

**IN THE HIGH COURT OF TANZANIA
AT TANGA
CRIMINAL SESSION CASE NO. 61 OF 2022**

**REPUBLIC
VERSUS**

KARUME SIMON SINYOTIA

RULING

K. R. Mteule, J

5TH October 2023 & 9th October 2023

Karume Simaon Sinyotia stands charged with the offence of murder contrary to **Section 196 and 197 of the Penal Code Cap 16 of 2022 RE**. It is alleged that on 28th day of February 2020, the accused person at Mbagwi Village within Handeni District in Tanga Region, did murder one Dorcas Logoli. The allegation goes further that the accused person was in love affair with Rose Peter who was the mother of the victim during the time when her husband was away. That upon the return of the said husband, the relationship between Rose Peter and the accused person terminated something which did not pleased the accused person. It is alleged further that on **28th February 2020**, the accused person went to the residence of Rose Peter and Logoli Sawia

armed with machete where he found Rose Peter carrying Dorcas Logoli accompanied by her sister-in-law **Mary Saitoti (Pw4)**. The allegation went further that the accused person forcibly took Dorcas and disappeared with her to unknown location and later it was alleged that Dorcas was murdered by him. Prosecution called in witnesses to make its case but the mother of the victim Rose Peter could not be found to testify.

On 4th October 2023, during prosecution hearing, the learned State Attorney Mr. Paul Kusekwa prayed for leave to recall PW3 who had already testified to come to produce the police statement given by Rose Peter who could not be found to appear physically as a witness. The prayer was made pursuant to section **34 B ((i) and (ii) of the Evidence Act, Cap 6 of 2022 RE**. Upon being asked, the learned defence counsel did not have any objection against the recalling of Pw3 and neither against the production of the statement of the witness who could not be found.

On 5th October 2023 Pw3 was recalled accordingly. When he wanted to tender as exhibit, the statement asserted to have been recorded from Rose Peter the mother of the alleged victim, Mr. Malegesi Advocate for

the Accused person objected the admissibility of the document on the following grounds:-

Firstly, that the factor for receiving the statement is not met pursuant to **section 24 B (2) (e) and of the evidence Act Cap 6 of 2022 R.E** which makes it a mandatory requirement for the defence to be informed on the reliance for this kind of evidence. Referring to paragraph (d) of the above section, Mr. Malegesi submitted that the defence must be served with the statement intended to be used and be given 10 days to object in accordance with section 34 B (e). In his view, this requirement was not met. He emphasized his position by the case of **Adinadi Iddi Sakimu and Another versus Republic, Criminal; Appeal No 298 of 2018, COA Arusha** page 20 where the court of Appeal insisted on serving of the statement within 10 days for the defence to be prepared. According to him, failure to follow the provision renders the act of the republic invalid and the document should not be admitted.

Secondly, Malegesi is of the view that section 34B (2) of the Evidence Act is contravened. According to him, the section requires a statement to have a declaration that it was read upon the maker on the date it was recorded before the statement is admitted. He referred to the Court of Appeal decision in the case of **Willy Jengela versus Republic,**

Criminal Appeal No 17 of 2015 COA at Mbeya (unreported). In this case, the Court of Appeal disposed of the appeal basing on admission of a written statement of a witness and held that it is mandatory to observe the law under section 34 B (2) (a) – (f) and failure of observing it was found by the Court of Appeal to amounting to an error committed by the Court.

Mr. Malegesi is therefore of the view that the requirements of section 34 B (2) (d) (e) and (f) were not observed since prosecution knew that their witness was missing, and he prays for the statement of Rose Peter not be admitted.

The learned State Attorney Mr. Paul Kusekwa disputed the objection and the assertion that it contravenes **section 34 B (2) (d) (e) and (f) of the Evidence Act**. In his view, the prosecution complied with all the requirements. Starting with paragraph (d) which requires the statement of a missing witness to be served upon the defence and any objection to be raised within 10 days under para (e), he averred that on prosecution gave an oral notice that efforts to find the witness proved failure and that they were to file it on the same day and serve the other party. According to Mr. Kusekwa, the defence counsel did not object.

Mr. Kusekwa disputed the assertion that prosecution knew that the witness was missing since 22/9/2023. According to him, they issued summons to the witnesses at the beginning of the session, but they discovered the day before that the witness could not be found. He referred to the summons signed by the Mbagwi village office just the day before indicating that Rose Peter cannot be found. According to him, the said summons is in the court record.

