

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

AT DAR ES SALAAM

CRIMINAL SESSIONS NO. 211 OF 2022

REPUBLIC

VERSUS

HARUNA MUSSA LUGEYE.....1ST ACCUSED

MWAJUMBE WENDU BAKARI.....2ND ACCUSED

ALLY KHALID TAGALILE.....3RD ACCUSED

RULING

24th & 25th April, 2024

MRISHA, J.

Before me is a cautioned statement dated the 20th day of December, 2014 and which appears to have been recorded from the third accused person namely **Ally Khalid Tagalile**. I am constrained to paint the above picture regarding the said document because apart from bearing the third accused's name, the same shows not only that it was signed by him, but also its last page depicts that it was the said accused person who certified it. This assertion is fortified by the heading appearing on the last page of that document which reads, thus:

"Uthibitisho wa Mtuhumiwa"

As if the above is not enough, during the hearing of the main case, P2 who testified as PW9 and was examined in chief by Ms. Lilian Rwetabura, learned Senior State Attorney, claimed that the said cautioned statement was made by the third accused person before him on 20.12.2014 at the Head Quarters of Tanzania Police Criminal Investigation Department in Dar es Salaam following the instructions given to him by his superior boss that he had to record the cautioned statement of such accused person whom he was informed that he was suspected of committing the offences of conspiracy to commit the terrorism acts and transporting two hand grenades.

Also, in the course of his testimony, PW9 narrated that before recording the third accused's cautioned statement, he participated in the task of arresting the said accused person who by then was residing at Singida, in connection with some information that such accused person was involved in the commission of terrorism acts.

It was his further testimony that the arrest took place in the evening of 19.12.2014 at Singida Fresh Oil where the said accused was working, then after being apprehended, the said accused was boarded in a police vehicle

and conveyed to Dar es Salaam where they arrived at 1145 hours in the following day of 20.12.2014.

PW9 did not end there as he also told the court that before recording such accused person's cautioned statement, he prepared the interrogation room and the recording materials including the pen and some papers, then he took the said accused to the said room where he gave him a chair to seat and began to introduce himself to him before requiring him to introduce himself to him.

He also testified that he informed the said accused person above the abovenamed offences which he was suspected to have committed and after doing so he informed him that he had a right to have his lawyer, relative or friend be present when he would be making his statement before him, but the said suspect/third accused opted to make his statement alone, but let him to record it.

According to PW9, the next question to the said suspect/third accused person, was to ask him to say if he was ready to make his statement before him and the accused confirmed to him that he was ready to. In short, what was said by PW9 is that he complied with all the legal requirement of recording the suspect's cautioned statement under section 58 of the Criminal Procedure Act, Cap 20 R.E. 2022 and at every stage,

the accused signed on the document and he also did the same to signify that actually all the important steps were followed.

Also, PW9 testified that after the said suspect/third accused person had finished to make his cautioned statement before him, he gave his statement to read whereby the said suspect/third accused went through the contents of that document and confirmed to him that they were correct, then he signed below that statement.

However, according to PW9, when he asked the said suspect/third accused person to write his certification, the latter asked him to write for him (accused) something which he did, and after completion, he appended his signature beneath such certification before he could proceed to write his certification and append his signature below it.

Finally, PW9 testified that he and the third accused persons signed on the last page of the said cautioned statement which he began to record at 1400 hours and finished on 1516 hours. After saying so, the said prosecution witness was given the said cautioned statement for him to identify it and he managed to do so, then he ended by asking the court to admit it as an exhibit in order to form part of the prosecution evidence.

Following such prayer, Mr. John Chogolo, learned Advocate whose services were enjoyed by the third accused person whilst Mr. Juma

Nassoro and Abubakar Salim, also learned Advocates for the first and second accused persons namely Haruna Mussa Lugeye and Mwajumbe Wendo Bakari respectively, strongly objected the admission of that document arguing that the third accused person never made any such statement before PW9. This necessitated a trial within a trial to be conducted by the court in order to ascertain the truth behind the third accused person's denial. Hence, the present ruling.

When the matter was called on for hearing, a total of two (2) witnesses, one for the prosecution side and another one for the defence side, testified before the court and examined as per the law.

Practically, it was the prosecution side which had to take the floor. The witness who testified in that party's favour, was PW9 who at this time, testified as PW1. In order to avoid unnecessary confusion, he will hereinafter be referred as PW1 (PW9).

His evidence before the court at that stage, was to the great extent similar to the one he adduced before the court during the hearing of the main case, save for some additional pieces of evidence relevant to the objection which is the subject of the present ruling. Hence, I will try my level best to make a summary of that piece of evidence.

