IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(CORRUPTION AND ECONOMIC CRIMES DIVISION)

AT DAR ES SALAAM

ECONONIC CASE No. 16 of 2021

(ORIGINATING FROM ECONOMIC CRIME CASE No 63 OF 2020 OF THE COURT OF RESIDENT MAGISTRATE OF DAR ES SALAAM AT KISUTU.)

(TRIAL WITHIN TRIAL FOR 3RD ACCUSED)

THE REPUBLIC

VERSUS

HALFAN BWIRE HASSAN.....1ST ACCUSED

ADAM HASSAN KASEKWA @ ADAMO.....2ND ACCUSED

MOHAMED ABDILLAHI LING'WENYA .....3RD ACCUSED

FREEMAN AIKAEL MBOWE.....4TH ACCUSED

RULING

07th & 14th December, 2021

TIGANGA, J.

In the midst of the proceedings when PW8 in the main case, SP Jumanne Malangahe, was testifying, he told the court that on 07th August 2020 he was assigned a duty to record the cautioned statement of the 3rd accused and recorded it. He tendered for admission the cautioned statement for the 3rd accused which he allegedly recorded. The defence objected its admission on the following grounds.

i) That the 3rd accused was not at the Central Police Station Dar es Salaam nor did he record any statement at the said station on 07/08/2020 or at any other date.

ii) That the 3rd accused was coerced into appending his signature to a statement he never partook in writing, at Mbweni Police Station, nor was he permitted to read the same. The coercion was in the form of verbal and psychological threats issued at Mbweni Police Station, Dar es Salaam where the 3rd accused was subjected to threats by DC Goodluck Minja, who had a pistol and SP Jumanne Malangahe, who threatened that unless the signature was appended, torture would be imminent as was done at Moshi Central Police Station.

iii) The 3rd accused's statement was recorded beyond the statutory prescribed time limit of four hours contrary to the mandatory provision of section 50 (1) (a) of the Criminal Procedure Act [Cap 20 R.E. 2019]. The accused was arrested on 05th August 2020 at 13.00hrs and his statement was recorded on 09th August, 2020.

iv) The cautioned statement of the third accused was verified at the foot under a non-existing law to wit, section 57 (3) of the CPA [Cap 20 R.E. 2018] at the foot, while purporting to be recorded under [Cap 20 R.E 2019], that is tantamount to no caution

statement being taken from the accused. Therefore the statement was recorded under two different legislations one being a proper legislation, the other one being none existing.

v) The 3rd accused was not properly cautioned by PW8 by failure to cite the specific subsection of the law under which the said caution was issued versus the established offence. Also that he was cautioned under the non existing law, which is "Prevention and Combating of Terrorism Act", instead of The Prevention of Terrorism Act.

vi) That the document (purported to be cautioned statement, of the 3rd accused) sought to be admitted is not the same as that supplied during committal proceedings i.e one cites section 24 (2) of the Prevention of Terrorism Act, while the one sought to be admitted cites only section 24 of the said Act.

vii) That the caution statement is bad in law for failure to show under which section between sections 57 or 58 of the CPA, it was recorded. Further that, it is bad in law for lack of a fresh caution under section 57(2)(d) of the CPA, which provides that once a person starts to confess there must be an independent caution whereby the recording officer must stop and re caution him. It is followed by that person being taken to the justice of the peace. On

that point, they promised to rely on the case of **Seko Samwel vs Republic,** Criminal Appeal No. 7/2003.

Out of the objections raised, objections number (i) and (ii) falls under section 27 of the Evidence Act [Cap 6 R.E 2019], these were to be resolved by trial within trial while the rest of the objections that is (iii) to (vii) which are based on the non-compliance of various provisions of the Criminal Procedure Act [Cap 20 R.E 2019], which parties were to submit on those points of objection.

Therefore by consensus of the parties, trial within trial was conducted first and on its conclusion, parties filed submissions which had double roles, one as the final submission on trial within trial, and two, the submissions in support and against the raised points of law regarding the non compliance of the Criminal Procedure Act (Supra).

In the trial within trial, the prosecution called four witnesses namely SP Jumanne Malangahe, DC Msemwa, D/Sgt Goodluck Minja and Insp. Insp. Lugawa Issah Maulid, these testified as, PW1 (TWT), PW2 (TWT), PW3 (TWT), and PW4 (TWT) respectively.

They also tendered three exhibits namely, a letter dated 12/11/2021 from the Deputy Registrar to the National Prosecution Services Office, (NPS) as exhibit P1,(TWT), the Detention Register, PF.20, labelled DR

No.12/2020, as exhibit P2,(TWT), and a Detention Register PF.20 labelled as WEF 01/01/2019, as exhibit P3,(TWT).

The defence called three witnesses namely Mohamed Abdillah Ling'wenya, who testified as DW1, (TWT), Lembruse Mchome, who testified as DW2,(TWT), and Gabriel Semheta Mhina, who testified as DW3, (TWT). They also tendered six exhibits namely, the witness statement of PW3 as exhibit D1,(TWT), a letter to the Court of the Resident Magistrate of Dar es Salaam, at Kisutu as exhibit D2,(TWT), a dispatch book labelled Classic Court 2, as exhibit D3,(TWT), a copy of charge sheet of Criminal Case No. 77 of 2020 in which DW2 was charged, as exhibit D4,(TWT), the copy of the proceedings of the same case, as exhibit D5,(TWT), and the charge sheet of Economic Case No. 63 of 2020 in which DW3 was charged, as exhibit D6,(TWT).

