

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL SESSIONS NO 211 OF 2022

REPUBLIC

- 1. HARUNA MUSSA LUGEYE.....1ST ACCUSED**
2. MWAJUMBE WENDU BAKARI.....2ND ACCUSED
3. ALLY KHALID TAGALILE.....3RD ACCUSED

RULING

22nd November, 2023

MRISHA, J.

In the course of cross examining the second prosecution witness whose name is withheld as P7, Mr. Mwakibolwa, learned Advocate who stood for the first accused person, made a prayer under section 164(1)(c) of the Evidence Act, Cap 6 R.E. 2019 (the TEA) read together with section 154 of the said Act that the witness statement of P7 be admitted as an exhibit on their part due to contraction between the former statement of P7 made at the Police Station and the one made by him when testifying before the court.

According to Mr. Mwakibolwa, the contradiction is that in his former statement P7 did not state that the first accused person escaped from the police lawful custody during a search exercise at his premises wayback in the year 2014 and that before escaping the said accused person asked for a permission from the police in order to go for a short call, while when adducing his evidence before the court, P7 said the said accused person escaped from the lawful custody and that before doing so, the first accused person asked for a permission to go for a short call.

The above prayer of the first accused person's learned defence counsel was supported by his learned friends including Mr. Abubakar Salim and John Chongoro, learned advocates who appeared for the the second and the third accused person respectively.

On her side, Ms. Jenitrizer Kitaly, Senior State Attorney representing the Prosecution Republic objected the prayer of the defence side on the ground that the same has not met the qualifications required by the law. Forinstance, the learned counsel submitted that the counsel for the first accused person has not established the inconsistency between the former statement of P7 and the evidence adduced by

him before the court, not has he established the contradiction between the two statements.

To bolster her submission, Ms. Jenitrizer Kitany referred the court to the case of **Lilian Jesus Fortes vs Republic**, Criminal Appeal No. 151 of 2018, CAT Sitting at Dar es Salaam (unreported) which according to her, provided the criteria to be following in order to contradict a witness regarding his former statement and the evidence adduced before the trial court.

In rejoinder, Mr. Mwakibolwa reiterated his previous stance and maintained that there are contradictions between the former statement of P7 and the evidence adduced by him before the court. He also added that on their part, they managed to meet all the conditions as indicated in the case of **Lilian Jesus Fortes vs Republic** (supra) cited by his learned sister.

Having heard the rival submissions by the counsel for both parties herein as well as the authorities referred thereto, it is now the task of this court to determine whether there is merit in the prayer made by the defence side.

It is important to state at this stage that sections 154 and 164(1) (c) of TEA are there for the purpose of either cross-examining a witness

on previous statements made by him in writing, contradicting or impeaching the credibility of a witness. The impeachment can either be done by the adverse party or by the party calling a witness subject to the consent of the court, as per section 164(1) (c) of TEA which provides that:

"The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him-

(a),,,N/A

(b),,,N/A

(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted" [Emphasis is mine]

Also, section 154 of the TEA provides categorically, that:

"A witness may be cross-examined on previous statements made by him in writing or reduced into writing, and relevant matters in question, without such writing being shown to him, or being proved, but if it is intended to contradict him by the writing, his attention must be, before the writing can be

proved, be called to those parts of it which are to be used for the purpose of contradicting him.” [Emphasis is mine]

In the present case, the prayer made by the counsel for the first, second and third accused is intended to contradict P7 on the previous written witness statement made by him at the Police Station along with the evidence he has recently adduced before the court.

However, I have noted that his attention in respect of those parts like escaping of the first accused from lawful custody and the fact that he asked for a permission to go for a short call, was not been drawn to him. In my view, that is contrary to the mandatory requirement provided in the proviso to section 154 of TEA, as indicated above.

The same procedural requirement which as I have said above was not met by the defence counsel, was also indicated by the Court of Appeal in the case of **Waisiko Ruchele @Mwita vs Republic**, Criminal Appeal No. 348 of 2013 CAT at Mwanza (unreported) where it was stated that:

“...that when impeaching the credit of a witness by proof of a previous contradictory statement his attention must first be drawn to it and the same opportunity should be given to the witness of explaining the discrepancy or inconsistency in court. ” [Emphasis is mine]

In the present case, it is obvious that the attention of P7 was neither drawn to him, nor was he afforded an opportunity to explain the inconsistency before the court.

Not only that, but also, I have noted that the procedure of impeaching such prosecution witness was not complied with by the counsel for the first, second and third accused person as rightly submitted by Ms. Jenetrizer Kitaly. The same was provided in the case of **Godfrey Maleko v Thomas Mwaikaja** [1980] TLR. 112 and **Lilian Jesus Fortes vs Republic** (supra) in which the Court of Appeal stated that:

*"The procedure for impeaching a witness by using his previous writing therefore, requires the following to be done, in our view; **First**, the previous statement must be read to him. **Secondly** the attention of the witness must be drawn to those parts which are intended to demonstrate contradictions. **Thirdly**, the statement should be tendered in evidence.*

Back to our case, it is my considered opinion that above first and second conditions were not complied with by the defence counsel. This is because first, the statement sought to be used by the defence counsel in order to contradict P7, was not read over to him, secondly, it is apparent that the attention of such prosecution witness in respect of


those parts which are intended to demonstrate contradictions, was not drawn to him.

It is due to the above reasons, that I am in line with the submission of the counsel for the Prosecution. Republic that the prayer made by the defence counsel falls short of meeting the procedural requirements for impeaching or contradicting the credibility of the above named second prosecution witness. Hence, I dismiss it accordingly.

It is so ordered.

Dated at Dar es Salaam this 22nd day of November, 2023




A.A. MRISHA
Judge
22.11.2023