

**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: 5/04/2022

Date of Ruling: 6/04/2022

MGONYA, J.

In the cause of **PW14 AN's** testimony, particularly when this witness prayed to tender the caution statement of the 2nd Accused person herein one **RAHMA ALMAS MWINYI @ BABY @ RAHMA ALMAS IDDI** who testified to have recorded her statement, the said prayer encountered a series of points of objection from Defence Counsel jointly. Therefore this ruling is in respect of those points of objection. The said objections are as below:

Submitting on behalf of all Defence Counsel present in court, Mr. Majura Magafu the learned Counsel mentioned **the first objection** that the witness before the court is not competent to

tender the statement. The reason being he is not the one who interrogated the 2nd Accused as the latter has never been interrogated by any person to that effect.

The **second objection** on the line is that, the statement which is said to have been recorded from the 2nd Accused has been obtained contrary to **section 53 of the Criminal Procedure Act Cap. 20 [R. E. 2019]** herein to be referred as **the CPA**. Submitting further to this objection, Mr. Magafu was of the view that the person under restraint is to be informed of his / her rights. These includes, the reasons of his interrogation by way of warning, that the interrogating officer also has to introduce himself by his name and rank; and that the accused has to be informed of the punishment in case she is convicted. Referring to the statement in issue, it is the Defence concern that the provisions of section 53 were not adhered to. Hence the said statement was unlawfully obtained.

Third that the said statement was taken contrary **to section 50 and 51 of the CPA**. Enlightening on this objection, it is Mr. Magafu's submission that the said statement was taken over and above the statutory time of four hours after arrest. He said, the time which the 2nd Accused was arrested up to the time she was interrogated does not appear in the statement to ascertain

compliance of this section. Hence the statement was illegally obtained.

The **forth** object is to the effect that when the 2nd Accused person was interrogated, she was not a free agent; meaning that section 53 to 58 of the CPA were not complied with. Explaining on this point, it is Defense Counsel concern that on the interrogation day, the 2nd Accused would have been a free agent if the provisions of sections 53 to 58 were complied with. Since the same were not complied with, the same amounts to the accused's statement not made voluntarily hence if the same was voluntarily made, then the admissibility of the caution statement would have been admitted as per section 27 of the Evidence Act. But since it was involuntarily made, the same cannot be admitted for evidence against the accused as per the provisions of section 29 of the Evidence Act.

The **fifth point** of objection is to the effect that, before the 2nd accused writing her statement, she was tortured and induced to sign something that she didn't know. In the event therefore, the said statement has been obtained contrary to **section 27** of the **Evidence Act**.

The above Defense submission was objected by Prosecution stating that, from the wording of the above five points of objections, it is their firm observation that indeed the 2nd Accused

person herein was legally interrogated and her caution statement was legally procured. It suffices to say that, from their detailed submission of which I don't intend to reproduce, it is their prayer that the advanced points of objection by Defence be overruled and the 2nd Accused cautioned statement be admitted for evidence as prayed.

From the foregoing, the major two issue for determination have emerged. The first one is whether the 2nd Accused person was interrogated and her cautioned statement recorded by PW14 AN. And second, if the first issue is answered in affirmative, then whether the said caution statement was legally procured.

It is has been averred before this court by the Defense court that, the witness at the dock is not competent to tender the 2nd Accused caution statement since the accused has never been interrogated by this witness nor any other person. It is to a great surprise to the court that the same Defense team raising the above objection defends a caution statement that the witness at the dock states to have recorded. It goes without saying that there exists a 2nd Accused's caution statement that was once taken. This has been proved by the Defense submissions in respect of irregularities stated to have occurred in the cause of recording the said caution statement.

Phrases such as:

- ***The second Accused was forced to sign a document which she didn't know,***
- ***The statement was taken contrary to law,***
- ***The second accused prior to write her statement was tortured,***
- ***The interrogating officer ought to have introduced himself by his name and rank before starting recording the statement.***

All the above phrases, confirms and endorse the fact that indeed the second accused person recorded her statement before the relevant Authority. In the event therefore, the issue as to whether the 2nd Accused person was interrogated and her cautioned statement recorded by PW14 AN is answered **POSITIVELY.**

In determining the rest of the points of objection, as it has been ruled out that the 2nd Accused person has recorded her caution statement, as of now the court is to determine as to whether the said caution statement was legally procured.

To start with is the allegation that the statement which is said to have been recorded from the 2nd Accused has been obtained

contrary to **section 53 of the Criminal Procedure Act Cap. 20 [R. E. 2019]** herein to be referred as **the CPA**.

