

**IN THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MOROGORO)**  
**AT IFAKARA**  
**CRIMINAL SESSION NO. 05 OF 2021**  
**REPUBLIC**  
**VERSUS**  
**LEONARD BUNDALA MALULANYA @ RENA NGASA**  
  
**RULING**  
**(ON TRIAL WITHIN TRIAL)**

*Hearing date: 17/2/2022*

*Ruling date: 18/02/2022*

**NGWEMBE, J:**

The accused was arraigned in this court charged for the offence of murder contrary to sections 196 and 197 of the Penal Code Cap 16 R.E. 2019. In the course of hearing the fourth prosecution witness, F 8620 D/CPL Mkama who is a police officer stationed in Ulanga District at Mahenge, testified forcefully that on 6/01/2020 while at his station, recorded caution statement of the accused. He proceeded to identify the said caution statement, hence prayed to tender it as part of his evidence.

In turn the defense counsel strongly contested its admissibility with reasons that his client (accused) was not freely volunteered to confess

before police, rather was tortured prior to and during recording his confession. As such the statement was made under duress and involuntary. Following that objection, this court being guided by sections 3 and 27 of the Evidence Act Cap 6 R.E. 2019 together with many precedents thereto, I decided to conduct a trial within trial.

It is an imperative requirement that the assessors should retire throughout the conduct of the trial within a trial in order to avoid being possibly prejudiced by hearing of the evidence which might afterwards be held inadmissible. This position was rightly discussed and concluded by the Court of Appeal in the case of **Ngwala Kija Vs. R, Criminal Appeal No. 233 of 2015** (CAT at Tabora).


The purpose of conducting trial within a trial is to unearth the truth on voluntariness or otherwise of the accused to make his confession. In other words, the accused retract his statement that he was forced to say what is in the statement. In order to satisfy the legal requirements of how such statement was made, the trial court is duty bound to conduct trial within a trial for only one purpose, that each party should be given enough time to be heard on how such confession or statement was made. Thus, the prosecution has unshakable duty to prove voluntariness of the accused to make his statement, while the accused has a duty to disprove his voluntariness to confess.



As such evidences of both parties must be heard. Since this is a mini trial, the honourable assessors sitting in the main trial were ordered to retire and go outside the court room during the whole trial within a trial.

Hearing commenced by each party lining up witnesses to proof and or disproof their case. The learned State Attorney Caristus Kapinga as a lead counsel on this trial within a trial assisted by the learned Principal State Attorney Flora Masawe came up with two prosecution witnesses, while the defense counsel had one witness who is the accused alone.

The first prosecution witness F. 8943 D/CPL Geoffrey (police officer) working at Mahenge Police station, testified confidently that the accused Leonard Bundala Malulanya appeared before F. 8620 D/CPL Mkama on 6/1/2020 at around 8:00 am in their offices who recorded his confession. Continued to testify that, their office is spacious and all are sitting in one office, while their officer incharge has a different office.

That he witnessed the accused recording his statement before Mr. Mkama. That he never witnessed any torture of the accused. The recording of the statement commenced from 8:00 am to 11:00 am. Added that in their office there are tables, chairs and shelves for files. Rested by stating that their office may accommodate up to seven or more police officers. 

In re-examination, he added that all interrogations are conducted in their office in presence of other detective police officers.



The second prosecution witness F. 8620 D/CPL Mkama testified that he was assigned to record statement of the accused. Prior to recording his statement, Mr. Mkama introduced himself, and the charge facing the accused together with the purpose of recording his statement. Proceeded to testify that he told the accused all statutory prerequisites including his right to deny saying anything or voluntarily making his statement free from any influence or promise of any present or future gain or with undue influence of whatever nature. Also, his right to call any person of his choice to be present when he is recording his statement. At the end the accused opted to freely make his statement in the absence of any other person.

Rested his testimony by adding that after recording his statement, he read over the contents of the whole statement to the accused and the accused was satisfied that indeed that was his statement. Thus, proceeded to signify his acceptance by putting his finger print in every page as he could not read and write.

In cross examination, he testified that, in the room there were other detective police namely, DC Arawu; DC Alinani; D/CPL Keneth; and WP Gema. Thus, neither torture nor undue influence occurred to the accused neither before nor during recording his statement. Therefore, the statement was made voluntarily and with free will same should be admitted as part of the court proceedings.

In turn the defense witness who is the accused, testified quite eloquently that on 6/1/2020 at around 8:00am was summoned from police custody to the interrogation room, where he met Mr. Mkama, Geoffrey, Mashishanga



and another police whose name was forgotten. That he recorded his statement while tightened with rope in his hands. Also, Geoffrey stood on his chest at the same time Mkama had a stick beating and torturing him. That he recorded his statement in the circumstances of torture. That to save his life he had to disclose everything, otherwise they would have caused harm to him.

On cross examination, he admitted that he was arrested while was at Shinyanga, then was taken to Morogoro central police and finally at Mahenge Police Station in Ulanga District. Proceeded to admit that it is true Mr. Mkama recorded his statement on 6/1/2020 and had to disclose everything under duress. In re-examination, he testified that the mode of recording his statement was by questions and answers. Rested by insisting that the statement was made under duress.

Considering deeply on the cons and prons of this trial in line with the contents of the statement itself, I find prudent to be guided by the law itself. Section 3 of the Evidence Act defines confession to include words or conduct or a combination of both words and conduct when taken together proves that the maker was the one who committed the offence or otherwise. In **Criminal Appeal No. 228 of 2005, between Amir Ramadhani Vs. R**, the Court of Appeal discussed at length admissibility of confession statements, which though not similar with this case, but similar scenarios. The maker denied generally to have made any statement, in this trial the accused has tried to deny his caution statement because he made it under duress and torture.



However, at the end the Court of Appeal in page 21 of their judgement found the appellant to have made that statement before Justice of Peace. The Court of Appeal also discussed at page 22 of their judgement that the appellant denied to have made any statement before police officer. At the end they concluded that, indeed the accused made that statement, but what he was doing was to try to retract it without giving any valid reason. The confession statement was admitted in court.

In this case the contents of the caution statement in dispute, is so elaborate with clear details of number of people involved in causing death of the deceased, instruments used to kill the deceased, the place where the deceased met his death, number of bags of sesame, the transport used to transport the body of the deceased and the place where it was thrown, the transport used to transport bags of sesame from the deceased house, the place where that sesame were sold and the amount of money. Such details, cannot be made by any person who was not involved in the whole process. Above all, the maker of the statement mentioned systematically the names of his co- accused who are not in this court and narrated quite clearly on the duty of each of them in killing the deceased.

Undoubtedly, the statement is so detailed to the extent that no one can make it if he did not witness or involve in the whole process.

Apart from the contents of the statement itself, I have calmly, considered the grounds of objection in line with the evidence adduced by the defense witness in comparison with the prosecution witnesses, any person properly



guided by law and with basic principles of law, would conclude, as I hereby conclude, that the allegations of torture prior and during recording of his statement is an afterthought.

Without labouring much on this issue, I would safely conclude that the statement was made by the accused voluntarily with free will expressing exactly what happened on the fateful date to the deceased. I therefore, overrule the objection and proceed to admit the caution statement made by the accused before police on 6/01/2020 as an exhibit marked P5 forming part of this proceedings.

**It is so ordered.**

**Date at Ifakara in Kilombero District this 18<sup>th</sup> February, 2022.**



A handwritten signature in blue ink, appearing to read "P.J. Ngwembe", is written over the printed name.

**P.J. NGWEMBE**

**JUDGE**

**18/02/2022**