

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)
SITTING AT MPANDA
CRIMINAL SESSIONS CASE NO. 16 OF 2022

REPUBLIC

VERSUS

LUSHINGE S/O MASASILA.....ACCUSED

RULING

16th May, 2023 & 30th May, 2023

A.A.MRISHA,J.

After successfully parading four prosecution witnesses, Mr. Gregory Muhangwa, learned State Attorney who stood for the Prosecution Republic filed a notice under section 34B (1)(2)(a) of the Evidence Act, CAP 6 R.E 2019(the Evidence Act) and served a copy of it to Mr. Lawrence John who represents the accused person one **Lusinge s/o Masasila.**

The said notice was filed with a view of requesting this court to admit as documentary evidence a witness statement of **Dr. Boniface Alex**

Misago who is alleged to have conducted the Post-mortem examination of the deceased body one **Spora d/o Masanja**.

As per the notice it appears that the said doctor is sick and the efforts to procure him as a witness have proven failure and it is because of that ground the prosecution implored this court to admit the statement in lieu of the oral evidence of that doctor.

Having been dully served with such notice, Mr. Lawrence John quickly filed a reply notice with a view of objecting the admission of a witness statement which the prosecution Republic intended to tender as evidence. As a result, I had to stay the hearing of the main case in order to hear both parties regarding the said objection; hence the present ruling.

The objection is coupled with two limbs. However, I will not deal with the second limb because the same was withdrawn by Mr. Lawrence. Submitting in relation to the first limb of objection the learned counsel argued that that the statement has no proof from the Muhimbili Orthopaedic Institute, hence no proof that the witness cannot be procured. It a legal requirement under section 34B(2)(a) of the Evidence Act Cap 6 R.E. 2022 which provides conditions for the same to be admitted. He noted that one of the conditions is stated at paragraph (a)

where its maker is not present by reason of health problem or if all reasonable steps have been taken to procure his attendance but he cannot be found.

The learned counsel also contended that in the notice filed by the prosecution there is no where it is stated if the reasonable steps were taken to procure the presence of the witness and that the steps taken have proven futile. According to him, the Deputy Registrar of this court issued a summons to **Dr. Boniface Alex Misago** since 05.04.2023, and it was addressed to **Dr. Boniface Alex Misaga** of Kanoge Health Centre Mpanda via RCO Katavi meaning that the ones to serve it could either be the RCO Katavi or the Court Server who could certify at the end of it that the witness cannot be found. Mr. Lawrence also submitted that the prosecution failed to tender evidence of medical treatment of that doctor.

He referred the case of **Joseph Shaban vs. Mohamed Bay & 3 Others vs The Republic** [2017] TLR 219 CAT at Dar es Salaam to substantiate his proposition and went on to submit that in that case Court insisted that there must be plausible evidence to prove that the witness whose statement is to be tendered cannot be procured.

Applying the above principle to the case at hand Mr. Lawrence submitted although the summons issued for the said Doctor bears a statement by the Doctor In charge of the health centre that the witness is sick but the same does not state the health condition of the witness since 28.04.2023 which is almost three weeks since it was signed.

He also said that there is no affidavit of the process server to show that the witness is sick and cannot be procured, which prejudice the accused with the right to cross examine the witness and it also infringe the right to be heard which is recognised by the law.

Responding to the above objection, Mr. Abdon Bundala, Learned State Attorney referred section 34B(2)(a) of TEA and advised the counsel for the accused not to read the provisions of the law in isolation. He contended that the cited provision has put a statement at the beginning which is very clear that the reason of being bodily unfit. He went on to submit that in the course of procuring the witness, the act of his immediate supervisor to show that the witness is sick is sufficient evidence to prove that the said witness is bodily unfit.

As for the summons addressed to the witness, Mr. Bundala submitted that the truth is the witness has not been admitted in hospital but he has been attending clinic and at the moment this case is being heard our

witness is at MOI attending clinic. In addition, Mr. Muhangwa who was assisted by Mr. Bundala, submitted that the notice was filed before the court as per the law as indicated in the notice, and there is proof of summons signed by the Medical Doctor In charge of the station in which the witness was working. He also said that there are steps taken by the government to procure the witness.

He referred the case of **Republic vs Said Shaban Malikita**, Criminal Appeal No. 265 of 2019 for the purpose of showing that the law has not indicated at what extent a witness can be procured but the summons endorsed at the back that the witness cannot be procured is sufficient. Concerning the issue of affidavit, the learned State Attorney argued that under the enabling provision there is no requirement of affidavit hence the argument by the accused counsel is unwarranted.

He also contended that the argument by the counsel for the accused that the summons was supposed to be signed by the RCO as a person issued with a summons to serve the witness is not a proper procedure because the RCO Katavi used several subordinates to circulate the summons and it is the Medical Doctor In charge who possess the proper information regarding the whereabouts of the witness.

To put more emphasis on his submission, the learned State Attorney cited the provisions of section 291(1) of the CPA which according to him requires the court to admit the document which relates to the medical issue where a notice has been issued by the party to the case to the other party of the case, a requirement which he complied with. He also, referred the case of **The DPP vs Emmanuel Erasto Kibwana & 2 Others**, Criminal Appeal No. 516 of 2015 CAT at Mbeya(unreported) in which the above provision of the law was discussed by the Court.

In rejoinder, Mr. Lawrence reiterated his previous stance and urged this court not to admit the witness statement of doctor Boniface Alex Misago. He said the counsel for the prosecution Republic failed to say anything about the mandatory requirements stated in the case of **Mohamed Bay's** case(supra). He also submitted that the prosecution are the ones who alleged that the witness is sick; hence they are the ones to prove that the witness is sick by tendering documentary evidence.