I had also an opportunity of going through the statement in issue that is the caution statement of the 2nd accused person. At the beginning of the said statement, I have come across the rights offered to the accused by the officer who was interrogated her through the prescribed form of which appears in the first page of the statement. The first paragraph consists of the caution and the rights to the accused. The same states, I quote:

**"MAELEZO YA ONYO CHINI YA KIFUNGU 57 CHA
SHERIA YA MWENENDO WA MASHAURI YA JINAI
CAP. 20 [R. E. 2002]**

ONYO: *Mimi E. 4128 D/SSGT NDEGE nakuonya wewe RAHMA D/O ALMAS MWINYI kwamba unatuhumiwa kwa kosa la MAUAJI NA KUPATIKANA NA SILAHA chini ya Kifungu 196 cha Sheria K/ADHABU hivyo basi haulazimishwi kusema neno lolote kuhusiana na tuhuma hizi isipokuwa kwa hiari yako mwenyewe, lolote utakalolisema litaandikwa hapa chini na maelezo yako yanaweza kutumika kama ushahidi mahakamani pia unayo haki ya Kisheria kuwa na wakili wako, jamaa yako, ndugu yako au rafiki yako ili aweze kushuhudia wakati ukitoa maelezo yako.*

Imesainiwa

Saini ya Afisa wa Polisi

The second paragraph consists of the reply to the caution and the rights. The same reads, I quote:

JIBU LA ONYO: Mimi RAHMA D/O ALMAS MWINYI @ BABY nimeonywa na E 4128 D/SSGT NDEGE kwamba natuhumiwa kwa kosa la MAUAJI NA KUPATIKANA NA SILAHA chini ya kifungu 196 cha Sheria K/ADHABU na kwamba lolote nitakalolisema litaandikwa hapa chini na maelezo yangu yanaweza kutumika kama ushahidi mahakamani na kwamba pia ninayo haki ya Kisheria ya kuwa na wakili wangu, jamaa yangu, ndugu yangu au rafiki yangu ili aweze kushuhudia wakati natoa maelezo yangu.

(Imesainiwa)

Sahihi ya Mtuhumiwa

Tarehe 16-09-2017

(Imesainiwa)

Sahini ya Shahidi.

Imesainiwa Tarehe

Saini ya Afisa wa Polisi

Finally is the third paragraph which consists of the question to whether the accused was ready to write her statement in the presence of her advocate, a friend or relative where the same reveals:

SWALI: Je uko tayari kutoa maelezo yako?

JIBU: Ndiyo niko tayari kutoa maelezo yangu.

SWALI: Ugependa nani awepo kushuhudia ukitoa maelezo yako?

JIBU: Ningependa kutoa maelezo yangu nikiwa peke yangu na maelezo yangu yaandikwe na askari anayenihoji.

(Imesainiwa)

(Imesainiwa)

Saini ya

Shahidi

Saini ya Mtuhumiwa.

Saini ya Afisa wa Polisi

From the above information from the said caution statement, and the contents thereto, this court is satisfied that before recording the 2nd accused person's caution statement, indeed she was cautioned and her rights were well considered and envisaged. The above phrases demonstrates as to how the accused was prepared and instilled the knowledge of what was about to take place and the consequences thereafter so that she won't be taken by surprise when the said statement is needed in the future. The agreement to this situation was endorsed by the signatures of both the recorder and the accused thereto. It is from these premises, the court is of the firm view that the accused was availed with the appropriate and legal entitlements as the law requires. Hence **this point is overruled.**

Another point of objection is that the said statement was taken contrary to **section 50 and 51 of the CPA**. On the same line is another objection to the effect that when the 2nd Accused person was interrogated, she was not a **free agent**; meaning that section **53 to 58 of the CPA** were not complied with.

It is not disputed that according to **section 50 of the CPA** the person under restraint is supposed to be interrogated by the relevant authority not more than four hours after the arrest. Referring to the time that the accused person in this matter and the recording thereto, the contents of the said statement reveals that the accused person was arrested at **12:00 Hrs.** as she revealed in the last page of the caution statement where she said:

"Haya ndiyo maelezo yangu niliyotaka kuyatoa leo baada ya kuwa nimekamatwa muda wa saa sita."

