. Mluge Karoli** in respect of the said statement admissibility. The said objections were to the effect that:

**1<sup>st</sup>**, that the 5<sup>th</sup> Accused caution statement was not taken voluntarily;

**2<sup>nd</sup>** that in the said caution statement, the date and time to the cautioned rights to the accused is not recorded;

**3<sup>rd</sup>** that the Accused was arrested and his the statement recorded on 21<sup>st</sup> January 2018 and not on 24<sup>th</sup> January 2018 as alleged by the Prosecution;

**4<sup>th</sup>** that the said caution statement was only two pages and not seven as it is and further that the signatures in the rest of the pages do not resemble his signature.

The above points of objections were duly supported by the learned Counsel Mr. Augustine Shio and Mr. Majura Magafu.

Submitting on the 1<sup>st</sup> point of objection, Mr. Mluge Karoli the learned Counsel was of the view that the said caution statement was procured from the 5<sup>th</sup> accused involuntarily, contrary to **section 27 of the evidence Act. Cap. 6 [R. E. 2019]**. Further, on the 2<sup>nd</sup> point that in the said statement, there was no time and date in the cautioned part where the accused is informed his rights contrary of **section 52 (2) of the Criminal Procedure Act. Cap. 20 [R. E. 2019]** herein to be referred as **the CPA**.

Submitting on the **3<sup>rd</sup>** point, the learned Advocate informed the court that the Accused was arrested and his the statement recorded on 21<sup>st</sup> January 2018 and not on 24<sup>th</sup> January 2018 as alleged by the Prosecution, contrary to **section 50 and 51** of the **CPA**.

Submitting on the last point of objection, Mr. Mluge was of the firm submission that the said caution statement alleged to have

been recorded from him, was only two pages and not seven as it is and further that the signatures in the rest of the pages do not resemble the signature of the 5<sup>th</sup> accused person. This point was supported by Mr. Shio's submission stating that in fact there in a breakdown of the statement flow from the second page to the rest of the pages, something he mentioned to be strange.

In response, the learned Principal State Attorney Mr. Yamico Mlekano referring to the above points of objection he was of the view that the said objections needs evidence to prove that the statement was procured voluntarily, further that the 5<sup>th</sup> accused interrogation and caution statement recording was conducted on the date mentioned by the Prosecution witness and that there were no further additional pages that were written out of the accused's knowledge. He thus prayed trial within trial proceedings be conducted to prove the above facts.

Prosecution in the trial within trial proceedings had three witnesses to prove the above facts. The 1<sup>st</sup> was the Police Office Officer who alleged to have interrogated the accused and record his caution statement. Whereas the witness informed the court that on 24<sup>th</sup> January 2018 at Arusha Central Police Station around **23:00 Hrs.** he was assigned by the Investigation Team Leader to interrogate the 5<sup>th</sup> accused one **CHAMBIE JUMA ALLY** and record his caution statement. It is his assertion that around **23:15 Hrs** he

started interrogating the accused and recorded by writing his caution statement whereas he adhered to all legal procedures towards caution statement writing and finally the Accused signed the said statement by his own signature. PW1 further informed the court to have completed recording the said statement around **01:20 Hrs.** The said caution statement was admitted as **ID 1.** Further, the witness identified the 5<sup>th</sup> Accused herein to be the person he interrogated and recorded his statement on 24<sup>th</sup> January 2018 and insisted that he signed to all the pages to the statement before him.

The second Prosecution witness was the Police Officer who testified to the effect that he was the one who arrested the 5<sup>th</sup> Accused person herein at Kilimanjaro International Airport (KIA) on 24<sup>th</sup> of January 2018 around 21:100 after they have been informed his whereabouts by the 4<sup>th</sup> Accused Person herein one **GODFREY PETER SALAMBA** who initially was mentioned by their accomplice **NDUIMANA AUGUSTEE JONAS ZEBEDAYO** when he was interrogated and his statement recorded on 30<sup>th</sup> December 2017 at Kabanga Police Station at Ngara District in Kagera Region. The witness testified to the effect that after he has arrested the accused, he brought him to Arusha Central Police Station and handed him to Arusha OC CID around 22:45 Hrs. The witness

identified the 5<sup>th</sup> Accused herein to be the person he arrested on 24<sup>th</sup> January 2018 at KIA.