It was his testimony that regarding the third accused's objection that he did not make any statement before him, PW1 (PW9) emphasized that he actually recorded the cautioned statement of that accused person on 20.12.2014 which according to him, bear the signature of that accused person which the said accused person appended before him on the day he recorded that statement from him.

He added that apart from the day he had arrested the third accused person, he had never met with him before. Also, while in the witness box, and upon being given a chance to identify the said accused person, PW1 (PW9) managed to do so.

Also, the said witness managed to identify the cautioned statement alleged to have been obtained from the third accused person and he urged the court to admit it for identification purpose. Such prayer was admitted without any objection from the defence counsel and the court marked it as ID 1.

When cross examined by Mr. Chogolo , PW1 (PW9) said that from Singida to Dar es Salaam they spent almost eleven (11) hours, he cautioned the third accused person that he was suspected to have committed the terrorism acts, he had no doubt when the third accused signed the said

cautioned statement by using Arabic words. Nor did he bother to find another document with the accused's signature.

He also responded that he did not ask the third accused person why he signed his cautioned statement by using Arabic language, when he arrested the said accused person, he had the rank of ASP (Assistant Superintendent of Police), when he arrested the said accused person, the latter was not in prison by that time, it is true that when making his cautioned statement, the third accused person was not from the prison remand.

Also, when cross examined by Mr. Nassoro, PW1 (PW9) said that it if will be revealed that on the dates of 19.12.2014 and 20.12.2014 the third accused person was in prison remand for the charges of murder, his evidence will still be true. In his response to the questions put to him by Mr. Salim, the said prosecution witness said that he does not know the Arabic language, but he can be able to identify it.

That he does not know the Persian or Pakistan language and cannot be able to know if those languages refer to one language. That he knew the signature used by the third accused person was Arabic because the latter is a Muslim and normally Muslims are trained Arabic language which is

why he concluded that the signature used by the third accused person to sign the alleged cautioned statement was in Arabic language.

PW1 (PW9) went on saying that he is sure the signature appearing on the cautioned statement in dispute was written in Arabic language, he asked the third accused person about that signature and the accused told him that he used to sign in Arabic language.

Also, PW1 (PW9) said that the third accused person was conveyed to Dar es Salaam, not to Arusha due to the instructions given to him by his superior boss. That it is not true that they conveyed the said accused person to Dar es Salaam and not Arusha in order to affect his psychologically (saikolojikale).

In the course of his testimony as DW1, the third accused person narrated that it is true that he was arrested while at Singida on 17.12.2013 when he was on his work to Singida Fresh Company where he used work.

That the five persons who invaded and arrested him on that date, did not introduce themselves to him, besides they boarded him in the vehicle make Toyota Land Cruiser and began to beat him on several parts of his body. That happened after he asked them who were they.

That before transporting him to Arusha, those people took away his properties which were a small bag with laptop and a smartphone. Upon

arrival at Arusha, they met other persons who began to ask him why he had killed a person at Soweto pitch ground. They continued to ask him several questions in relation to offence of murder, then began to oppress and abuse him.

That thereafter he was taken to Arusha Central Police where he was detained from 17.12.2013 to 30.01.2014 when he was taken out of the Police remand and conveyed to the Resident Magistrate's Court of Arusha at Arusha (the subordinate court).

Upon arriving there, he was arraigned with other co accused person for several counts which included four counts of murder and nine of attempted murder which offences were related to Preliminary Inquiry (PI) No. 52/2014.

To prove that he was arraigned before the subordinate court and that the said case was later dismissed, as stated above, DW1 prayed to tender copies of a charge sheet and proceedings in respect of PI No. 52/2014 as exhibits on his case and the same were admitted by the court and marked Exhibits DAK 1 and DAK 2 respectively despite the prosecution objections which were overruled by the court.

DW1 also told the court that according to Exhibit DAK 1, he was the 14th accused person. It was his testimony that after several mentions of that

case, on 06.09.2014 the said same was dismissed by a Nolle Prosequi and he was among the nine (9) accused persons who were discharged.

However, DW1 said after being discharged, he was re-arrested by the police and taken to Arusha Central Police where he was detained up to 11.09.2015 when he was transferred to Dar es Salaam and dropped at a place called Base area.

While there he heard the some of the persons present that they will make sure the fix him with another case to see if he will be discharged under Nolle. In the evening, he was boarded in the vehicle and conveyed to Dar es Salaam Central Police where he was detained up to 28.10.2016 when he was arraigned before Hon. Mwambapa of the Resident Magistrate's Court of Dar es Salaam at Kisutu (the second subordinate court).