Given the nature of the objections subject of this ruling, I am not intending to reproduce what the witnesses said in the trial within trial or to reproduce the submissions filed in support or against the objections, I will summarise them briefly to bring home what went on. However, in the course of this ruling, I will be referring to them whenever, I discuss the issue for which that particular evidence or submission relates, the purpose being not to make my ruling unnecessarily long.

Finding the truth of the first set of objection as contained in objection (i) and (ii) is a factual exercise which necessitates the conduct of trial within trial. The second sets of objection relating to points numbers (iii) to (vii) relates to non compliance of the Criminal Procedure Act [Cap. 20 R.E 2019], these are resolved by the submissions by the parties.

It is trite that, where issues of facts and that of law are to be decided by the court in one case, issues of law should as a matter of practice be dealt with first before dealing with issues of facts. Therefore, in the normal practice, we would have disposed the points of law first, to ascertain the compliance of the provision of the Criminal Procedure Act, (supra). However, as in this case there is a denial by the 3rd accused first to be at Dar es Salaam Central Police Station where the cautioned statement is alleged to have been made on 07/08/2020, and to make that statement at that station. Second, that while at Mbweni Police Station the 3rd accused was coerced to sign the statement which he never partook in writings and that he was not even allowed reading it. There is a need first to establish whether the 3rd accused person was really at Dar es Salaam Central Police Station and that the said cautioned statement was actually made by him at that station. Secondly, whether the 3rd accused was coerced and threatened

to sign the statement at Mbweni Police station on the date he alleged to have been so coerced.

As earlier on pointed out, the court conducted trial within trial to establish these facts. In the process the prosecution being duty bound under section 27(2) of the Evidence Act, (supra) to prove that the cautioned statement which is alleged to contain the confession was voluntarily made, called four witnesses to prove these issues.

Through the evidence of PW1 (TWT) and PW3 (TWT) on these issues the evidence by the prosecution was straight forward that, after the arrest of the 2nd and 3rd accused at Rau Madukani and the search of Moses Lijenje at various places in Moshi Municipality, Hai District and Arusha Region in vain on 05/08/2020 and 06/08/2020. They travelled to Dar es Salaam on 06/08/2020 evening, where they arrived in the morning of 07/08/2020 at about 05:00 to 6:00 hours at Dar es Salaam Central Police Station. The evidence is that, on arrival, they handed over the accused at the Charge Room Office of Dar es Salaam Central Police Station where the accused were received by PW2 who detained them in.

It is their further evidence that, soon after brushing their teeth, PW1 (TWT) came back at the CRO at 07:00hrs where at 08.00hrs took out the

3rd accused out of the police cell for recording his statement which he started to record at 08:10 hours.

That was supported by the evidence of PW2 (TWT) who said to be a Police Officer on duty at CRO of Dar es Salaam Central Police Station, who on that date, was assigned to deal with the Detention Register by detaining in and taking out the detainees. Just like PW1 (TWT), he said to have received the 2nd and 3rd accused from ACP Kingai, and PW1 (TWT) and to have given the 3rd accused back to PW1 for investigation purpose.

He tendered exhibit P2 (TWT) where he recorded the entry of detaining in the 3rd accused and that of taking him out of police cell for investigation purpose, recording of the cautioned statement being part of investigation.

According to PW1 (TWT), before recording the statement, he introduced himself to the 3rd accused person who in turn introduced himself to be Mohamed Abdillah Ling'wenya. He further said, in that cautioned statement, the 3rd accused confessed to have participated in the commission of the offence, the confession which PW1 (TWT) recorded and finished in about 2 hours and forty two minutes. It is his evidence that after recording the statement, PW1 (TWT) read the statement to the 3rd accused who confirmed the same to be correct. Following that confirmation, they

both signed the statement and the 3rd accused was returned in lock up, while the recorded statement was handed over to A/Insp Swila of Dar es Salaam.

The defence via the evidence of the 3rd accused who testified as DW1 (TWT), disputed to have been to Central Police Station and recorded the statement while there, but instead DW1 (TWT) on 07/08/2020 when they arrived in Dar es Salaam from Moshi, he was taken to TAZARA Police Station where he stayed up to 09/08/2020 when he was taken to Mbweni Police Station. According to his evidence, while at Mbweni Police Station, he was on 10/08/2020 coerced by threat to sign the cautioned statement he never partook in writing and neither was he allowed to read the same before signing.

Disputing the allegation that he was recorded in exhibit P2 (TWT), the Detention Register of Dar es Salaam Central Police Station, he said he has never been at that station, therefore never recorded in that register and that, even at TAZARA and Mbweni Police Stations he had never been recorded in any register, whether a Detention Register or any other register at any of those police stations.

In his further defence, he said in exhibit P2 (TWT) there is no names or force numbers of DC Msemwa, therefore there is no proof that DC

Msemwa was at Central Police Station and there is no any police officer who was on duty with him, who was called to support his evidence. Neither did the OCS of Central Police Station come to give evidence that DC Msemwa was one of the police officers at his station or to support the evidence of SP Jumanne, PW1 (TWT).

It is further the defence evidence that, PW2 (TWT) lied in his evidence because according to the evidence of DW2 (TWT), on 14/05/2020, PW2 (TWT) was already at Oysterbay Police Station. This, according to DW2 (TWT), is evidenced by the fact that, on 14/05/2020 DW2 (TWT) was arrested and taken to Oysterbay Police Station, where he was received by PW2 (TWT) who was on duty at CRO of Oysterbay Police Station and he was the one who received him. On that very first day, DW2 (TWT) even asked PW2 (TWT) to go and take the money from his PPR and buy him food, something which he did and from there they became friends.

