

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL SESSION CASE NO. 103 OF 2018
THE REPUBLIC
VERSUS

MIRIAM D/O STEVEN MRITA.....1ST ACCUSED
REVOCATUS S/O EVARIST MUYELLA@ RAY.....2ND ACCUSED

RULING

18th February, 2022 & 21st February, 2022.

E.E. KAKOLAKI, J.

Before this court the two accused persons **MIRIAM D/O STEVEN MRITA** and **REVOCATUS S/O EVARIST MUYELLA@ RAY** are jointly and together facing the charge of **Murder**; Contrary to Section 196 of the Penal Code [Cap. 16 R.E 2002 now 2019]. It is alleged by the prosecution that on 25th day of May 2016, both accused persons at Kibada area within Kigamboni District in Dar es salaam Region did jointly and together murder one **Aneth Elisaria Msuya**. When the charge was read over to the accused persons both denied any involvement thus throwing the ball to the prosecution to prove their

guilty. When the case was set for hearing and in its urge to prove the charge against them the prosecution paraded the first witness one WP 4707 Sgt. Mwajuma (PW1) who in the course of her testimony sought to tender in court 1st accused's cautioned statement allegedly reduced down by her on the 07/08/2016. Admission of the said document was strenuously resisted by counsels for both accused persons. The Republic was under representation of Ms. Gloria Mwenda and Ms. Calorine Matemu, learned Senior State Attorney and State Attorney respectively whereas the 1st and 2nd accused persons were defended by Mr. Omary Msemo and Mr. Nehemiah Nkoko both learned counsels respectively.

Picking up objection against admission of the said cautioned statement Mr. Msemo's points of objection were premised on three grounds. On the first ground he contended the statement was recorded outside the prescribed time limitation of four hours after her arrest as per the dictates of section 50(1)(a) of the Criminal Procedure Act, [Cap. 20 R.E 2019] hereinto referred as CPA as the 1st accused was arrested on 05/08/2016 and her statement recorded on 07/08/2016. According to him there is no explanation as to whether time was sought and extended for recording the said cautioned statement as per the dictates of section 51(1) of the CPA. Secondly, he

stated the statement was extracted after the accused person was subjected to torture hence involuntarily obtained as the complaint of torture was also raised before the committal court on 06/09/2017 in which its ruling was delivered on 09/01/2016 ordering for issue of PF3 to the accused persons for medical attention. And thirdly, that the 1st accused was not informed of her rights before recording the said cautioned statement as prescribed under section 53(c) of the CPA, something which violated her rights to communicate with her lawyer, relatives or friends before recording the alleged statement. Basing on these grounds it was his prayer that the cautioned statement sought to be tendered should not be admitted by this court. On his side Mr. Nkoko for the 2nd accused while supporting the raised grounds of objection added that, PW1 failed to inform the court as to when was the 1st accused arrested so as to establish whether the alleged cautioned statement was recorded in time or there was a need for extension of time as per section 51(1) of the CPA. He further contended, the statement does not indicate where was it recorded and it contravened the provisions of section 53(a)(b) and (c) of the CPA which infraction he contended affected the accused's rights for being subjected to mental and/or psychological torture.

In response to the raised points of objection Ms. Mwenda informed the court that the complaints raised by Mr. Nkoko do not qualify to be points of law for requiring facts to prove them. As regard to the ones raised by Mr. Msemu she argued, since the same were suggesting that the statement was obtained involuntarily and that it was recorded out of time limitation as provided by the law which assertions she strongly denied, this court was enjoined to conduct trial within trial to let the prosecution prove the same was procured voluntarily and timely.

It is trite law that a confession or statement will not be presumed to have been voluntarily made until objection to it is raised by the defence on the ground that it was not so or it was not made at all and determined by the court that the same is **“free from the blemishes of compulsion, inducements, promises or even self-hallucinations.”** See the cases of **Twaha Ali and 5 Others Vs. R**, Criminal Appeal No. 78 of 2004 (CAT-unreported), **Paul Maduka and 4 Others Vs. R**, Criminal Appeal No. 110 of 2007 (CAT-unreported) and **Seleman Hassan Vs. R**, Criminal Appeal No. 364 of 2008 (CAT-unreported). It is from that stance this court ventured into a mandatory procedure of conducting trial within trial for determination of voluntariness or otherwise of the said cautioned statement which was

admitted for identification purposes as exhibit ID1 and further establish whether the same was procured within time limitation or not.