The third witness was the Police Officer who by 2018 was the OCS at Arusha Central Police Station. This witness testified to the effect that he was the custodian of all the Police registers at the station, the Detention Register inclusive. This witness through **Exh. P1** the Detention Register 2018 proved that the accused by the name **CHAMBIE JUMA ALLY** was detained at Arusha Central Police Station and Registered respectively in the Detention Register (Exh. P1) on 25<sup>th</sup> January 2018 at **01:55 Hrs** at night and on 28<sup>th</sup> January 2018 at **07:00 a.m.** he got out from Police remand at Arusha for the reason of travelling to Dar es Salaam the place where his case originated via **OB/IR.6586/2017** under escort of Police Officers.

Defence had only one witness the 5<sup>th</sup> Accused himself. The witness denied to have been arrested on 24<sup>th</sup> January 2018 at KIA as alleged by Prosecution witness testifying as PW2 in these proceedings, instead, he testified to have been arrested by unknown person to him who passed to be the passenger landed at KIA from Dar es Salaam on 20<sup>th</sup> January 2018. That it is after he has received him and at the time they were about to enter into the taxi he was driving to Arusha, he was arrested by the said person who was in the company of other persons. He was then taken to

KIA Police Station where he stayed there for two days before he was taken to Arusha Central Police Station on 23<sup>rd</sup> January 2018.

At Arusha, DW1 testified to have been interrogated by a group of Police Officers before he was taken out of the station and his caution statement recorded while he was in a car. He informed the court to have only recorded his statement which ended into two pages. The witness insisted that the said statement was recorded against his will. Hence his prayer that the same be rejected for admission as evidence.

In determining this matter, there are some issues to be determined.

**1<sup>st</sup> issue is whether the 5<sup>th</sup> accused was arrested on 24<sup>th</sup> January 2018 as alleged by the Prosecution.** During the trial, PW2 in these proceedings states to have been the Leader of the Investigation Team. It is in his testimony that he declared to have been led by information from Godfrey Peter Salamba, who was amongst the accused in this matter that the 5<sup>th</sup> Accused was also an accomplice to the case at hand. The later corroborated to the extent of making it possible to arrest the 5<sup>th</sup> Accused herein at KIA on **24<sup>th</sup> January 2018** at around **21:00 Hrs**. The witness further testified to have brought the accused at Arusha Central Police Station on the same night and handed him over to the OC CID. His

testimony was corroborated by PW1 who confessed to have been handed the accused on the same date and interrogated him and record his statement as from **23:15 Hrs** up to **01:20 Hrs**. The testimony of these two witnesses were well and finally corroborated by evidence of PW3 who through Exh. P1, the Detention Register that indeed the accused by the name of **CHAMBIE JUMA ALLY** was detained on the night of 25<sup>th</sup> January 2018 at the Arusha Central Police Station. The memory of this court is still fresh that the admissibility of Exh. P1 was smooth and was not objected by the entire Defence Team. This demonstrates that **Exh. P1** was a reliable and trustworthy evidence.

On the other hand, the Accused who testified as DW1 denied the above facts by testifying to have been arrested on 21<sup>st</sup> January 2018 at KIA without being enlightened anything on his arrest and was brought to KIA Police Station and later after two days ie. On 23<sup>rd</sup> January 2018 he was brought to Arusha Central Police Station where he was interrogated by the group Police Officers before his two pages statement was recorded and signed.

In determining the truth on this matter, I have to go back to the principles of burden of proof where it is the cannon law that whoever alleges has a burden to prove the fact. This is well



canvased under **section 110 (1) & (2) of the Evidence Act, Cap. 6 [R. E. 2019]**. The same states:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.***

In this regard, I have to reiterate my earlier observations that mere words without any proof such as words from the 5<sup>th</sup> Accused herein, cannot raise reasonable doubt against tangible Prosecution evidence such as a Caution Statement and the Detention Register which was brought to court to support the Prosecution case.

As we are having the evidence of the three Prosecution witnesses who all claim that it was only the 5<sup>th</sup> accused person herein and non-other who was arrested and interrogated on 24<sup>th</sup> January 2018 at Arusha Central Police Station and further remanded in custody on early times of 25<sup>th</sup> of January 2018 through ID 1 and Exh. P1, against mere words of the 5<sup>th</sup> Accused person, I am satisfied by the Prosecution testimony and I see no

reason whatsoever to think that circumstances were any another than those testified by them taking into consideration the accused's admission not to have known them before and admittedly to have no grudges against them. Likewise, I have seen no reason why they should have lied against him, then I believe that they have told the court the truth.