It is further DW2 (TWT)'s evidence that, even after he was charged in Criminal Case No. 77 of 2020 at Kisutu RMs Court and returned at Oyserbay Police Station after he was not received in prison on the ground that he had not tested for COVID 19, PW2 (TWT) is the Police Officers who received him at Oysterbay Police Station. As part of his evidence he tendered exhibits P2, P3, P4, and P5. Although the exhibits were objected by the

prosecution, this court admitted them but reserved its right to asses the probative value of those exhibits.

Further fortifying the defence that the 3rd accused was not taken to Central Police Station, he called DW3, who said that when he was arrested by Mahita, Jumanne and Goodluck at Oxygen Pub in Tabora Municipality where he was going to meet his friend Dida. After his arrest, he was taken to Tabora Central Police Station, then Nzega Police Station, before being conveyed to Dar es Salaam at TAZARA Police Station where he stayed from 23/09/2020 up to 25/09/2020 when he was taken to Court and joined in a case in which the 1st, 2nd and 3rd accused persons together with Justine Kaaya and one Khalid were also charged.

According to him, after his arrest, he was asked whether he knew the 4th accused, he said he did not knowing him, but when they asked him about the 3rd accused he confessed to know him as his workmate. However, he but told them that, he did not know where the 3rd accused was at that particular time. According to him, when he got charged in court he was taken to Segerea Prison where he met the 3rd accused. While in Segerea Prison, the 3rd accused told him that, he was arrested at Moshi, Rau Madukani, taken to TAZARA Police Station before he was taken to Mbweni Police Station from where he was later taken to Court.

However, after spending almost ten months, on 27/07/2021 himself together with Justice Kaaya and Khalid were discharged after the Director of Public Prosecutions had decided not to charge them. He tendered the charge sheet as exhibit; it was admitted as exhibit D6 (TWT).

He said the charge sheet, exhibit D6 (TWT) shows the accused and its corresponding prison in which he was remanded. Exhibit D6 (TWT), reads that DW3 was remanded at Segerea Prison, but the same charge sheet indicates that Mohamed Abdillah Ling'wenya, the 3rd accused was remanded at Ukonga Prison together with Adam Hassan Kasekwa, but he has not told the court the cause of the difference in his testimonies of where the 3rd accused was remanded. He said when he was at TAZARA Police Station he did not see Mohamed Abdillah Lingw'enya, but he was just told by the 3rd accused himself that he was at TAZARA Police Station.

In rebuttal of the evidence by DW3 the prosecution called PW4 (TWT) an Acting OCS of TAZARA Police Station who testified that, the 3rd accused never been detained at TAZARA Police Station on the alleged date. He also tendered exhibit P3 (TWT), the Detention Register of TAZAZA Police Station.

That presents a summary of the evidence in the trial within trial. That was followed by the submissions made by the parties, which they filed as ordered and scheduled by this court.

As earlier on alluded, that I will not reproduce the submissions made but I will be referring to them as I go along in this ruling.

From the above exposition, I tend to agree with the defence counsel that, generally the prosecution as a matter of law has the burden of proof and in the matter at hand, the duty is under section 110 as a general duty and specifically in the trial within trial is under section 27(2) of the Evidence Act, (supra). The standard of proof as provided under section 3(2)(a) of the same law, is beyond reasonable doubt. See **Jonas Nkize vs The Republic,** [1992] T.L.R 214

It is the law that except in few special cases where a burden shifts to the accused, generally, no duty is cast to the accused to prove his innocence, See **Joseph John Makune vs Republic,** [1986] TLR 44. What the accused needs to do under the proviso to section 114(1) of the Evidence Act, (supra) is to raise reasonable doubt in the prosecution evidence in order to be entitled to the benefit of such doubt.

On the issue as to whether the accused was detained at Dar es salaam Central Police Station or not, the prosecution called PW1 (TWT) and

PW2 (TWT) in the trial within trial, and tendered the two exhibits that is exhibit P1 (TWT) and P2 (TWT), PW1 (TWT) told the court the way he participated in the arrest of the accused at Rau Madukani in Moshi Municipality and in transferring the 3rd accused person to Dar es Salaam, the facts which have not been disputed.

He also told the court that he personally conveyed the 2nd and 3rd accused to the Central Police Station of Dar es Salaam, where they were received by the PW2 (TWT) who recorded them in exhibit P2 (TWT) and after about an hour or two of their arrival in Dar es Salaam, according to the prosecution evidence, PW2 (TWT) took out the said 3rd accused person from the lockup of the Central Police Station, Dar es Salaam and went to record his Statement. The facts that the 3rd accused was detained in and taken out on 07/08/2020 are reflected in the entry in exhibit P2 (TWT) of that date.

Through the evidence of DW1 (TWT), the defence gave evidence inviting the court to disbelieve both, the PW1(TWT) and PW2(TWT) on the ground that, the 3rd accused was never taken to the Central Police Station of Dar es Salaam, and that the presence of PW2 (TWT) at Central Police Station of Dar es Salaam as well as the fact that he was on duty on that particular day have not been corroborated by some important documents such as Station Diary, which is a Police Form No. 51, (which as per PGO No.

284 (4) (a-c), (5) and (6-18) would have contained undisputable details of PW2 (TWT) being on duty) nor the Occurrence Book, or the Duty Roster/Duty Book, Police Form No. 59A (which per PGO 280 would have shown indisputably what duty PW2 (TWT) was assigned at the said Station and for what durations. They also submitted that, the fact has not been corroborated by the evidence of the shift in-charge and the Officer in charge of Central Police Station of Dar es Salaam.

