

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**SUMBAWANGA DISTRICT REGISTRY**

**AT SUMBAWANGA**

**CRIMINAL JURISDICTION**

**SITTING AT MPANDA**

**CRIMINAL SESSION NO. 34 OF 2021**

**REPUBLIC**

**VERSUS**

**YOHANA D/o GINASA @ NGOSHA**

**15/02/2023 & 15/02/2023**

**RULING**

**MWENEMPAZI, J.**

The witness PW3 Assistant Inspector of police one Godfrey Ruzabila Ndangala was an acting OC CID for Mpanda District when NELSON S/O LWICHE @ THOMAS was murdered. He participated in issuing administrative directives to investigators in a bid to find the perpetrator of the said murder. Today he was testifying to matters he knew by virtue of his role in the investigation of the case which now is leveled against YOHANA GINASA @ NGOSHA, who is alleged by the prosecution that he murdered NELSON S/O

LWICHE @ THOMAS on the 4/2/2021 at Itenka 'A' Village, Mpanda District in Katavi Region.

He has testified that one of the persons who were interviewed in the investigation of the case is one NEEMA D/O BONIFACE who was the wife of the deceased and on the material date (3/2/2021) they were together with the deceased heading for their home from liquor club. However, when this case was scheduled for hearing they were issued with the summons so that they serve it to NEEMA D/O BONIFACE but it has not been possible to locate her, both at Itenka 'A' Village and at the place of her domicile - at Musoma. The prosecution wants to tender her statement in lieu of oral evidence. As the prosecution was leading the evidence the witness sought to tender a witness statement of one NEEMA D/O BONIFACE. That attempt has met an objection on two points.

**One**, that the statement is not qualified with the factors prescribed under section 34B (2) (d) and (e) of The Evidence Act. **Two**, that the witness is not a competent witness because he did not record the statement. On the first point of objection, the Counsel for the defendant has submitted that for the statement to be utilized in lieu of oral evidence, the prosecution must issue notice of 10 days before it is admitted in Court. The notice was

issued on 14/2/2023 and the defendant was served on the same date. That is, according to the submission by the Counsel, contrary to section 34B (2) (d) and (e) of Evidence Act, Cap 6 R.E 2019; to reinforce the point, the Counsel has cited the case of **Omary Athuman @ Magari and Another Vs. Republic**, Criminal Appeal No. 398 of 2019, Court of Appeal of Tanzania at Dar es Salaam at 10 where it was observed that: -

*"...The respective provision is complied with when a copy of the statement is served on the accused ten (10) days before the date when the same is produced in evidence".*

The intention of the requirement to give ample time to the accused to prepare for defence in the referred case; at page 13 it was observed that:

*"Omission to supply them with a copy of the statement within the statutory period, denied them a fair hearing which occasioned failure of justice".*

The Counsel for defence prayed that the statement should not be admitted for failure to comply with the prescribed time as provided for under Section 34B (2) (e) of the Tanzania Evidence Act, Cap 6 R.E 2019.

On the second point the Counsel argues that the witness is not a competent one because he did not record a statement sought to be tendered. He submitted that it is a settled law that a witness who is competent to tender the document is one who had possession of the document, custodian or made that document or who saw the document at one point in time. This witness has not shown whether he saw the document, he only testified that he directed for the document to be recorded. The Counsel submitted that the witness has not shown that he had possession of the document or he knew about it. He cited the case of **Fredy Stephano Vs. Republic [2008] TLR 160** for the argument that the witness cannot say whether the statement was read over to the witness or not. The witness cannot say with certainty that the witness read the statement or not. He prayed that it should not be admitted.

Mr. Lugano Mwasubila, Learned State Attorney submitted that the Republic is vehemently opposing the objection. On the first point he submitted that the statement is being sought to be tendered after complying with Section 34B (2) (d) and (e) of Tanzania Evidence Act, Cap 6 R.E 2019. The Counsel submitted that the prosecution has complied with the law by filing the notice and statement attached to it. It is not the requirement of

the law to await for the lapse of 10 days. The 10 days requirement is intended for the defendant who ought to have filed notice of objection or pray for time to do so in compliance to the law, after being served with the notice and a copy of the statement sought to be tendered in lieu of oral evidence.

Since the prosecution complied to the law by filing notice and attaching the statement and since the defendant knew that the case will commence to be heard filed a notice of objection or apply to utilize their ten (10) days in order to file the objection. Since they have not done so, they have waived their right to object.

According to the Counsel for the prosecution, the cited case of **Omary Athuman @ Magari and Another Vs. Republic** (Supra) is distinguishable in that case the adverse party was not served with the notice, the prosecutor applied for ten (10) days to produce the statement. The statement was not tendered.