According to Mr. Kusekwa, since the notice was not objected, he does not see the rationale to raise the objection on that material date as the defence waived its right to raise the said objection. He submitted that this position was so stated in the case of **Chikwudi Denise Okechuku and 3 others versus Republic, Criminal Appeal No 507 of 2015 COA at Dar es salaam (unreported)** found in Tanzlii page 39 and 30. He submitted further that from that decision, the defence counsel ought to have raised the objection when prosecution posed the request to recall the witness to produce it.

Regarding the point of objection on contravention with item (f) of Section 34 A of the Evidence Act, Mr. Kusekwa submitted that the Pw3 identified the signature of the witness who gave the statement and that

it is indicated that the statement was read over and the witness declared "*maelezo yapo kama nilovoeleza*".

He therefore submitted that the conditions in section 34 B were all complied with and he therefore prayed for the statement to be admitted. He distinguished the case of **Willy Jengela** cited supra by the defence council in that in our case all the conditions were met while in **Willy Jengela** the conditions were not met.

In rejoinder, Mr. Malegesi argued that an oral prayer cannot override the requirement of **section 35 B (2) (i) to (f)** but prosecution only informed the court about their notice, and it was not correct to object something which was only an information. He challenged the argument that his failure to object waived defence rights to object the statement. He relied on **Willy Kangela** where it was stated that the court ought to reject it even where the adverse property raised no objection.

Concerning the second ground that the statement met the conditions of paragraph (f), and that declaration is a matter of content, he submitted that before admitting any document, such a document must be tested as to the compliance with section 34 B (2) (d) (e) and (f) of the Evidence Act where paragraph (f) addresses the declaration that the

statement was read and that it was actually read before the maker signed.

I have gone through the rival arguments. Starting with the first point of objection, Mr. Malegesi is of the opinion that prosecution ought to have served the defence with the statement and the defence to have 10 days to raise objection. It is clear that on 4th October 2023, Mr. Kusekwa gave an oral notice to recall PW1 to appear and produce the statement which was to be served upon the defence on the same date. Mr. Malegesi did not object both the recalling of PW3 and the production of it as evidence. Whether this was in compliance with the Law, I think it appropriate to reproduce paragraphs (d) and (e) of Section 34 B of the Evidence Act. They provide:

"(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the

party proposing or objecting to the statement being so tendered in evidence:"

Paragraph (d) requires the statement to be served upon the adverse party before the hearing date. It was not disputed that Mr. Kusekwa served the defence with the said statement on the same date. Since defence did not object the procedure prayed to be adopted by Mr. Kusekwa to serve the defence, so long as the same was served as proposed by Mr. Kusekwa without objection, then the defence cannot raise the objection at this time while they already told the court that they did not have any objection. The objection if any should be limited to the admissibility of the document and not at the procedure which was already concluded. In my view, paragraph (d) was complied with.

Regarding paragraph (e) I agree with Mr. Kusekwa that within 10 days the defence had a chance to object and Mr. Malegesi subscribed to the prosecution prayers. The act of telling the court that he did not have objection to the prosecution prayers, waived further right to object since the court had already ruled on that matter. I agree with Mr. Kusekwa that the defence exercised its right to object and it declared to have no objection and therefore the matter was already closed.

Regarding the objection on the statement not being read over to the maker who signed, I have read the said statement, and at the end it contains words "*Mwisho wa maelezo yangu, nimesomewa yapo sawa kama nilivyoeleza*" These words are contrary to what Mr. Malegesi has submitted that the said statement was not read to the maker of the statement who confirmed it to be correct. This declaration appears to be contained in the statement and the maker signed and inserted thumb print.

From the findings, I agree with Mr. Kusekwa on the distinction between the instant case and the case of **Willy Jengela as in the instant case**, there was full compliance with the law on the procedure to tender the statement of one Rose Peter who could not be found to appear physically.

On this basis, I overrule the defence objection and allow prosecution to proceed with tendering of the witness statement. It is so ordered.

Dated at Tanga this 9th Day of October 2023



A handwritten signature in blue ink, appearing to read "KRM", is positioned above the printed name of the judge.

KATRINA REVOCATI MTEULE

JUDGE

9/10/2023

Court:

Ruling delivered this 9/10/2023 in the presence of Paul Kusekwa, Rehema Mgeni, Ferida Nyika and Jesca Thomas (Learned State Attorneys) and Advocate Denise Malegesi, Defence Counsel, and the accused person present.

KATRINA REVOCATI MTEULE

JUDGE

9/10/2023