Further to that, in the final submissions filed by the defence counsel, they reminded the Court that, both exhibit P1 (TWT) and P2 (TWT) were challenged during admission. Their value ought to, per law and by this Court's own decision (Hon. Siyani, JK) be measured accordingly.

They reminded the Court that PW2 (TWT) was cross examined and failed to mention the person he received CRO duty from, and to whom he handed over; something inexplicable given the mandatory provisions of PGO 287 (11, 12 and 13). PGO No. 287 (12) is particularly important as it requires entry of CRO Officer going on duty to be entered in the Station Diary for the particular Police Station.

Lastly he asked this court to discredit the exhibit P2(TWT) on the ground that there is no paper trail as a proof of chain of custody when it

was released by the OSC of Central Police station to be used in the trial within trial in respect of the 2nd accused persons.

They cited the case of **Ligwa Kusanja and Another versus The Republic,** Criminal Appeal No. 113 of 1999 at page 9, in which it was held that a Court has a duty to consider all the evidence received, including defence evidence. They reminded the Court that, DW-2 was led and adopted by 3rd accused's Counsel; with full perceived consent and knowledge of the 3rd accused; therefore any argument of conflict of interest is baseless, if it ever arises.

They concluded on the issue by drawing the attention of the Court to PGO 353 (2) (b) which makes it mandatory that as soon as a prisoner is received for remanding in a cell, he be taken to a Government doctor or dresser. Such taking would in their opinion have added **weight** to the prosecution case; in their view the un-explained failure to account for the failure to comply is fatal.

Their arguments were supported by oral evidence of DW1 that he has never been taken to Central Police Station of Dar es Salaam, but he was taken straight to TAZARA Police Station. Secondly, they were supported by the evidence of DW3 who said from Tabora, and Nzega he was conveyed to TAZARA Police Station. He did not say that when he was at TAZARA he got informed that the 3rd accused was also held there, what he said is that he

was told by the 3rd accused himself when they met at Segerea Prison that when he was arrested he was taken to TAZARA Police Station and later to Mbweni Police Station before he was taken to Court.

The other evidence relied upon by the defence was that DW2 when he was arrested and taken to Oysterbay Police Station on 14/05/2020 he found and was received by PW2 at Oysterbay Police Station. He allegedly proved both his presence at Oysterbay Police Station on the date alleged something which afforded him opportunity of meeting PW2 (TWT) and the absence of PW2 (TWT) at Central Police Station by tendering four exhibits namely P2, (TWT) P3, (TWT) P4, (TWT) and P5, (TWT).

In my deliberation on the evidence and the arguments advanced in respect of this issue, I will start with the invitation posed by the defence regarding the chain of custody of the exhibit P2 when it was taken out from the custody of OCS Central Police Station and tendered in trial within trial in respect of the 2nd accused.

This issue will not detain me much, as it is on record that, by exhibit P1, (TWT), exhibit P2, (TWT) was once tendered in court in the trial within trial relating to the admission of the cautioned statement of the 2nd accused. It should also be noted that, that exhibit was one of the subject of the decision of this court dated 20/10/2021, in the trial within trial in respect of the 2nd accused. Any issue of how the exhibit was taken out from

Central Police Station was supposed to be raised there and then by that ruling, the chapter on how it was taken out then, was closed in that trial within trial. It can therefore not be discussed now and at this stage.

In this trial within trial, the evidence shows that, exhibit P2 (TWT) was collected from Deputy Registrar of this Court via exhibit P1 before it was tendered in court. Therefore if a chain of custody was supposed to be traced from there, the argument is therefore misplaced and thus dismissed.

Regarding the 3rd accused presence at Central Police Station of Dar es Salaam, the evidence advanced to prove that is the testimony of PW1, (TWT) and PW2 (TWT) as well as the exhibit P2 (TWT). Without any other evidence to the contrary this kind of evidence proves that the 3rd accused was detained at the Central Police Station on 07/08/2020. The evidence shows that he was detained in and taken out few hours later to record the cautioned statement by the PW1. The complaint is that the evidence has not been corroborated in material particulars by other witnesses and the documents listed herein before as submitted by the defence counsel.

Now the question which I ponder is whether the evidence given by PW2 (TWT), is a type of evidence which requires corroboration? In law, some types of evidence is self sufficient while others need corroboration to acquire probative value. The following list presents the evidence which needs to be corroborated, **i)** Unsworn testimony, See. **Vumi Liampenda**

Mushi vs The Republic, Criminal Appeal No. 327 of 2016 CAT- Arusha, **ii)** Dying Declaration, See. **Frank Joseph @ Sengerema vs The Republic**, Criminal Appeal No. 378 of 2015 CAT- Tabora, **iii)** Statement of the co-accused, See, **Section 33 of TEA** and **Asia Iddi vs The Republic** [1989] TZ – HC 38, **iv)** Unsworn evidence of a child of tender age, See, **Said Salum vs The Republic,** Criminal Appeal No. 499 of 2016 CAT- Dar es Salaam. **v)** Evidence on identification made under un favourable conditions, unless the court is satisfied that the witness is telling the truth, **Frank Joseph @ Sengerema vs The Republic**, (supra), **vi)** Evidence based on hearsay, **vii)** Any other evidence which is weak and doubtful. These types of evidence need corroboration before they are applied and relied upon in deciding the case or an issue before the court.

The issue is whether the evidence by two witnesses regarding the presence of both the 3rd accused and PW2 (TWT) at the Central Police Station of Dar es Salaam fall in any of the categories of the evidence listed above. My quick assessment shows that, it does not fall in any of the categories above. Looking at the argument of the defence, they are suggesting that the evidence is too weak, for failure to call some witnesses and tender some documents. That argument would have been material had the defence given evidence which raises doubt to the prosecution evidence,

which for the reasons which I am going to give soon hereafter is not the case.

