

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 16 OF 2021

REPUBLIC

VERSUS

HALFAN BWIRE HASSAN 1ST ACCUSED
ADAM HASSAN KASEKWA @ ADAMOO 2ND ACCUSED
MOHAMED ABDILLAH LING'WENYA 3RD ACCUSED
FREEMAN AIKAEL MBOWE 4TH ACCUSED

RULING

29th September, 2021 & 20th October, 2021

M.M. SIYANI, J

In the course of giving his testimony, PW1, a police officer one ACP Ramadhan Kingai led evidence on how Adam Hassan Kasekwa @ Adamoo (the 2nd accused person) was arrested in Moshi town on 5th August 2020, searched and later assisted the police in vain, the pursuit of another suspect who was identified as Moses Lijenje. It was ACP Ramadhan Kingai's testimony that having failed to trace the said Moses Lijenje, Adam Hassan Kasekwa @ Adamoo was transferred to Central Police Station Dar

es salaam where he was interrogated and confessed having conspired to commit terrorist acts. As such ACP Kingai moved the court to accept as part of his testimony, a cautioned statement allegedly made by the said Adam Hassan Kasekwa @ Adamoo on 7th August, 2020 while at Central Police Station Dar es salaam.

Admissibility of the said statement was objected by the defense team, on the two grounds. **First;** that the said caution statement was recorded out of the prescribed time contrary to section 50 (1) (a), (b) 51 and 52 of the Criminal Procedure Act Cap 20 RE 2019. **Second;** that Adam Hassan Kasekwa @ Adamoo, was tortured before and during the recording of the statements. Basing on the nature of the two objections above, both the prosecution and the defense counsel, agreed that there was a need to have evidence tendered in order to find their answers. In agreement with the learned counsel, I stayed hearing of the main case and order trial within trial to be conducted. During the hearing of the trial within trial, each side had three witnesses. In this ruling however, and for the purpose of avoiding making my decision unnecessarily long, I intend not to reproduce the contents of their testimonies, I shall only be referring to them, when need arise.

Briefly, evidence led by the prosecution, is that having been arrested on 5th August 2020, Adam Hassan Kasekwa @ Adamoo, could not be interviewed within the prescribed four hours as investigation was still on going. Testimonies from both ACP Ramadhan Kingai (TWTPW1) and Inspector Mahita Omary Mahita (TWTPW2), indicates that upon being tipped off the presence of Adam Hassan Kasekwa @ Adamoo and his two other colleagues at Rau Madukani in Moshi town, their primary mission was to arrest the three of them. However upon reaching there, they only managed to arrest two suspects, Adam Hassan Kasekwa @ Adamoo being inclusive. A third person called Moses Lijenje, could not be traced and so according to ACP Kingai and Inspector Mahita, Adam Hassan Kasekwa @ Adamoo volunteered to lead the police in search for him. As such, they visited Bomang'ombe, KCMC, Majengo, and Aishi Hotel in Machame, but all in vain. Therefore around 22:30hrs they returned back to Central Police Station Moshi where Adam Hassan Kasekwa @ Adamoo was detained.

Such evidence indicates further that on 6th August, 2020, the hunt for Moses Lijenje continued again with the aid of Adam Hassan Kasekwa @ Adamoo, the police team visited other places like Moshi Bus Terminal and Sakina area in Arusha where the said Moses Lijenje was said to have a

sister. Still his where about could not be traced and around 20hrs, an order was therefore issued by the Director of Criminal Investigation (DCI) to convey the arrested suspects to Dar es salaam where the matter was first reported and an investigation file opened. Both ACP Kingai and Inspector Mahita claimed that they reached Dar es salaam around 05:30hrs in 7th August 2020, where Adam Hassan Kasekwa @ Adamoo, was handed over to D/C Msemwa (TWTPW3) and accordingly detained at Central Police Station. ACP Kingai testimony shows further that, while at Central Police Station Dar es salaam and having been informed of his legal rights, Adam Hassan Kasekwa @ Adamoo was interrogated as from 7:30 am to 9am on the same date of his arrival from Moshi.