Again it settled law that, objection on admissibility of confession statements may be taken on two grounds. One, under section 27 of the Evidence Act, that it was made involuntarily or not made at all and secondly, under section 169 of the CPA that it was taken in contravention of the provisions of CPA, such as section 50, 51 etc. Where it is under Evidence Act, the court has to conduct trial within trial or inquiry to establish its voluntariness or otherwise. And where the objection is taken under the provisions of CPA, its admission is absolute in the discretion of the court upon having regard to the considerations shown under section 169(2) of the CPA, and satisfied that its admission would be in the benefit of public interest and the accused's right and freedom are not unduly prejudice. In other word there must be balance of interest of both public and the accused person. See the case of **Nyerere Nyague Vs. R**, Criminal Appeal No. 64 of 2010 (CAT-unreported).

In this case the grounds of objection as raised by the learned counsel for the 1st accused and supported by the 2nd accused's advocate are premised on both Evidence Act and CPA, therefore in determining them I will be guided by the principles stated in the case of **Nyerere Nyague** (supra). In proving

that the statement was procured timely and voluntarily after informing the 1st accused person of her rights, the prosecution paraded three witnesses namely Sgt. Mwajuma (PW1) who recorded the cautioned statement, SP. David P. Mhanaya (PW2) who arrested the 1st accused at Arusha and transfer her to Dar es salaam and Dr. Deogratius M. Kallaga from Temeke Hospital, who attended the accused persons including the 1st accused and tendered in court the alleged caution statement as exh. ID1 and PF3 by the 1st accused as exh. PE1. In a bid to discredit prosecution evidence and prove that the said cautioned statement was obtained involuntarily, out of time and in violation of 1st accused rights the defence called in court evidence of 1st accused as DW1, Mbazi S. Mrita (DW2) 1st accused's brother and S/sgt. Pembe M. Zuberi (DW3), acting in-charge of the Segerea prison dispensary who attended the 1st accused. The court was also invited by the defence to take judicial notice of the proceedings of the committal court of 06/09/2016 at the Resident Magistrates Court of Dar es salaam at Kisutu and its ruling of 09/01/2017.

To start with the first ground of objection which was also beefed up by Mr. Nkoko, the issue for determination is whether exh. ID1 was procured outside the prescribed time of four hours and in infraction of the provision of section

50(1)(a) of the CPA and that no time was extended as per section 51(1) of the CPA. In countering the objection, it was prosecution evidence through PW2 who arrested the 1st accused at Arusha in company of two other fellows ASP. Jumanne and Insp. Latifa that, on the night of 04/08/2016 under instructions of Director of Criminal investigation (DCI) and RCO for Temeke Special Police Region moved to Arusha from Dar es salaam for the purposes of arresting the 1st accused person and arrived there in morning of 05/08/2016. That they arrested her on 05/08/2016 at Tembo Club located at Monduli Road through Insp. Latifa who was in his team at about 5.45 PM, which fact is not disputed by DW1 though according to her, the time was about 3.30 PM or so before she was taken to Arusha Central Police Station at about 7.30 PM for briefing with the RCO for Arusha Region one SSP Katabazi about her arrest. PW2 testified, they stayed there waiting for RCO until when he arrived at 8.45 PM and briefing conducted before they left for search at her residence Sakina area at about 11.30 PM. PW2 testified further that, the search exercise was concluded at about 5.00 AM in the morning of 06/08/2016 before they passed at the accused hotel, SG Hotel at about 5.30 AM to briefly see the motor vehicles alleged to have been used or facilitated commission of murder incident of Aneth Msuya before the same were seized

by the RCO for Arusha. From there they passed at the RCO's office for Arusha Region before the journey to Dar es salaam with the 1st accused person in company of Insp. Latifa and ASP Jumanne had started, where they arrived at Temeke Special Police Region offices at about 9.00 PM after encountering traffic on their way as they passed Chalinze route. As it was late and since the accused person was tired, the RCO for Temeke SSP. Mchovu on humanitarian grounds deferred the exercise of interview and recording accused's cautioned statement till the following day hence PW2 ordered Insp. Latifa to handle the accused to the shift ,in-charge for incarceration in the lock up till next day when the cautioned statement was recorded. When cross –examined as to why they failed to record the cautioned statement at Arusha soon after her arrest when awaiting for briefing with the RCO, PW1 said the RCO's office were closed and could not have access to them so they conducted oral interrogation only. And when further cross examined as to whether the 1st accused was subjected to torture on the 07/08/2016 he denied saying, that was not true and he never assaulted her particularly on her toes as alleged. He also denied to have released the 1st accused to take bath on the 08/08/2016 reasoning that she was being handled by women police as a female suspect.