All in all, my considered opinion is that, the evidence does not need corroboration. However, though it does not need corroboration, the same has been corroborated by the evidence of PW1 (TWT) who said that he personally took the 3rd accused to the Central Police Station and that he found PW2 (TWT) there as the Police Officer on duty at CRO.

Given the nature of the evidence of the two witnesses, it can correctly be said that, the two witnesses are corroborating each other and are in terms of the principle in the case of **Goodluck Kyando vs The Republic,** [2006] TLR 300 entitled to credence.

It has already been held herein above that, under the proviso to section 114(1) of the Evidence Act, (supra) the accused is required to raise a reasonable doubt which, if raised entitles the doubt to be resolved in his favour.

Now the issue is whether the evidence by the defence has raised any reasonable doubt? The evidence of the 3rd accused himself who testified as DW1 (TWT) is to the effect that, he was never at Central Police Station on 07/08/2020 but at TAZARA Police Station. Section 112 of the Evidence Act provides that;

> *"The burden of proof* ***as to any particular fact lies on that person who wishes the court to believe in its existence****, unless it is provided by law that the proof of that fact shall lie on any other person."* [Emphasis added]

It is the 3rd accused who alleged to be detained at TAZARA, Police Station as opposed to Central Police Station of Dar es Salaam. He wishes the Court to believe that he was held there; therefore he was under section 112 cited above, duty bound to prove, though at the relatively lower standard on the preponderance of probability, that he was held at TAZARA Police Station, not at Central Police Station of Dar es Salaam as alleged by the prosecution.

Reviewing his evidence, and that of the witness called by him, I find none of them who have actually proved that he saw the 3rd accused person at TAZARA Police Station.

The 3rd accused said in his evidence that, he was at TAZARA Police Station at the same time with the 2nd accused, and that they were taken together to Mbweni Police Station, but he did not call the 2nd accused to prove that particular fact. It is also on record that by the time DW3 (TWT) Gabriel Semheta Mhina was taken to TAZARA on 23/09/2020 the 3rd accused had already been taken to Court; therefore the two did not meet at TAZARA Police Station. Further to that, as already held it has not been said by DW3 (TWT) that, while at TAZARA DW3 (TWT) got informed that the 3rd

accused was also held there from 07/08/2020. What DW3 (TWT) said is that, he was informed by the 3rd accused himself when they met in Segerea Prison. That evidence is however doubtful as it goes against his own evidence as contained in exhibit D6, (TWT) the charge sheet, which he said the corresponding name of prison on each name of the accused persons meant that the accused was being remanded in that particular prison.

I say his evidence is doubtful because, exhibit D6 (TWT) shows that the 3rd accused was held at Ukonga, the fact which creates doubt as to whether they met at Segerea Prison as DW3 (TWT) alleges and that he actually told him the story. This doubt is strengthened by the evidence given by him that due to the outbreak of COVID 19 they were not being taken to court but their case was heard electronically.

Last but not least, even the evidence of PW4 and exhibit P3 (TWT) do not recognize the presence of the 3rd accused and DW3 at TAZARA Police Station.

Further more the allegation that PW2 (TWT) was on 14/05/2020 already working at Oysterbay Police Station, was disputed by the prosecution who also objected exhibits D2, (TWT) D3, (TWT) D4, (TWT) and D5, (TWT) on the ground that, they were not relevant at all. I entirely agree with prosecution that the said exhibits are not relevant and of assistance in deciding the issue at hand.

This finding is based on the fact that, the evidence hinges to prove two main issues, **one** that, PW2 (TWT) was not at the Central Police Station of Dar es Salaam, but at Oysterbay Police Station, definitely that, being at Oysterbay Police Station he could not have received the 3rd accused at Central Police Station of Dar es Salaam, on 07/08/2020. **Two,** that DW2 was himself at Oysterbay Police Station on 14/05/2020.

Now looking at the exhibits D2 (TWT), D3 (TWT), D4 (TWT), and D5 (TWT) neither of them is talking about the DW2 (TWT) being at Oysterbay Police Station on the days he so alleges, nor prove that PW2 (TWT) was at Oysterbay Police Station. Let alone failure to prove the presence of the DW2 (TWT) or PW2 (TWT) at Oysterbay Police Station, none of the four exhibits suggest to that effect. Now being irrelevant, their probative value is zero in as far as assisting this court to decide the issue at hand.

The prosecution attacked the said evidence in the submission that, DW2 (TWT) is a witness with interest to serve; therefore his evidence should be treated with care. In support of that proposition, they cited the authority in the case of **Moi Ikwabe Matiko @ Moi Mokona vs The Republic,** Criminal Session Case No. 06 of 2019, HC-Mwanza, which quoted with approval the case of **Abraham Saiguran vs Republic** (1981) T.L.R. 265 H.C to the effect that evidence of witnesses with interest to

serve must be approached with care and should not be acted upon unless corroborated by some other independent evidence.

The prosecution mentioned the following shortcomings which render the evidence of this witness unreliable, **(a)** contradiction in his evidence that he requested D/C Msemwa to collect money from his PPR at Oysterbay Police Station while at the same time admitting the fact that at the time of being arrested at Mwanga he had no money, and so when he was searched at Moshi Central Police Station and that he did not say that he got the money some times later, **(b)** By giving two varying versions during examination in chief on how he allegedly identified D/C Msemwa, first, that he identified him by his name D/C Msemwa, but later while still examined in Chief he changed that, it was by force number H.4323. **(c)**. Denying during cross examination the fact of identifying D/C Msemwa by his name but rather said it was by force number, **(d).** Failure to give evidence how he was able to establish the names of D/C Msemwa in relation to the force number, and **(e)** Failure to give proper physical description of PW2 (TWT), on this I would rather add the contradiction on giving physical description as he once said PW2 is body built and fatter than him, he later denounced what he said earlier and said instead that PW2 (TWT) may be fatter than him or he may be fatter than PW2 (TWT).