The learned advocate contended further that the cases cited by the counsel for the prosecution Republic are distinguishable to the case at hand. He clarified that in case of **Said Shaban Malikita** (supra) the whereabouts of the witness were unknown and the process server was right to endorse that the witness could not be procured, but in the

present case the whereabouts of the witness are well known as disclosed in the filed notice. As for the case of **The DPP vs Emmanuel Erasto Kibwana**(supra) the discussion focused on admission of a post-mortem report but in the instant case it is all about admission of a witness statement.

Regarding the provisions of section 291(1) CPA Mr. Lawrence argued that such provision of the law is all about statements by medical witnesses; hence distinguishable to the case at hand because of two reasons. **One**, that the notice was not filed under such provision, **second** it relates to the medical report signed by medical officer on purely medical or surgical matter. But in our case what is sought to be tendered is a medical statement and not medical report, hence it cannot be brought under section 291(1) CPA.

Having heard the submissions by the counsel for the parties and going through the filed notices and considered all the authorities cited therein, I am now in a position to determine whether the objection raised by the counsel for the accused person has merit.

At first, I wish to point out that the law regarding admission of witness statements under section 34B of the Evidence Act is very clearly that for the same to be admitted in evidence all conditions stipulated therein

must be complied with cumulatively as was stated by the Court of Appeal in the case of **Mohamed Bay's** case(supra) and in the case of **Adinardi Iddy Salimu & Another vs The Republic**, Criminal Appeal No. 298 of 2018, CAT at Arusha(unreported).

In the latter case the Apex Court stated at page 19 of its judgment that, *"The Court has on several occasions emphasized on the mandatory requirement of the law that, for a statement to be admitted in lieu of oral direct evidence, **the conditions stipulated under the cited provision must cumulatively be complied with.**"*

The said conditions as provided under section 34(2)(a)-(f) of the Evidence Act can be paraphrased as follows: -

- a) The maker of the statement cannot be procured without delay,
- b) The statement is signed by the maker.
- c) The statement contains a declaration that the same is true and is liable to be prosecuted if found untrue,
- d) A copy of it is served to each of the parties to the proceedings before the hearing,

e) If none of the parties, within ten days from the service with the copy of the statement, serves a notice on the party proposing or objecting to the statement being tendered in evidence, and

f) Where the statement is made by a person who cannot read it, it is read to him before he signs and is accompanied by a declaration by the person who read it to the effect that it was so read.

In the present case it is obvious that the notice to tender a witness statement of **Dr. Boniface Alex Misago** was filed under section 34B(1)(2)(a) of the Evidence Act. Section 34B (1) provides inter alia that, *"...a written or electronic statement by any person who is, or may be, a witness **shall subject to the following provisions of this section**, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence"*[emphasis added].

In my understanding of the above provision the words 'shall subject to the following provisions' means that all the conditions stipulated under section 34B(2)(a) - (f) must be complied with cumulatively in order for the court to admit the witness statement and in the event the same are not complied with the statement cannot be admitted in terms of section 34B of the Evidence Act. The consequence of omission to comply with such mandatory requirement was stated in the case of **Shilinde Bulaya**

vs The Republic, Criminal Appeal No. 185 of 2013 in which the Court of Appeal categorically stated that, *"where all the conditions are not complied with the statement should be expunged or discounted"*. Also see the case of **Twaha Ali and 5 others Vs Republic**, Criminal Appeal No.78 of 2004(unreported).

In the instant case there is not doubt that the witness whose statement is sought to be tendered in evidence is an educated elite capable of knowing how to read and write; hence I find condition in paragraph (f) of section 34B, Evidence Act not applicable in this case, save for the rest of the paragraphs as outlined above.

However, it appears to me that not all such conditions were complied by the prosecution Republic as indicated by the counsel for the accused person. This is because despite submitting that the said witness is sick none of the learned State Attorneys led sufficient evidence particularly documentary evidence, to show that the said witness cannot be procured without delay. What is not in dispute is that the said witnesses' whereabouts are well known and he is not admitted in hospital rather he has been attending clinics.

In the circumstances, and by considering the fact that a summons for such witness was issued almost three weeks before hearing of this case,

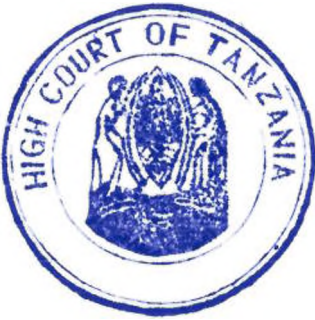
the prosecution could do something more to procure his attendance and if efforts to do so could prove failure one would have expected them to make a follow-up regarding his health progress and update the court as well as the adverse party.

Also, despite claiming that several efforts were taken to procure the witness the prosecution has neither describe them nor mention names of persons whom the government tasked with a role to procure the witness. Worse enough no medical report from the MOI institute was either attached in the notice or tendered before this court to show that the witness is bodily unfit and therefore cannot be procured without delay.

Not only that, but also the authorities cited by the prosecution Republic are all distinguishable to the case at hand, as rightly clarified by Mr. Lawrence; hence I see no need of saying much about that. Suffice it to say that there is no iota of evidence to prove that the said witness cannot be procured without delay. The prosecution Republic had enough time to make efforts to procure him but they have failed to do so for the reasons known to them.

From what has been advanced above, I hold that the above objection has merit. Consequently, I sustain the first limb of the objection raised by the counsel representing the accused person.

It is so ordered.




A.A. Mrisha
Judge
30.05.2023