On the other side, DW1 in her statement said soon after her arrest on 05/08/2016, was taken to Arusha Central Police Station and then USA River Police Station before they came back to Central Police Station and later on moved to her residence for search purposes, which exercise was conducted till it was down on the 06/08/2016, the date in which the journey to Dar es salaam started while her face covered with clothes on the way, only to find herself in the grilled lock up at unknown Police Station to her when reached at Dar es salaam in the evening of 06/08/2016. She said was asked by PW2, Jumanne and Latifa to follow their instructions before they locked the grilled door with padlock and left her there till in the morning of 07/08/2016 when the trio visited her and took her to one room while blindfolded, where she was subjected to torture including heavy assault on her bottom parts of the feet (the sole), while forced to confess to have killed Aneth Msuya the fact which she denied. She added, on taken back to the lock up and after being unfolded she noted the second finger of her left toes was bleeding profusely before Latifa took her to another room where she was given breakfast. And that, in the afternoon the trio returned and continued to push her to confess to the murder of one Aneth Msuya, in which she persistently denied before she was taken back to the lock up where she spent another night while

handcuffed and blindfolded up to 08/08/2016 when she was allowed to take bath. It is on the very date when she was moved to another police station close to the airport where she was also subjected to great threats of being killed and inserted a piece of stick in her private parts plus several beatings after being taken to unknown forests twice and later on forced by Latifa to sign papers in one room in the presence of the trio on 12/08/2016.

After subjecting to scrutiny evidence from both parties, I entertain no doubt that exh. ID1 subject of this ruling was recorded on 07/08/2016. I so find as Mr. Msemo when raising objection to its admission said, it was recorded on that date which manifestly was outside time limitation of four hours as provided under section 50(1)(1) of the CPA since the 1st accused was arrested on 05/08/2016. It is further evident that, PW1 who recorded it when testifying was not subjected to cross-examination by the defence counsels to contradict her on the date and before who was the said cautioned statement recorded, thus an admission that it was executed on 07/08/2016 before PW1. It is the law, failure to cross-examine on important matters implies admission of the facts stated by the opposite party. That proposition was adumbrated by the Court of Appeal in the case of **Jaspini s/o Daniel**

@Sizakwe Vs. DPP, Criminal Appeal No. 519 of 2019, (CAT-unreported) when the Court held that:

"....it is settled law that failure to cross examine a witness on an important matter implies acceptance of the truth of the witness evidence in that respect..."

Having so found, let me now move the crux of the matter in the first objection as to whether exh. ID1 was recorded outside the prescribed time. Considering both parties evidence on the fact I am made to believe PW2's evidence who testified that, after arrest of the 1st accused on the 05/08/2016 briefing was conducted to the RCO for Arusha Region before they proceeded to her (accused) residence for search until 06/08/2016, when they passed at SG Hotel and later to RCO's office before they left for Dar es salaam where they arrived late in the night at about 09.00 PM. And that the RCO for Temeke where the accused was taken directed not to conduct interview to the accused as she was tired till 07/08/2016 morning when it was conducted. I disbelieve the 1st accused story that she was taken first to USA River Police Station soon after her arrest before they returned to Arusha Central Police Station on the pretext that, they were heading to TANZANITE ONE to attend the accusations levelled against her that she was involved in minerals theft,

as in my opinion that story is not in anyway connected to her arrest on the charge of murder. I so opine as the court was not told whether the complaint of minerals theft was reported at USA River Police Station and had any connection to murder accusations against the 1st accused. I therefore discount it. It is the law under section 50(2)(a) of the CPA that, in calculating the period available for interviewing a person who is under restraint in respect of an offence the time or period within which the accused is being conveyed to the police station or other place for any purpose connected to the investigation shall not be reckoned. Section 50(2)(a) of the CPA provides:

*(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, **there shall not 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-***

*(a) **while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;** (Emphasis supplied)*

I find the above cited provision of the law relevant and applicable to the facts of this case as when the 1st accused was arrested on 05/08/2016 interview

could not be conducted to her before search is conducted to her home, the exercise which undisputedly continued to 06/08/2016, before the arresting officers passed to Arusha Central Police Station and started their journey back to Dar es salaam, as the purposes of going Arusha was to arrest the said accused person and bring her Dar es salaam where her case is investigated. It is also undisputed fact that, they arrived at Temeke Special Region Police Station, Dar es salaam in the night of 06/08/2016 in which as per PW2 the accused could not be interviewed for being tired and on humanitarian grounds till next day, which reasons I also find not only reasonable but also justifiable to defer reckoning the time limitation for interviewing the accused from her arrest period on the evening of 05/08/2016. It follows therefore that, time started to run on the 07/08/2016 from 06.00 AM in which as per PW1 and exh. ID1 itself the interview and recording of statement started at 9.30 AM. Counting from 06.00 AM the time within which the statement started to be recorded was within the time limitation of four hours as stipulated by section 50(1)(a) of the CPA. Thus, the above issue is answered in negative as exh. ID1 was recorded within time.

Next for determination is the issue as to whether the said exh. ID1 was obtained involuntarily and without according the 1st accused of her rights. During the trial within trial it was PW1's evidence that when asked by SSP. Mchomvu, RCO for Temeke Region to record the 1st accused cautioned statement on 07/08/2016, she found the interview room prepared for that purpose and Insp. Latifa brought in the said suspect. She testified that, the suspect whom she identified in court as the 1st accused person was in good health condition and got seated on the chair in front of her as they were only two of them in the room before both introduced to each other. PW1 said she informed the suspect of her intention to record her cautioned statement and was informed of all her necessary rights such as the right to say anything or stay mute, right to have her relatives, friends or lawyer present, when recording the said statement or proceed in their absence. She stated the suspect opted to proceed on her own and signed the statement sheet to signify her willingness and the exercise continued up to 01.25 PM when she was asked to certify through her own hand writing that she read the statement and its contents were correct followed by PW1's certificate. And that each page of the statement was initialled by the suspect's signature and thumbprint. As that was the first part of her statement later on she procured

the second part as additional statement after identification parade was conducted to her, and the same procedure of certifying correctness of the statement was taken by both parties. According to PW1 the statement was procured voluntarily as the 1st accused was informed of her rights and opted to proceed on her own. When cross examined as to whether she had medical knowledge to diagnose if the suspect had any medical condition, PW1 said, she had none as she only observed her (accused) physically and satisfied herself that she was fit to proceed with the interview. When cross examined by Mr. Msemo as to whether she provided the suspect with communication devices for her to communicate with relatives, lawyer or friends she said was not allowed to so do since the RCO for Temeke would have facilitated her if at all she was in need of that right. In proving that the accused was not tortured physically, the prosecution called in PW3 the medical officer from Temeke Hospital who treated the suspect on 18/01/2017. It was his evidence that, after the patient history he diagnosed she had minor tissue injuries as per the PF3 exh. PE1 and prescribe her pain killers.

As disclosed earlier on herein above, on her part DW1 gave a detailed account of the torture she underwent since the day she arrived at Dar es salaam on 06/08/2016 night until when she was allegedly forced by Insp.

Latifa to sign the papers she did not know its contents on the 12/08/2016. She mentioned the torture to include covering of her face with black clothes, assaults with blunt objects on her legs and bottom part of her feet (the sole) in particular while blindfolded, taken to the forest two times with threats to be killed if not confessing to murder of Aneth Msuya, denial of access to her relatives, friends and lawyer plus medical access till when she was taken to court on 23/08/2016. That she had her legs swollen, injuries on the face and hands for being handcuffed in most of the time. She said, did not disclose her complaint of torture to the court until her 2nd appearance in court on 06/09/2016 when she appeared represented by the advocate who raised it and the ruling to that effect delivered on 09/01/2017, ordering her to be issued with PF3 and taken to Hospital, which order was complied with on 18/01/2017 when attended by PW3 as indicated in exh.PE1. When cross examined as to why she failed to raise her complaint of torture on 23/08/2016 when arraigned before the court she said was not given right of saying anything. To support DW1's evidence on the assertion of torture DW3 the clinical officer from Segerea Prison Dispensary was called in court who testified that, he attended her one day after her admission in the prison on 24/08/2016 and noted she had sceptic wound on the fourth finger of her left