It is the law, as held in the case of **Marano Slaa Hofu & 3 Others vs The Republic,** Criminal Appeal No. 246 of 2011, CAT- Arusha that, it is only major contradictions touching the root of the matter which affect the evidence, those which are minor and not going to the root, can be ignored. The question to be resolved is whether, the contradictions pinpointed are major and go to the root of the matter or are minor which deserve to be ignored.

The issue at hand which calls for determination is whether the PW2 (TWT) was at Oysterbay Police Station as opposed to Central Police Station? Looking at the above pinpointed contradictions, it is incumbently clear that, the contradictions are not minor, they are major and they go to the root of the matter, and with them we can not say that the DW2 is reliable.

It is the law that the accused must not prove that he is innocent, but needs to raise reasonable doubt. However, the evidence advanced for purposes of creating doubt must itself not be doubtful. The apparent contradictions in the evidence of DW2 and his own evidence that he has interest in the case as admitted during cross examination that he has been positing in social media (twitter) expressing his dissatisfaction on how the court is handling its proceedings and that in his belief, the case against the

accused is fabricated, he is not a free minded witness but an emotional one, whose evidence needs corroboration which has not been done. His evidence therefore cannot reliably assist the court to reach at a just and fair decision.

That said, I find the objection raised that the 3rd accused has never been at Central Police Station of Dar es Salaam, but he was at TAZARA Police Station has no merit. The evidence by the prosecution proving that the 3rd accused was at Central Police Station has not been shaken by the defence. There is no any evidence showing that he was elsewhere than at Central Police Station or which has raised doubt on his presence at Central Police Station of Dar es Salaam. The ground of first objection is hereby overruled basing on the reasons given.

Next is the second ground of objection, that, the 3rd accused was coerced into appending his signature on the statement he never partook in writing at Mbweni Police Station, nor was he permitted to read it. The coercion was in the form of verbal and psychological threat issued by one DC Goodluck Minja, who had a pistol and SP Jumanne Malangahe, who threatened that unless he appended the signature, torture, will be imminent as was done in Moshi Central Police Station.

While the prosecution through the evidence of PW1, (TWT), PW2 (TWT), and PW3 (TWT), as found in the first issue have proved that the cautioned statement of the 3rd accused was recorded at Dar es Salaam Central Police Station on 07/08/2020 at the time commencing from 08:10 hours to about 11.02hrs, as also evidenced by exhibit ID-1 itself, which was presented for identification by this Court. It is the further evidence of the prosecution that before recording the cautioned statement PW1 (TWT), took the accused out of police lockup of Central Police Station, Dar es Salaam as evidenced by the Detention Register exhibit P2 (TWT), at the entry of 07/08/2020 at 08.10hrs when the accused person was taken out for investigation purpose.

It is the prosecution evidence through PW1 (TWT) that before recording the statement, he introduced himself to the 3rd accused person, and cautioned him that he was accused of the offence of conspiracy to commit the terrorist offences under section 24 of the Prevention and Combating Terrorism Act, Cap 19, and alerted him that, he was not obliged to answer questions put to him and whatever he will answer will be recorded and may be used as evidence in court.

Further to that, PW1 (TWT) said that he informed the 3rd accused the right to have his Advocate, friend and relative or any other person around

to witness the recording of the statement but the 3rd accused told him that, he did not need the presence of any person be it an Advocate, his relative or friend he was personally ready to give his statement.

According to him, in that cautioned statement, the 3rd accused person confessed to have participated in the commission of the offence, a confession which PW1 (TWT) recorded and thereafter he read the said statement to the 3rd accused who confirmed the same to be correct. That was before both, the accused and PW1 (TWT) signed the statement that was followed by the return of the 3rd accused to police lockup of the Central Police Station, Dar es Salaam and the recorded statement handed over to A/Insp Swila of Dar es Salaam.

It is PW1 (TWT)'s evidence that, on 08/08/2020 he was directed by ACP Ramadhani Kingai to transfer the accused person from Central Police Station, Dar es Salaam to Mbweni Police Station, which is also in Dar es Salaam. He did so while in the company of Insp. Mahita, A/Insp Swila & D/Sgt Goodluck as well as PC Wembo the driver. His evidence is that, that was when the cautioned statement had already been recorded.

According to him, when they handed over the accused at Mbweni Police Station CRO, on 08/08/2020 he left that station and he never returned to Mbweni Police Station and met the accused person. Therefore

on the date when the 3rd accused is said to have been threatened at Mbweni Police Station, they were not there on that date.

He said at Central Police Station of Dar es Salaam, he never threatened the 3rd accused. The 3rd accused signed at will after he had given the statement which PW1 (TWT) recorded.

Regarding the allegations of torture, he said they did not torture the accused person while at Moshi Central Police Station and that he is not aware that in Dar es Salaam there is a Special Police Station for detaining the persons accused of terrorism.

In their submissions, the learned Senior State Attorney submitted that PW1 (TWT) and PW3 (TWT) stated in their evidence that they were not at Mbweni Police Station on 9th or 10th of August, 2020 because on these particular days, they were involved with other investigative tasks including the arrest of the 1st accused Halfan Bwire Hassan. Therefore, they could not have coerced or threatened the accused to sign a statement which he recorded on 7th August, 2020 at Dar es Salaam Central Police Station.