In defense and despite admitting to have been with Moses Lijenje at Rau Madukani area where he was arrested, Adam Hassan Kasekwa @ Adamoo (TWTDW1), denied **first;** to lead the police arresting team to different areas in Moshi and Arusha in pursuit for the said Moses Lijenje and **second;** to have been taken to Central Police Station Dar es salaam as according to him he was straight taken to TAZARA Police station Dar es salaam from Central Police Station Moshi. It was his testimony that upon his arrest on 5th August 2020, the police officers tortured him severely and that through torture he was forced to make some statements. All these

according to Adam Hassan Kasekwa @ Adamoo, were done while in Moshi.

The defense story on what happened to Adam Hassan Kasekwa @ Adamoo upon reaching Dar es salaam on 7th August 2020, is that he was first detained at TAZARA Police Station before being conveyed again to Mbweni Police Station where he was threatened to sign some documents on 9th August 2020. The fact that Adam Hassan Kasekwa @ Adamoo, was subjected to torture, was supported by testimonies from Mohamed Abdillah Ling'wenya (TWTDW2) and Lilian Furaha Kibona (TWTDW3). While Mohamed Abdillah Ling'wenya, said he heard Adam Hassan Kasekwa @ Adamoo crying painfully in what he described as "sauti ya zege" while at Central Police Station Moshi, Lilian Furaha Kibona, said he saw Adam Hassan Kasekwa's scars when she visited him at Segerea remand prison. Apart from having scars in both hands, testimony from Lilian Furaha Kibona, indicates that Adam Hassan Kasekwa @ Adamoo, looked unhealthy and he was limping.

Upon closing the defense case, the learned counsel, had a chance to make their final submissions and I am grateful for the well-researched submissions. On the part of the prosecution side, it was argued against

the first limb of the objection that, Adam Hassan Kasekwa @ Adamoo, cautioned statement, was taken within the prescribed time in accordance with requirement of the law under section 50 (2) of the Criminal Procedure Act Cap 20 RE 2019. In view of Mr. Robert Kidando, the learned Senior State Attorney who prepared the prosecution's final submissions, the provision above, excludes time spent by an investigator in conveying a suspect to a police station or other places for the purposes connected with investigation when calculating a period of time available for interviewing a person under restraint.

With regard to the instant case, it was therefore contended that time spent by investigators in search for Moses Lijenje (who admittedly was with the accused persons) as led by Adam Hassan Kasekwa @ Adamoo, and that spent in transferring him to Dar es salaam, should be excluded in calculating the basic time of four hours available for interview of a person under restraint. The cases of **DPP Vs James Msumule @ Jembe and 4 others**, Criminal Appeal No. 397 of 2018, Court of Appeal of Tanzania (unreported) at page 11 and **Yusuph Masalu @ Jiduvi & 3 Others Vs Republic**, Criminal Appeal No. 163 of 2017, Court of Appeal of Tanzania at Mwanza (unreported) at page 14,15 and 16, were cited in support of this contention.

On the reason why Adam Hassan Kasekwa @ Adamoo, was conveyed and interviewed in Dar es salaam instead of Moshi where he was arrested, Mr. Kidando argued that the same was due to the serious nature of the offence, public interest and complexity of investigation as attributed by the fact that such offense was to be committed in different regions of United Republic of Tanzania. The learned State Attorney invited the court to the provision of section 169 (2) of the Criminal Procedure Act (supra) and the case of **Chacha Jeremiah Murimi and 3 others Vs Republic**, Criminal Appeal No. 551 of 2015, Court of Appeal of Tanzania at Mwanza (unreported) at page 15,16 and 17 in support of his argument.

With regard to the second limb of the objection where Adam Hassan Kasekwa @ Adamoo, complained that he was tortured prior to and during the making of the caution statement, the learned Senior State Attorney submitted that, the statement was recorded on 7th August 2020 at Central Police Station Dar Es Salaam as testified by three prosecution witnesses. He argued that the defense side, has failed to raise any reasonable doubt as to voluntariness of the said statement because; **First**, Adam Hassan Kasekwa @ Adamoo's, defense testimony, has deviated from the objection raised. **Second**; he has failed to cross examine the prosecution witnesses on important matters and **Third**, credence of the defense

evidence.