In the case of **Chukwudi Denis Okechukwu and Three Others Vs. Republic**, Criminal Appeal No. 507 of 2015 Court of Appeal of Tanzania at Dar es Salaam the Court observed:

*"Our understanding of the provisions of Section 34B (2) (e) of The Evidence Act is that the one who had the duty to lodge a notice or raise an objection to the admission of the statement of Asp. Shilla, were the appellant. Since the record is clear that, they neither raised an objection to its admission, nor prayed for leave to lodge a notice, they cannot now be heard to complain that, the statement and the corresponding materials were admitted irregularly without due notice. In that regard we find this ground of appeal by the appellants to be baseless, we dismiss it".*

Thus the Counsel for prosecution submitted that the first point should be dismissed and the statement of Neema Boniface be admitted as an exhibit.

On the second point, the Counsel submitted that the witness is a competent witness to tender as per Section 127(1) of The Evidence Act. Also, the witness has laid foundations to show that he is competent to tender. That he was an acting OC CID. At the time he was custodian of all investigation files in the District of Mpanda. He issued directives and the statement was handed over to him after completion of recording. The Counsel submitted that the case of **Fredy Stephano Vs. Republic (supra)**

is distinguishable as the subject was a caution statement and not a witness statement. The Counsel also cited the case of **DPP Vs. Christina Biskasevskaja**, Criminal Appeal No. 16 of 2016 Court of Appeal of Tanzania at Arusha at page 7 that "knowledge of the document sought to be tendered is the necessary factor" for the competence of the witness. Therefore, the witness is competent.

In rejoinder the Counsel for the defendant reiterated the submission in chief and argued that the case of **Chukwudi Denis Okechuku and 3 Others Vs. Republic (supra)** is distinguishable. The case was dealing with the situation where the defence did not object. He argued also that the case of **Fredy Stephano Vs. Republic (supra)** is relevant. He prayed that the objection be sustained and the statement should not be admitted.

I have heard the submission and recapitulated the same in this ruling. The questions of concern have been whether the witness statement of Neema Boniface may be admitted in this case given the notice of the reliance on the same was given on 14/2/2023, yesterday. Whether the current witness who did not record the same but administratively directed for its recording and it was handed over to him by the recorder is a competent witness to tender it.

The prosecution side are relying in Section 34B (1) and 2(a), (d) and (e) of The Evidence Act. Thanks to the counsel for the defendant, he cited the case **Fredy Stephano Vs. The Republic**, Criminal Appeal No. 65 of 2007, Court of Appeal of Tanzania at Tanga ([2008] TLR 160). At page 6 – 9 is the relevant part for our case. After the Court had quoted the whole Section, at page 8 it observed that:

*"For a statement to be admitted in Court in lieu of oral evidence under Section 34B (1) all the condition stipulated in subsection 2(a) to (f) must be complied with..."*

When the Court was further clarifying the points under Section 34B (2) (d) and (e) of The Evidence Act, the defendant cannot exercise a right under (e) if the notice and a copy of the statement was not served to him/her by the person proposing to tender it. In my understanding therefore, the defendant is the one who is supposed to act within statutory time as suggested by the Counsel for the prosecution and if that could not be done due to short time, he ought to have just prayed to be given time to do so, since he was served with the notice and the statement and he still have time to comply with the law.



As to whether the statement is tenable in evidence, apparently the statements has qualified for the same to be admitted in Court, and since the defendant was served with it, it is upon the defendant to express his need to object if at all he intends to do so.

As to the competency of the witness I will not dwell much on the point. The witness testified that he ordered for the statement to be recorded and it was handed over to him after completion. In case of **DPP Vs. Mizrai Pirbakish @ Haji and 3 Others**, Criminal Appeal No. 493 of 2016 Court of Appeal of Tanzania and the case of the **Director of Public Prosecution Vs. Kristina d/o Biskasevskaja**, Criminal Appeal No. 76 of 2016 Court of Appeal of Tanzania at Arusha (unreported) it was held that every person with knowledge of the fact can testify. That means even in the document the scope has been widened to that effect as it was observed in the case of **DPP Vs. Kristina d/o Biskasevskaja**, (supra) at page 7 that:

*"Since the envelope was addressed to the Government Chemist and PW1, a Chemist in that office is the one who analyzed the same, we buy the argument by the Learned Senior State Attorney that PW1 was in the circumstances with full information and knowledge*

*of the envelope and therefore, a competent witness than anyone else to tender in Court, the envelope and its contents”.*

Under the circumstances the witness is a competent witness to tender. In general therefore, the objection is overruled and the statement is admitted as exhibit P3 and marked as exhibit. It is ordered accordingly.



  
**T.M. MWENEMPAZI**  
**JUDGE**  
**15/02/2023**