Further from the same statement, the starting time of recording is seen in page 2 to be **13:10 Hrs.** The said interrogation and recording was adjourned due to an merged factor as seen on page 9 to be **14:40 Hrs.** and resumed at **18:25 Hrs.** and completed recording at **19:40 Hrs.** of the same day, that is on **16/9/2017**. Computing to the time taken from the time the accused was arrested, the interrogation was complete, the exercise was well within the statutory time. However, I have heard the

Defence concern that it was beyond that time. Here I would like to emphasize that even though that was the case of which is not, it has to be noted that section **50(2) of the Criminal Procedure Act Cap. 20 [R. E. 2019]** gives exceptions for such a statement to be admitted. The said section is couched in the following words:

"In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence."

This position has been stated in the case of ***NYERERE NYAGUE v. R., Criminal Appeal No. 67 of 2010 (Unreported)*** where it was observed that:

"It is not therefore correct to take that every apparent contravention of the provision of the CPA automatically leads to the exclusion of the evidence in question."

On the objection that **section 53 to section 58** was not complied with, after going through the statement in issues, this

court is also satisfied that the said sections were duly complied with. However, at this point, I would like to expound on the contents of **section 58 (1) of the CPA**. During submission of the point in relation to this section, it came to my understanding that, in the event where the accused knows reading and writing, then he ought to be furnished with any writing materials he requires for writing out the statement. I have to invite learned Counsel to this case to read the said provision one again carefully as from the wording of this section, such a right of which here is said to have been infringed as the accused was not furnished with the writing materials, the same is not an automatic right as it has been referred to. I would like to quote the relevant part of it as hereunder:

"58(1): Where a person under restraint informs a police officer that he wishes to write out a statement, the police officer shall:

(a) Cause him to be furnished with any writing materials he requires for writing out the statement."

Basically the above provision is meant for statements made by suspects upon their **wishes** and **request** to the Authority to be furnished with such writing materials and not for governing the recording of a caution statement.

Further, it is not disputed that legal procedure to the conduct of criminal matters must *prima facie* be obeyed by all the Stakeholders in the Criminal Justice System, "Haki Jinai". However, that is not always the case depending on the circumstances and degree of non-compliance or the breach if a need arise. I wish in this regard to refer to the decision of **Lord Cooke of Thornton of the Court of Appeal of Newzeland** in ***NEWZELAND INSTITUTE OF AGRICULTURE SCIENCE INC. V. ELLESMERE COUNTRY (1971) NZLR 630*** when he spoke for the court thus:

"Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement that on considering its place in the scheme of the Act or Regulation and the degree and seriousness of the compliance."

From the above, the instant points of objection are **overruled.**

The final point of objection is to the effect that before the 2nd accused writing her statement, she was tortured and induced to sign something that she didn't know. In the event therefore, the said statement has been obtained contrary to **section 27** of the **Evidence Act.**

It is still in my mind that when Mr. Magafu was referring to torture in respect of the 2nd accused, the said torture argued for was **physiological** and not physical. This was due to the fact that it was the same day that the 2nd accused was arrested at Vingunguti, brought to Oysterbay Police Station and interrogated, later went to Ngazija graveyard, and went back to Oysterbay where she continued with interrogation in issue all in the same day. It has been said that the busy timetable constrained and tortured the accused psychologically. It was the Defense observation that she ought to have been provided with conducive and flexible environment for her to write her statement.

In examining this matter and in reflection of all the events that took place on that material day, it is obvious that all the activities thereto were conducted in a manner of emergency and in accordance to the circumstances and nature of the offence in issue. Under those circumstances, flexibility had no space. Since the major task of Police is Protection of the Citizens and their properties, then the mode of conducting their business has to be in a way that they have to be **prompt and rapid**. What is to be observed under the situation is that the rights of the accused are not infringed. The fact of having a late lunch or supper is a normal practice even in a very normal ways of life during the day.

After having heard the Defense submission on this point, I am satisfied that there was no any tangible and major effect towards the accused that infringed her rights in relation to the recording of her caution statement. Neither, the Counsel failed to demonstrate even in a nutshell as to how the accused was further tortured to affect her rights in writing and signing her caution statement. In the event therefore, this point too is **overruled**.

Before I conclude this ruling, I have to declare that the contradiction as demonstrate above that had emerged as to whether the witness before the Court or any other person interrogated and recorded the 2nd accused's caution statement was a major reason as to why this Court did not proceed to trial within trial proceedings to ascertain the existence of the of the 2nd accused caution statement of which I have now ruled out was lawfully recorded. From the above and since this Court is satisfied that indeed the 2nd accused person wrote her caution statement before PW14 AN and that the same was obtained in accordance to the law, **I proceed to overrule all the advanced points of objection by the Defence and allow the caution statement be admitted for evidence as prayed.**

It is so ordered.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya", with a horizontal line extending to the right.

L. E. MGONYA

JUDGE

6/04/2022