It was argued that while through the objection raised, Adam Hassan Kasekwa @ Adamoo, retracted the cautioned statements by claiming that the same was involuntarily taken; but apart from stating to have been threatened to sign and certify some documents, through his defense testimony he has repudiated the same by stating that he neither made such statement nor being tortured while in Dar es salaam. In view of Mr. Kidando, such a deviation shows whatever was testified by Adam Hassan Kasekwa @ Adamoo, was merely afterthought having heard the prosecution's evidence. Taking a leaf from the court of Appeal of Tanzania decision in **James Burchard Rugemalira Vs Republic**, Criminal Appeal No. 391 of 2017, the learned State Attorney argued that cases must be decided on the issues on record and if it is desired to raise other issues, they must be placed on record by amendment. It was his submission therefore that, the issues on record in the instant case and which the court should determine, are those recorded on 15th September, 2021 when the objections as to admissibility of Adam Hassan Kasekwa @ Adamoo's confession statement, was raised.

Mr. Kidando went on to submit on the failure by the defense side to cross examine the prosecution witnesses on key issues. He contended that ACP Kingai was not cross examined on the alleged Adam Hassan Kasekwa's torture while at Moshi, threats at the time of recording the statement and the fact regarding Adam Hassan Kasekwa @ Adamoo's detention in other police station other than Central Police Station Dar es salaam. According to Mr. Kidando, such failure to cross examine on important matters as raised by ACP Kingai, has the effect of estopping Adam Hassan Kasekwa @ Adamoo, from seeking the court to disbelieve the prosecution's evidence on these aspects and referred the case of **Nyerere Nyague Vs Republic**, Criminal Appeal No. 67 of 2010, CAT, Arusha.

Mr. Kidando had also a comment on the credence of defense evidence. He argued that there were not only contradictions and inconsistencies from the testimony of Adam Hassan Kasekwa @ Adamoo, with that of Mohamed Abdillah Ling'wenya, but more so their testimonies contained improbable and implausible matters of facts. He pointed out the fact that Adam Hassan Kasekwa @ Adamoo, claimed to have been tortured while being conveyed to Dar Es Salaam while Mohamed Abdillah Lingw'anya mentioned nothing regarding torture as the two were conveyed to Dar es salaam.

The defense written submissions were prepared by counsel John Mallya. His argument in respect of the first objection is that the statement being recorded on 7th August 2020 following Adam Hassan Kasekwa's, arrest on 5th August 2020, was done so out of time and in contravention of the provision of section 50 (1) (a) of the Criminal Procedure Act, which requires such statements to be recorded within four hours counted from the time of one's arrest. Relying on the decision of the Court of Appeal of Tanzania in **Albert Mendes Vs Republic**, Criminal Appeal No. 473 of 2017, the learned counsel submitted that such statement was illegally recorded and therefore inadmissible.

As far as the exceptions available under section 50 (2) of the Criminal Procedure Act are concerned, counsel Mallya argued that such undertaking must be strictly construed as per the decision in **Albert Mendes's** case above. He contended that admitted by the prosecution witnesses, was the fact that Moshi Central Police Station had all facilities for recording suspect's statement but no account was given as to why Adam Hassan Kasekwa's, statement could not be recorded there.

On torture being inflicted to Adam Hassan Kasekwa @ Adamoo so as to obtain his confession, it was submitted that, torture need not necessarily

be physical as even mental, cruelty, degrading or inhuman treatment, can amount to torture and referred: Article 66 (6) (d) and (e) of the **Constitution of United Republic of Tanzania of 1977**, A book by Prof. Ruhangisa, J, E: **Human Right in Tanzania, The Role of Judiciary; United Nations Declaration on Protection from Torture, 1975** and **The Body of Principles for Protection of all Persons under any form of Detention or Imprisonment** as adopted by the United Nations General Resolution No. 43/173 of December, 1988. The learned counsel invited the court to borrow inspiration from the above instruments and to support his stance, he cited the case of **Attorney General Vs Mugesu Anthony and 2 Others**, Criminal Appeal No. 220 of 2011, **Alphonse Mwalyama and 2 Others, Vs Republic**, Criminal Appeal No. 37 of 2004 and **Hamis Chuma Hando Mhoja Vs Republic**, Criminal Appeal No. 36 of 2018.