leg toes. He however tendered no document in court to exhibit his finding and the medications he prescribed her apart. When cross examined on the cause of that sceptic wound DW3 said, the same could be resulted from any cause such as stumbling on rough object, burnt from hot water and other related causes. He could not confirm if resulted from violence as the same was not fresh one to allow him detect the nature of object used to inflict wound. On further cross examination whether DW1 had and medical chit or PF3 when admitted in prison, DW3 said he saw none.

As stated and found above when determining the first objection it is undisputed fact that the said statement was recorded by DW1 on 07/08/2016 as that fact was not challenged by the defence. I so say because, if the defence intended to challenge it, they would have maintained in their objection that the 1st accused never recorded statement before DW1 Sgt. Mwajuma on 07/08/2016 but rather involuntarily made it before Insp. Latifa on the 12/08/2016. It is from that failure I had the audacity of concluding with certainty that, that fact is not controverted. From that stance the sub-issue here for determination is whether the same was procured involuntarily before PW1. As stated above by PW1 the suspect was informed of her rights and opted to proceed in absence of relatives, friends or her lawyer, since if

she wanted to reach them the RCO for Temeke would have facilitated her. As the alleged accused rights are claimed to have been violated before she was forced to sign the papers before Insp. Latifa and not Sgt. Mwajuma (PW1) whom as per evidence informed her of all rights before recording exh. ID1, I find such allegation is unfounded and therefore an afterthought. I proceed to hold she was duly informed of her rights before recording her cautioned statement exh. ID1 before DW1. As to the allegation of torture before recording cautioned statement (exh.ID1) before DW1 on 07/08/2016, I also find the same is unproved for two reasons. **One**, it is uncontroverted fact that exh.ID1 was recorded on 07/08/2016 from 9.30 AM to 1.25 PM by PW1, the date and time in which the 1st accused allege to have been subjected to heavy torture something which is impossible. **Secondly**, there is no cogent evidence from DW1 to controvert the evidence in PF3 exh. PE1 by PW3 remarking that she had minor tissue injuries so as to substantiate her allegations on heavy beatings allegedly administered to her from the arrest date until when she was arraign in court and later incarcerated in prison. As to the sceptic wound observed by DW3 there is no proof of its age leave alone its cause as DW3 said, it could as well resulted from rough object or burn of hot water. It is from those facts I entertain no doubt in holding

that, if at all the accused was seriously assaulted hence fall in bad condition, when taken to court and later on to prison, the committal court magistrate would have detected it and ordered her to access medical attention and further that, she would not have been admitted in prison without a PF3. Further to that and basing on the above raised deficiency in DW1's evidence, I am not prepared to believe and consider her assertion that, when appeared in court at first on 23/08/2016 was not allowed by the court to say anything, the accusation I consider to be a serious one as what she was not allowed to answer to is the charge of murder as stated in her evidence in chief and not to raise any complaint touching her health affairs. It is from the fore stated reasons I resolve the raised issue in negative as the 1st accused was informed of all of her rights and exh. ID1 was procured before PW1 (Sgt. Mwajuma) voluntarily without torture as claimed since she was a free agent. In the event and for the fore stated reasons this court is of the finding that, the raised three objections against admission of 1st accused cautioned statement duly recorded by DW1 Sgt. Mwajuma on the 07/08/2016 have no merits and therefore dismiss them. I proceed to hold the same is admissible under the circumstances of this case.

It is so ordered.

DATED at Dar es salaam this 21st day of February, 2022.



E. E. KAKOLAKI
JUDGE
21/02/2022.

Ruling delivered at Dar es Salaam in chambers this 21st February, 2022 in the presence of both accused persons in person, Mr. Genes Tesha and Gloria Mwenda learned Senior State Attorneys for the Republic, Mr. Peter Kibatala and Mr. Omary Msemo, learned counsels for the 1st accused person, Mr. Nehemiah Nkoko learned counsel for the 2nd accused person and Ms. Monica Msuya, court clerk.



E. E. KAKOLAKI
JUDGE
21/02/2022