According to DW1, the case he was arraigned of, was PI No. 8 of 2015 and he was jointly charged with the first accused herein for the offences of conspiracy to commit an offence contrary to the provision relating to terrorism acts. That on 04.11.2016 during committal proceedings other three accused persons were joined; also, the charge was amended by adding other counts of conspiracy to commit an offence of terrorism by intending to assault Hon. Mizengo Kayanza Peter Pinda, the retired Prime Minister.

Regarding the claims that he was arrested on 19.12.2014, DW1 said that they are not true because on that day he was remanded in Kisongo Prison Remand at Arusha facing the charges of Murder and Attempt to murder.

He also disputed the claims that he signed the alleged cautioned statement by using Arabic language. To prove that, DW1 said first, he doesn't know how to write in Arabic language, secondly, his signature is as the one appearing in the committal proceedings of PI No. 8 of 2015 which he appended on 04.11.2022 and the one he signed during the Preliminary Hearing of Criminal Sessions Case No. 211 of 2022 before Hon. Nkwabi, J.

Generally, the third accused person (DW1) denied the prosecution evidence regarding the tendered cautioned statement because it is not his. Nor did he sign it.

During cross examination by Ms. Janethreza Kitaly, learned Senior State Attorney who assisted Ms. Lilian Rwetabura, DW1 said that it is true he was conveyed to Arusha Police Central, from Arusha to Dar es Salaam, he was denied his belongings.

At Arusha Prison Remand he did not enter with anything, when transported to Dar es Salaam he left behind his coat and shoes at Arusha

Central Police Station, it is true he did not tell the court how he accessed Exhibits DAK 1 and DAK 2.

That by virtue of Exhibit DAK 2, there is nowhere it is shown that he was present in court (the first subordinate court) on 30.01.2014; also, under Exhibit DAK 1, it is not shown if he was present before the first subordinate court on that particular date.

That he does not agree with the learned counsel that by his failure to tender the whole proceedings relating to PI No. 52/2014, the court will not be able to ascertain whether he was present before the first subordinate court on 30.01.2014.

Also, DW1 said that Exhibit DAK 2 reveals, "*Yusuph Ally Huta and 11 Others*"; but the Charge sheet which is Exhibit DAK 1 reveals that there were 14 accused persons which makes the two documents to differ.

That on 19.12.2014 he was at Kisongo Prison Remand, he does not agree with the learned counsel that the documents which can prove that he was in prison remand on that date is either a Remand Warrant or an Official letter from Kisongo Prison Remand.

He also responded that by looking on the tendered charge sheet, there is no date of 19.12.2014, but the document is self-explanatory, the said document does not show that he was in Kisongo Prison Remand on

19.12.2014. Not only that, but also DW1 said he never told the court that while at Kisumu RMs Court (the second subordinate court) he was afforded an opportunity to say anything, but he did not tell that court that he was fixed with the case which led to the filing of the present case.

Further, DW1 said he did not tell the court if the rest of the accused persons discharged with him by the first subordinate court were also fixed with fabricated cases. He heard PW1 (PW9) while testifying before the court, but that prosecution witness was not cross examined about his allegations of torture.

Responding to questions put to him by Mr. Yusuph Aboud, learned Senior State Attorney who also assisted Ms. Lilian Rwetabura, DW1 said Exhibit DAK 2 bear the name of Buchumi Hassan Mazi who was also involved in PI No. 52/2014, but the name of that person does not appear on Exhibit DAK 1. He also said that it is the charge sheet which justify that a certain accused person was charged with an offence, but it is not correct that none appearance of the name of Buchumi Hassan Mazi in Exhibit DAK 1 entails that he was not charged with other co accused persons whose names appear in that document.

When re-examined by his advocate, DW1 said he tendered before the court the proceedings relating to Nolle Prosequi, he did not tell the court

how he accessed exhibits DAK 1 and DAK 2; he also said that the charge sheet had a typing error and that Buchumi was added before Nolle prosequi.

On my part, I have passionately gone through the above rival submissions, the tendered exhibits along with the cautioned statement in dispute and after doing so, I am of the view that the only issue for determination of the court is whether the third accused person herein made that cautioned statement before PW1 (PW9). If the answer to that question will be in the affirmative, then the next question will be whether the said confessional statement was voluntary.

Before I dwell into that determination, however, I find it apposite to appreciate the principles of law which I find to be relevant and helpful to the trial court which is placed in a position to decide on the fate of a cautioned statement which is sought to be tendered for admission, just like the one before me.