From the above international instruments, case laws and books, counsel Mallya argued that, despite having no medical evidence to prove torture against Adam Hassan Kasekwa @ Adamoo, but in his view there was corroborating evidence from three defense witness to that effect. He therefore invited the court to find circumstantial evidence of torture in unexplained delay of recording Adam Hassan Kasekwa @ Adamoo's

statements, delay in conveying him to Dar Es Salaam, hiding the facts that Adam Hassan Kasekwa @ Adamoo, was detained at TAZARA Police station, un-explained delay in charging him until 19th August 2020 and failure by Lilian Furaha Kibona to locate her husband despite her best efforts. The learned counsel submitted that the whole process involved failure by the police officers to abide with the Police General Orders and as it was in the case of **The Director of Public Prosecution Vs Doreen John Lemba**, Criminal Appeal No. 359 of 2019 at page 12 to 17 hence affecting admissibility of the tendered cautioned statement.

In his conclusion, counsel Mallya was of the view that the prosecution side had failed to prove beyond reasonable doubts, a threshold set under sections 169 (3) and 169 (1) of the Criminal Procedure Act, that Adam Hassan Kasekwa @ Adamoo's statement was recorded as per the requirements of the law and consequently the same should be rejected.

Having revisited the tendered evidence and the learned counsel's final address to me, I will start with the first ground of objection where as noted, the concern was that the statements allegedly made by Adam Hassan Kasekwa @ Adamoo, was recorded beyond the prescribed time. Admittedly, the law under section 50 (1) (a) of the Criminal Procedure

Act, limits the basic period available to the police officer for interviewing a person under restraint in respect of an offence, to four hours commencing at the time he or she, was taken under restraint in respect of that offence. The only exception to that general rule is where that period is either extended under section 51 of the Criminal Procedure Act (supra) or where time used for the purposes spelt out in section 50 (2) of the same Act is not reckoned as part of the basic four hours. The law is therefore settled that unless section 51 or 50 (2) of the Criminal Procedure Act comes into play, failure to comply with section 50 (1) of the Criminal Procedure Act, renders the recorded statements, inadmissible. In **Baven Hamis and 2 Others Vs Republic**, Criminal Appeal No. 99 of 2014 the Court of Appeal of Tanzania stated the following in relation to compliance to section 50 and 51 above:

In conclusion, we think that failure to comply with the provision of sections 50 and 51 of the CPA in recording the cautioned statements of the 2nd and 3rd appellants, affected their admissibility.

Again in **Mashaka Pastory Paulo Mahengi @ Uhuru and 5 others Vs Republic**, Criminal Appeal No. 49 of 2015, where there was two days delay in interviewing a suspect after conveying him to Arusha, the Court

of Appeal of Tanzania, expunged the recorded statement and observed the following:

Again, it went unexplained why these two days period, i.e. 4th June, 2006 to 5th June, 2006, were not available to the police for the 1st appellant's interview to be properly conducted within the period available for the 1st appellant's interview under section 50 (1) (a) and 50 (2) (a) once he had been conveyed to Arusha on 3^d June 2006...Accordingly, having been illegally obtained, we expunge the repudiated cautioned statement (Exh. P.17) from the record.

Similar position was also reached by the same Court in **Albert Mendes Vs Republic**, Criminal Appeal No.473 of 2017, a case which was referred to me by counsel John Mallya.

In the instant case, Adam Hassan Kasekwa @ Adamoo was arrested on 5th August 2020. According to ACP Kingai, the complained statement was recorded on 7th August 2020. It is therefore obvious that four hours of his arrest, had lapsed when the alleged statements were recorded at Central Police Station Dar es salaam. There was no evidence as to extension of time under section 51 of the Criminal Procedure Act. The only room that

remains therefore is whether these statements enjoys the benefit of the exceptions under section 50 (2) of the Criminal Procedure Act.