The prosecution further submitted that the defence case has miserably failed to raise any reasonable doubt as to the voluntariness of the said statement for the following reasons;

First, is failure to cross examine prosecution witnesses on important matters, that although PW1 and PW3 were mentioned for being responsible in coercing and threatening the 3rd accused into appending his signature on papers which were already written, during testimony, these witnesses were not cross examined on those aspects which were significant during trial within a trial. Similarly, these witnesses were not cross examined on their alleged involvement in torture at Moshi which was a significant aspect in determining voluntariness of the statement.

It is their submission that, failure of the defense to cross examine on the above important matters is deemed to have accepted that matter and has the effect of estopping the 3rd accused from seeking the court to disbelieve the prosecution evidence on those aspects. They referred the Court to the principle laid down in the case of **Nyerere Nyague vs. The Republic,** Criminal Appeal No. 67 of 2010, Court of Appeal of Tanzania at Arusha, (unreported) at page 5.

Second, is the credence of defence evidence; they submitted that the defence case is flawed with contradictions, inconsistencies, implausible evidence and from a witness with interest to serve which have cumulative effect of diminishing the credibility of the defense evidence as shown herein after.

They submitted that, DW1's evidence contains inconsistences and contradictions. According to them, this is seen in his evidence where he repudiated his cautioned statement while during committal proceedings he retracted it. On the other hand while giving evidence in trial within trial of the 2nd accused he did not state about the involvement of D/Sgt Goodluck and SP Jumanne Malangahe in torturing him at Moshi Central Police Station.

By way of conclusion on the issue, they submitted that, the testimony of PW1, (TWT) PW2, (TWT) PW3 (TWT) and PW4 (TWT) in trial within trial is sufficient to prove that the cautioned statement of the 3rd accused was recorded on 07/08/2020 at Dar es Salaam Central Police Station and that the same was voluntarily made and in compliance with the law. Consequently, they prayed for the court to overrule all objections and make a finding that the 3rd accused cautioned statement was voluntarily made.

The defence side generally insisted that the 3rd accused was coerced and threatened to sign the cautioned statement which had already been written. Regarding the evidence of torture of the 3rd accused, DW1, (TWT) while on affirmation testified that, when he was arrested at Rau Madukani in Moshi Municipality, he was straight away taken to Moshi Central Police Station where he was taken to a torture room which is behind the Police Station and tortured by D/Sgt Goodluck Minja, PW3 (TWT), SP. Jumanne Malangahe PW1 (TWT) and Insp. Mahita.

According to him, in that torture, he was being beaten on his toe while being forced to speak out what was their mission in Moshi. Despite the fact that, he told them that he was there to meet the 4th accused for VIP protection job, the three insisted that, they knew better what the accused persons were there for. It is his evidence that throughout his stay at Moshi Central Police Station, he was hand cuffed and did not eat any food, and so is during the journey to Dar es Salaam.

According to him, when they arrived in Dar es Salaam in the morning of 07/08/2020, they were taken straight away to TAZARA Police Station where they were both kept in lockup. However, sometimes later on that date, he was taken from lockup cell to a certain office where he found his fellow soldiers namely Alex Ahadi and Chuma Chungulu.

He said while in that room, SP Jumanne Malangahe, Insp. Mahita and D/Sgt Goodluck as well as ACP Ramadhani Kingai entered while in the company of one person who had a video camera. They started asking him how did he meet the 4th accused person and who connected him. It was when he told them that it was Lt. Denis Orio who linked them to the 4th accused for a VIP protection job. They also asked him the reasons for going to Moshi; he said he was going to meet the boss, the 4th accused person.

They asked him so many questions including his personal particulars, where he came from and where was he trained and returned him to lockup.

He said they stayed at TAZARA from 07/08/2020 up to 09/08/2020 at night, when he was taken out of the police cell and covered his face by D/Sgt Goodluck Minja and Insp. Mahita who took him to the car, before he was conveyed to a place which later he recognised to be Mbweni Police Station. He said at Mbweni Police Station he had his face uncovered, he was locked in police cell, and SP Jumanne gave him a piece of paper written a name Johnson John and told him that, from that day onwards he would be referred to as Johnson John. He said that, some times later on that day, he realised that the 2nd accused and Lt. Denis Orio were also at that station.

According to him, on 10/08/2020, he was taken out of lock up and conveyed to the nearest room written "Ofisi ya Upelelezi" where he found SP Jumanne and D/Sgt Goodluck. In that room, D/Sgt Goodluck went and stood at the door with the pistol in his hand while SP Jumanne took out a paper and required the 3rd accused to sign or else he would face the consequences.

He said when he turned about, he saw D/Sgt Goodluck with a Pistol in his hand who told him to sign or else they would torture him as they did to

him while in Moshi. According to him, SP. Jumanne threatened him to sign on the paper where he was directed to sign and since he was threatened, he signed the document and immediately after singing the document he was returned to lockup until on 19/08/2020 when they were taken to court and charged with this case.

Signifying that he was treated un fairly he said throughout his stay in the police stations, from Moshi to Mbweni up to 19/08/2020 he was given a police ration food once at TAZARA Police Station, where he was given ugali and vegetable. In the rest of days when he was at Mbweni Police Station, he was being assisted by a police officer whom he did not mention names, by giving him juices and biscuit. According to his evidence, he ate on 19/08/2020 when he was taken to prison.