First of all, it has been a common ground among the legal fraternity that whoever would like any court of law to enter judgement in his/her favour is duty bound to prove that the fact which he/she asserts actually exist; see **Agasto Emmanuel vs The Republic**, Criminal Appeal No. 8 of 2020 (HCT at Mbeya, unreported)

The above position emanates from the provisions of the law, as stated under section 110 (1) (2) of the Law of Evidence Act, Cap 6 R.E. 2019 and it is backed up by several authorities made by Courts of records.

Regarding the law relating to confessions which normally may be in the form of a Cautioned Statement or Extra Judicial Statement, it is trite law that the recording of interviews and statements by the police is governed by sections 57 and 58 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (CPA); see **Dickson Elia Nsamba Shapwata & Another vs The Republic**, Criminal Appeal No. 92 of 2007 (CAT at Mbeya, unreported).

Flowing from the above decision, it means that the suspect's cautioned statement may be recorded by using the provisions of the law namely section 57 and 58 of the CPA.

As for the procedure to be followed after the accused has objected to have either made the confessional statement voluntary or to have neither made any statement before a police officer, the Court of Appeal in the case of **Hepa John Ibrahim vs The Republic**, Criminal Appeal No. 105 of 2020 (CAT at Tanga, unreported). What was done by the court after the third accused denied to have made the alleged confessional statement before PW1 (PW9), is as stated in the above cited case.

Guided by the above principles of law, I will go straight to determine the sole issue raised above. As it has been pointed above, the third accused person has strongly denied to have made the alleged cautioned statement, thus putting the respondent Republic to a strict proof.

According to the evidence of PW1 (PW9), the third accused person was arrested by him on 19.12.2014, transported to Dar es Salaam whereafter he made the cautioned statement before him on 20.12.2014.

To the third accused, that assertion is not true because on those dates he was already remanded at Kisongo Prison Remand. From the evidence of those two witnesses, there are mainly two important questions which come to the focus; first, was the third accused at Kisongo Prison Remand on 19.12.2014 and 20.12.2014? Secondly, did he make the alleged cautioned statement before PW1 (PW9) on 20.12.2014?

I propose to start with the first question which relates to the main question raised above. Having examined the cautioned statement in dispute in light with the evidence adduced by PW1 (PW9) during a trial within a trial, I have no doubt that it was recorded under section 58 (4) of the CPA. This is because of the mode used by such prosecution witness adopted in recording that statement.

Also, in the course of his testimony, PW1 (PW9) said that after recording the third accused person's, statement, he gave it to the said accused person and asked him to write his certification, but the latter asked him to write it on his behalf. Thereafter, PW1 (PW9) wrote the third accused's certification and signed below that certification.

The cautioned statement in dispute is loud that the certification part of the suspect was endorsed by PW1 (PW9), just as he testified before the court.

As indicated above, it is not in dispute that the cautioned statement in dispute was recorded under section 58 of the CPA. Also, it is undisputed that the same was recorded under subsection (4) of section 58, CPA which empowers the police officer to record the cautioned statement of the suspect.

That being the case, is obvious that the police officer who records the suspect's confessional statement has to comply with some conditions set forth under sub sections (5) and (6) of section 58, CPA; one of them is to ask the suspect to sign on his certification part. This is provided under section 58 (6) (a), CPA which directs that:

*"(6) Where a police officer is satisfied that there is no further additional statement, alteration or correction to the statement, **he shall cause to***

be written at the end of the statement a form of certificate in accordance with prescribed form and shall-

(a) ask the person to sign the certificate set out at the end of the statement or if the statement extends to more than one page, sign each page of the statement...

My understanding of the above provision of the law is that it requires the police officer who recorded the suspect's cautioned statement to ask the suspect to sign the certificate set out at the end of the statement. The said provision does not say that if the police officer has written the certification for the suspect, the latter should not be asked to sign. The provision is couched in mandatory term by the use of the word, "Shall"; hence, it is incumbent upon the police officer to ask the suspect to sign the certification upon completion of recording statement.

However, looking on the cautioned statement in dispute, it is apparent that the certification part of the suspect does not bear the suspect's signature; it is only the signature of the police officer which appears to be appended below that certification.

Also, no reasons were assigned by PW1 (PW9) why he did not ask the third accused to sign his certification part.

In my view, that was a contravention of the law which raises a serious doubt whether the said statement was made by the third accused person herein.

Another issue is the alleged signature in that cautioned statement which appears to be written in Arabic language. In a trial within a trial which was conducted with a view to ascertain the validity of the alleged cautioned statement, the third accused, his advocate and those representing the first and second accused persons, strongly challenged the validity of the signature in the cautioned statement which is alleged to be appended by the third accused person.

