

THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT MUSOMA

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 181 OF 2022

THE REPUBLIC v. 1. JOHN MBATIRA @ MTUKE

2. SADICK SHABANI @ YOHANA

3. MANGA MGONOKI

4. STEVEN AUGUSTINO @ ODIERO

**RULING ON THE APPLICATION OF SECTION 58 (4) OF THE
CRIMINAL PROCEDURE ACT [CAP. 20 R. E 2022]**

25.09.2023 & 25.09.2023

Mtulya, J.:

In the course of hearing **Criminal Session Case No. 181 of 2022** (the case), prosecution witness number six, police officer H. 83 Cpl. Onesmo (PW6) had prayed to tender cautioned statement of **Mr. Sadick Shabani @ Yahaya** (the second accused) to display that the second accused had confessed the offence of murder of the deceased, **Mr. Rashidi Ally Hassan** (the deceased).

However, the prayer was confronted with three (3) points of objection raised by Defence Attorneys, **Mr. Baraka Makowe, Mr. Daud Mahemba, Mr. Amos Wilson** and **Mr. Victor Kisaka**, namely: first, PW6 played double roles of an investigator in the case and recorder of the second accused's alleged confession; second, the confession shows two (2) distinct dates of recording the same; and finally, the confession was involuntarily recorded. According to the learned defence minds, the alleged confession breached directives of

the Court of Appeal in the precedent of **Amani Ally @ Joka v. Republic**, Criminal Appeal No. 353 of 2019, which held that a police officer should not play two roles of an investigator and recorder of cautioned statements of accused persons. In the opinion of the defence attorneys, PW6 acted as an investigator and recorder of the second accused's cautioned statement, which displays a conflict of interest and may prejudice the second accused.

Regarding the complaint of distinct dates, the defence side submitted that there are two (2) distinct dates which show that the second accused was recorded his statement, namely: first, 13th July 2022 at Nyehunge Village in Sengerema District; and second, on 22nd July 2022 at Butiama, which is a violation of section 50 (1) (a) and 51 (1) of the **Criminal Procedure Act [Cap 20 R.E. 2022]** (the Act). Finally, the defence submitted that the second accused was forced to sign the cautioned statement without his willingness contrary to section 27 (3) of the **Evidence Act [Cap 6 R.E 2022]** (the Evidence Act).

Replying the defence submission, **Mr. Tawabu Yahya Issa** and **Ms. Evangelina Ephrahim Mukarutazia**, learned State Attorneys for the Republic submitted that the protests have no merit as some of the issues need to be resolved in a trial within trial and others need to be determined at this stage. According to Mr. Tawabu, the issue of double roles and cited decision **Amani Ally @ Joka v. Republic** (supra) have been captured by new enactment in section 58 (4) of the Act which had removed the anomaly and now police officers are

allowed to investigate and record accused persons cautioned statements. In the opinion of Mr. Tawabu, the decision of the Court of Appeal in **Amani Ally @ Joka v. Republic** (supra) has used the word *may* in restricting double roles and concluded that there was no any injustice caused by PW2 in the case.

Mr. Tawabu submitted further that there is no any problem for a police officer to investigate a case and take cautioned statements of accused persons as the law in section 169 of the Act and decision of the Court of Appeal in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010, at page 12, stated that not every violation of the Act leads to expunge of exhibits. In the opinion of Mr. Tawabu, it not automatic that every contravention of the provisions of the Act renders the exclusion of the evidence in question. Finally, Mr. Tawabu had declined to reply the second and third raised points submitting that the issue of different dates and involuntary confession may be resolved in trial within trial.

I have glanced the submissions of learned minds, and noted that the three points attract different replies. The first protest may receive reply at this stage. However, the second and third points must be resolved in a trial within trial as per directives of the Court of Appeal in **Paulo Maduka & Four Others v. Republic**, Criminal Appeal No. 110 of 2007.

The first issue on double roles cannot detain this court. There is provision of the law in section 58 of the Act, which regulates statement of suspects and its sub section 4 provides that *a police*

officer investigating an offence for purposes of ascertaining whether a person under restraint has committed an offence may record a statement of that person. However, the section has considered the rights of persons enacted in section 53 of the Act.

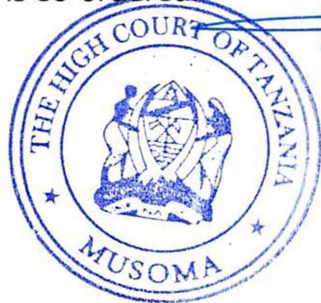
I am aware of the decision of the Court of Appeal in the precedent **Amani Ally @ Joka v. Republic** (supra) and **Nyerere Nyague v. Republic** (supra). However, the decision in **Amani Ally @ Joka v. Republic** (supra) has declined interpretation of section 58 (4) of the Act. There are no any conversations with regard to the provision. In any case, the case regulated a situation where the police officer (PW2) had displayed interest with the victim's family and investigated the matter. In the present case there is a police officer (PW6) who had investigated the case and recorded second accused's cautioned statement without any close relation with the deceased or deceased's family.


Similarly, the precedent in **Nyerere Nyague v. Republic** (supra) regulated a situation where there is breach of the Act. In the present case, there is specific enactment of section 58 (4) of the Act which provide that: *a police officer investigating an offence for purposes of ascertaining whether a person under restraint has committed an offence may record a statement of that person.*

Having said so, I overrule the first protest of the defence attorneys, and hereby order trial within trial for the second and third raised issues on the distinction of dates displayed in the cautioned

statement of the second accused and involuntariness of the confessional statement.

It is so ordered.




F. H. Mtulya

Judge

26.09.2023

This Ruling was pronounced in open court in the presence of the accused persons, **Mr. John Mbatira @ Mtuke, Mr. Sadick Shabani @ Yohana, Mr. Manga Mgonoki, and Mr. Steven Augustino @ Odiero,** and their learned Defence Attorneys, **Mr. Baraka Makowe, Mr. Daud Mahemba, Mr. Amos Wilson and Mr. Victor Kisaka,** and in the presence of **Mr. Tawabu Yahya Issa** and **Ms. Evangelina Ephrahim Mukarutazia,** learned State Attorneys for the Republic.


F. H. Mtulya

Judge

26.09.2023