Further the **2<sup>nd</sup> issue is whether the Accused's caution statement had only two pages.** In the cause of hearing, I have clearly noted from the 5<sup>th</sup> Accused testifying as DW1 that the Police Officer who arrested him at KIA is the same person who interrogated him and record his statement on 23<sup>rd</sup> of January 2018. If that was the case, and if the Accused was serious on this serious allegation, he could have cross examine PW1 (the interrogating and recording officer) and also PW2 (the arresting Officer) on this serious legal irregularity. Upon failure to cross examine them, I count the Accused's allegation at this particular stage to be a **grave afterthought** on his part.

In the case of ***KHAJI MANELO BONYE VS, THE REPUBLIC CRM. APPEAL NO 388 OF 2008 (29<sup>th</sup> September 2011) TZCA, [www.Tanzlii.org](http://www.Tanzlii.org) I82*** it was stated:

*"That is the situation herein and we see, therefore, no reason to doubt the credence of the said evidence of those witnesses as adduced before the trial court. For purposes of further clarity and stressing the importance of cross examination, we are obliged to quote **Peter Murphy in Blackstone's Criminal Practice at p. 1870 as quoted in Goodluck Kyando vs Republic Criminal Appeal No.118 of 2003.** The object of cross examination is:*

***(i) to elicit from the witness evidence supporting the cross-examining party's version of the facts in issue;***

***(ii) to weaken or cast doubt upon the accuracy of the evidence given by the witness in chief; and***

***(iii) in appropriate circumstances, to impeach the witness' credibility."***

Upon the 5<sup>th</sup> Accused's person failure to cross examine the two above mentioned witnesses on that particular fact, it is my observation that he agreed that those officers were two independent persons each performing his assigned duty over him.

Further in ascertaining the fact that the accused only recorded two pages caution statement, I had an opportunity of going

through the said caution statement which had a total of seven pages. It has come to my knowledge that the very page contains the case number, the accused personal particulars, the cautioned part that contains the offence charged, the law, his rights and confirmation to his rights. Duly signed by the accused and the recording officer. Further, on the second page contains his consent of being interrogated and give his statement. Together with the willingness to proceed without any relative nor advocate during interrogation, followed by the accused and the recording officer's signatures.

Further to that is the place where the statement was taken, the date, starting time and his history / background followed by the accused's and officer's signatures followed by the words "***maelezo yanaendelea***". Referring back to DW1's testimony before the court that was all about his caution statement. I mean that was the end of his caution statement denying the rest of the pages, being page 3 up to 7.

If that was the case, the then one has to go back to the 1<sup>st</sup> page of the statement which informed the accused to be alleged of **MURDER**. And that through the same statement he is going to give his statement concerning the said allegations. In that case, it does not get into one's mind that immediately after the accused's

history that marks the end of his caution statement on this serious offence of Murder. Taking into consideration that the Accused has been informed to have allegedly committed a Murder referring to the 1<sup>st</sup> page of which he does not dispute contains cautioned phrases that whatever he says shall be recorded and can be used against him in the court of law. Quoting a pice of the statemet it syas:

***"Maelezo yako yanaweza kutumika kama ushahidi..."***

Contents of the 1<sup>st</sup> and 2<sup>nd</sup> page semantically do not mean that his particulars and background can be used against him in court for the alleged offence of **MURDER**. His particulars and background do not form any facts, details, particulars, information and statement that will corroborate with the alleged offence of Murder.

Going further to the 3<sup>rd</sup> page where it was cautioned that the statement continues, indeed there was a connection of continuance of fact towards the accused's statement.

From the above observation, again as the burden of proof to this kind of case lies to the Prosecution, indeed I am satisfied that Prosecution through its 1<sup>st</sup> Witness (PW1) has successfully proved that

indeed he recorded the entire statement and not only the two pages statement as alleged by the DW1 herein. But above all is the logic that have been demonstrated above.

Lastly is the objection which lies to the rejection of admissibility of the statement as it was procured contrary to section **52 (2) of the Criminal Procedure Act, Cap. 20 [R. E. 2019]**.

In the end result the **objections against the tendering of the 5<sup>th</sup> Accused caution statement are overruled and I hereby proceed to admit the same for evidence as prayed.**

It is so ordered.



**L. E. MGONYA**

**JUDGE**

**05/08/2022**