This also shakes the credibility of the evidence of PW1 (PW9) who conceded that he does not know the Arabic language and cannot compare Arabic language with other languages like Pakistan and Persian.

If that is not enough, the third accused in his testimony has said that his signature is as the one appearing in the Committal Proceedings of PI No. 8 of 2015. Considering that there was a dispute regarding the validity of the signature appearing on the cautioned statement in dispute and the one in those committal proceedings, I had to make comparison of the two and found that in the course of appending his signature during Committal

proceedings of 04.11.2022, the third accused person did not sign in Arabic language, but he used a normal style of signing documents.

Also, I have noted that none of the counsel for the respondent Republic cross examined DW1 in relation to his denial that the signature appearing on the cautioned statement in dispute, is not his. All that indicates that the signature which appears on the cautioned statement in dispute is not his.

Coming to the second question, despite PW1's (PW9) claim that the third accused person made the cautioned statement in dispute before him on 20.12.2014 at the Head Quarters of Police Criminal Investigation Department in Dar es Salaam, the third accused person has maintained that he was not there, but was at Arusha in Kisongo Prison Remand.

On my part, I took some pain to revisit not only the tendered exhibits of DW1, but also the Committal Proceedings in respect of PI No. 8 of 2015 before the Resident Magistrate's Court of Dar es Salaam at Kisutu (the second subordinate court).

To start with the said proceedings of the subordinate court, the first page of those proceedings depicts that there were three accused persons namely Haruna Mussa Lugeye, Mwajumbe Wendu Bakari and Ally Khalid Tagalile, the first, second and third accused persons respectively.

By virtue of those proceedings, the first mention was on 09.02.2015. This alone, can draw an inference that in the year 2015, the third accused person was in Dar es Salaam. However, when those proceedings are carefully examined, it appears that from 09.02.2015 to 28.10.2016 the third accused person was not arraigned before the second subordinate court. This is because it is plain from those proceedings that between those dates, only the first and second accused persons were arraigned before that court.

The said proceedings also reveal that the third accused person came to be jointly charged with the first and second accused persons on 03.11.2016 before Hon. Mwambapa, RM. This bears him out on his assertion that he was not in Dar es Salaam on 20.12.2014, rather he was remanded at Kisongo Prison Remand.

Regarding exhibits DAK1 and DAK2, it is my view that the difference of number of accused persons and none appearance of Buchumi Hassan Mazi does not affect the defence of the third accused person that he did not make any statement before PW1 (PW1) as he was not present in Dar es Salaam on 20.12.2014.

I say so because there is enough evidence to show that the third accused person was arraigned before the first subordinate court. The variation of

number of accused is something which can happen when the case is before the court and investigation is still underway.

The evidence adduced by the third accused person clearly reveals that there was Nolle Prosequi which in my considered view, led to reduction of number of accused persons, just like it was the case in PI No. 8 of 2015 which started with two accused persons, then later the third accused person was added.

Again, I do not agree with the argument that Exhibit DAK2 does not show if the third accused person was present before the first subordinate court on 09.06.2016. The document shows that on that date the said accused person was one of the nine (9) accused persons who were discharged by the said subordinate court following an information tabled by Mr. A.R. Kombe, learned State Attorney to the effect that the DPP is no longer interested to further prosecute those accused persons which is why he entered a Nolle Prosequi under section 91 (1) of the CPA.

By common sense, the third accused person could have been listed by that State Attorney as among the accused persons to be discharged by way of Nolle prosequi if he was not present before the said subordinate court on that date.

Therefore, owing to the foregoing reasons, I am in agreement with the defence counsel and the third accused person that the latter did not make the alleged cautioned statement in dispute before PW1 (PW9). Having resolved that issue in the negative, I do not see any need to determine whether such statement was voluntary. This is because the third accused has managed to distance himself from the allegations that he is the one who made it.

The above been said and done, I proceed to find and hold that the objection raised by the third accused person against the admission of the alleged cautioned statement, has merit and it is hereby sustained. Consequently, the said cautioned statement is rejected.

Order accordingly.

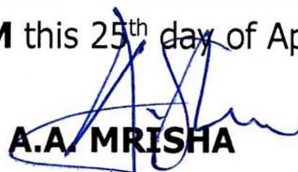


A.A. MRISHA

JUDGE

25.04.2024

DATED at **DAR ES SALAAM** this 25th day of April, 2024.



A.A. MRISHA
JUDGE