Evidence tendered by ACP Kingai and Inspector Mahita shows, Adam Hassan Kasekwa @ Adamoo was with two other suspects at Rau Madukani. One of them was the so called Moses Lijenje whose presence there, was also admitted by Mohamed Abdillah Lingw'anya. According to the prosecution evidence, the mission was to arrest the three, but they ended up apprehending two of them. It is also in record that following his arrest, Adam Hassan Kasekwa @ Adamoo, led the police to different areas in search for the third suspect and when efforts to have him apprehended proved futile, he was transferred to Central Police Station Dar es salaam where they arrived around 5:30 am on 7th August 2020 and the interview which led the disputed statement, was done as from 7:30am to 9am.

In my opinion, since the fact that Moses Lijenje was with Adam Hassan Kasekwa @ Adamoo and Mohamed Abdillah Lingw'anya at Rau Madukani on 5th August 2020 and the fact that the said Moses Lijenje was not apprehended there, were uncontested, then the claim by ACP Kingai and Inspector Mahita that they had to trace Moses Lijenje so that he could be apprehended as well, becomes more probable. Basing on such evidence,

it is therefore impossible to rule out that the arrested suspects which included Adam Hassan Kasekwa @ Adamoo, assisted the police officers in pursuit of a person identified as Moses Lijenje.

The record indicates further that both the prosecution and the defense side were not in dispute that following his arrest, Adam Hassan Kasekwa @ Adamoo was conveyed to Dar es salaam. Apart from evidence from Adam Hassan Kasekwa @ Adamoo himself and Mohamed Abdillah Lingw'anya, even Lilian Furaha Kibona, (Adam Hassan Kasekwa's wife) was aware of the fact that her husband was transferred to Dar es salaam from Moshi and that was the reason why she looked for him in several Police Stations and Hospitals here in Dar es salaam.

The prosecution's argument in support of such piece of evidence, is that time spent by police officers in search for Moses Lijenje (who admittedly was with the accused persons at Rau Madukani) led by Adam Hassan Kasekwa @ Adamoo, and the time spent in conveying the later to Dar es salaam, should be excluded in calculating the basic time of four hours available for interview of a person under restraint. Counsel John Mallya on the other side believed, having delayed to interrogate the suspect within the prescribed four hours, the prosecution side ought to have first

- applied for extension of time under section 51 of the Criminal Procedure
- Act before proceeding to interview the suspect and record the same.

With due respect to the counsel Mallya, section 51 (1) of the Criminal Procedure Act, comes into play where having started to interview a suspect, an officer in charge of investigation finds that there is a need for further interview of that person beyond the four hours. In this case there was no any formal interview already conducted to Adam Hassan Kasekwa @ Adamoo before 7th August 2020 and so section 51 (1) could not have been applied for extension of time for further interview.

As noted earlier, counsel Mallya invited the court to follow decision of the Court of Appeal of Tanzania in **Albert Mendes Vs Republic** (supra). However, I find the circumstances in this case being different from those in **Albert Mendes's** case because while in later case the investigators who were with the suspect in custody, refrained from interviewing the suspect on the reason that they were waiting for him to emit drugs pellets, in the case at hand, the police officers were moving with suspect from one point to another in search for another suspect before conveying him to Dar Es Salaam where the case was reported.

The above said, I find the delay to have Adam Hassan Kasekwa @ Adamoo interviewed and his cautioned statement recorded, with plausible explanations and so justifiable under section 50 (2) of Criminal Procedure Act. I find support in this stance from the Court of Appeal of Tanzania decision in **Yusuph Masalu @ Jiduvi and 3 Others Vs Republic**, Criminal Appeal No. 163 of 2017 which was referred to me by Mr. Kidando where the Court faced with similar circumstances, observed the following:

*In this case, the appellants were arrested on 8.7.2014, but the cautioned statements were recorded on the following day. The reason for failure to record the statements within time was stated to be the nature of the crime and the complications in the investigations. **The fact that the appellants sometimes were to move from one place to another as explained by PW1 and PW6 cannot be ignored.** This shows investigation was in progress. That being the case, the delay was with plausible explanation and in the circumstances, we find justification in recording the same outside the four hours prescribed under the provision of section 50 (2) of CPA which provides an exception to the four hours period prescribed by law.*

The first limb of the objection being determined as such, I will now turn to the second objection on voluntariness of the statements which ACP Kingai claimed to have recorded from Adam Hassan Kasekwa @ Adamoo on 7th August 2020 and while at Central Police Station Dar es salaam. The gist of defense team in relation to this ground of objection is that Adam Hassan Kasekwa @ Adamoo, was tortured before and during the recording of the tendered statement. My understanding on the way the objection was posed, is that the second accused person essentially made the statements but he did so involuntarily because of torture inflicted to him.

To prove that the second accused person made the statements while at Central Police Station Dar es salaam, the prosecution side relied on testimony from ACP Kingai, Inspector Mahita and DC Msemwa. While both Inspector Mahita and DC Msemwa did not witness when Adam Hassan Kasekwa was making the statement, their testimony had the effect of establishing the fact that the second accused person was conveyed at Central Police Station Dar es salaam. DC Msemwa for example testified that upon arrival, Adam Hassan Kasekwa @ Adamoo was handed over to him and therefore he was under his custody. He tendered in court a detention register (exhibit P1) which indicates Adam Hassan Kasekwa @

- Adamoo was received at Central Police Station on 7th August 2020 at
- 06:09am. At 07:11am on the same date he was taken out of cell for interrogation and returned at 09:05am. Such an exhibit shows further that it was ACP Kingai who took Adam Hassan Kasekwa @ Adamoo out of cell at 07:00am for interrogation purposes. Indeed, admissibility of the said register was not objected by the defense team.

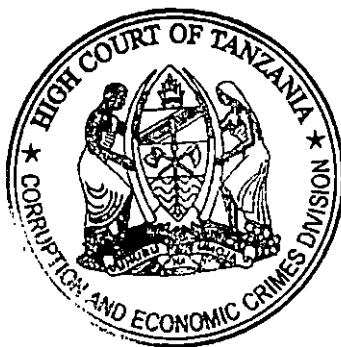
On the other hand, the defense evidence indicates Adam Hassan Kasekwa @ Adamoo was inhumanly treated by being subjected to torture while at Central Police Station Moshi. It was further shown that he signed the statements under threat while at Mbweni Police station. I have considered the defense testimonies in relation to his objection above. In my opinion and as correctly noted by Mr. Kidando, the same has deviated from the objection raised because the entire defense evidence negates the fact that at any moment, Adam Hassan Kasekwa @ Adamoo was conveyed to Central Police Station Dar es salaam where ACP Kingai is alleged to have recorded the disputed statements.

Since ACP Kingai prayed to tender the statement allegedly made by the second accused person on 7th August 2020, while at Central Police Station Dar es salaam, and since the defense team knew that the Adam Hassan

• Kasekwa @ Adamoo was never at any point of time, conveyed to that
• station, then it was expected that the objection could have been that he
never made any statements while at Central Police Station Dar es salaam
because that is the statement which ACP Kingai prayed to tender.
Therefore if at all Adam Hassan Kasekwa @ Adamoo made any statement
while at Central Police Station Moshi and signed the same under threat
while at Mbweni Police station, then such statement is yet to be tendered
in court and any objection to evidence which has not yet been tendered
in court will be prematurely made.

In the final and with what I have endeavored to say, it is obviously that
the two objections lacks merits and I accordingly overrule the same. I
now hold that the statement recorded by ACP Kingai was so recorded
within the time prescribed by the law and that the same was voluntarily
made by the 2nd accused person one Adam Hassan Kasekwa @ Adamoo.
It is so ordered.

DATED at DAR ES SALAAM this 20th Day of October, 2021



M.M. SIYANI
JUDGE