In the submission filed in support of the objection raised, the defence counsel submitted that it is undisputable, that PW3 (TWT), Goodluck Minja, was at Mbweni Police Station on 9th August 2020, at one point in time or another. This in their view corroborates 3rd Accused's assertions regarding the presence of PW3 (TWT) at Mbweni Police Station. According to them, it is further on record that; the 3rd accused was also at Mbweni Police Station on 9th August 2020. According to them, no proof has been tendered, despite the prosecution having due notice of this ground, that PW3 (TWT)

was not armed at Mbweni Police Station as there is no proof of surrender of arms was tendered in Court.

It is their arguments further that, the Officer in Charge (OCS) for Mbweni Police Station was never called; who in law is the overall custodial officer of all prisoners in the said station to show how the 3rd accused was received and treated whilst there. No Detention Register for Mbweni was tendered in evidence to rebut 3rd accused's notice and supporting allegations. In fact no witness was called from Mbweni, not even the CRO officer on duty to show that accused was not only received in a good state, but also that, his stay there was uneventful and complied with law. They cited to the court the case of **Azizi Abdallah versus Republic, [1991] TLR 71** the court held that;

> *"The general and well known rule is that the Prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach, but are not called without sufficient reason being given, the court may draw an inference adverse to the prosecution".*

They reminded the Court of the mandatory requirements of PGO 353 (2) (b); which would have shown that 3rd accused was received in good

state, as confirmed by a Government Doctor, and thus rebut allegations by 3rd accused.

They also submitted that, the fact that the 3rd accused was not taken to Court immediately upon the supposed recording of his Cautioned Statement (at Central Police as alleged), without even a single prosecution witness offering an explanation, speaks volumes and ought to be construed against the prosecution.

They submitted further that, per the testimony of DW-3, Gabriel Mhina, Goodluck Minja, has a disposition to torture suspects in custody; DW-3 was never cross examined on these specific details, and never shaken in any case. Witnesses who are themselves unworthy of belief and credibility cannot corroborate any evidence as was held in **Christian S/O Kale and Another versus Republic,** [1992] TLR 302 and **Michael Haishi versus Republic,** [1992] TLR 92. They prayed at the end that this ground be upheld.

In dealing with this point of objection I should recite that the gist of the objection is the 3rd accused complaint that he was coerced and threatened to sign the cautioned statement he never partook in writing by PW1 and PW3, that should he refuse to sign torture just like the one inflicted to him by the same Police Officers at Moshi Central Police Station would be imminent. He said he was so coerced on 10/08/2020 at Mbweni

Police Station. This means that, the accused was not tortured at the time when he was forced to sign the document, or immediately before. He was threatened reminded the torture inflicted to him on 05/08/2020 at Moshi Police Station.

It should also be noted that, the prosecution tendered for admission the cautioned statement allegedly recorded by the 3rd accused person on 07/08/2020 at the Central Police Station, Dar es Salaam. While the 3rd accused's objection is against the cautioned statement which he alleges to have signed under coercion on 10/08/2020. This is evidenced by his evidence when he said PW1, PW3 and Insp. Mahita conveyed him at Mbweni Police Station on 09/08/2020, they left and returned in the next day on 10/08/2020 when he was taken in a room written "Ofisi ya Upelelezi" where he was coerced and threatened torture, should he refuse to sign the cautioned statement which he signed. He also insisted when he was cross examined by Mr. Chavulla, SSA that;

> *"It is true that I told the court that, I was forced to sign the statement on 10/08/2020 at Mbweni and it is on that date when I saw Adamoo. I do not remember if Adamoo said he was taken out on 09/08/2020, I do not know what will happen if it will be found that Adamoo said that he was interrogated on 09/08/2020."*

I have detailed discussed the date on which the accused is alleged to have been coerced to sign the statement because when I was passing through the submissions filed by the counsel for the 3rd accused I found throughout the submissions, they argue that the 3rd accused was coerced on 09/08/2020, that is seen at page 4 of the submission when they were arguing this point.

It is also reflected in the third ground of time limit of recording the cautioned statement. This creates a dilemma as to when exactly was he coerced to sign the alleged cautioned statement. Was it on 10/08/2020 as testified by the witness or on 09/08/2020 as submitted by the Advocate? I am alive of the principle that as between the submission and evidence, when in conflict, then the evidence takes precedents.

However, that is when they are coming from different sources, but in the circumstances where the Advocate with full instructions of his client on the matter, on the same matter give an account different from that of his client, both versions must be doubted.

While aware that in criminal cases the accused person needs not to prove that he is innocent, but needs to raise doubt which are resolved in his favour, borrowing my dicta in the decision of the first ground of objection, that evidence which intends to raise doubt should itself not be doubtful.

Assuming for the sake of argument that everything is okay, it is very unfortunate that, in his evidence, the 3rd accused did not identify the document to be the one he was forced to sign and that the signature thereon is the one he appended on that date when he was allegedly coerced to sign and threatened torture.

The document sought to be admitted is dated on 07/08/2020, unlike his which he was forced to sign on 10/08/2020. He would have raised doubt had he said in his evidence, which he did not say, that he signed the document which was not dated, the assumption being that was dated later, or which was dated but he was forced to sign it as it was with date different form that of signing.

With all these shortcomings in the evidence, I find the non compliance of PGO 353 (2) (b) does not favour the 3rd accused.

Regarding the alleged complaint that the Officer in Charge (OCS) for Mbweni Police Station was never called; to prove how 3rd accused was received and treated whilst there and the non tendering of the Detention Register for Mbweni Police Station to rebut 3rd accused's notice and supporting allegations, and non calling of any witness from Mbweni, not even the CRO officer, on duty on that date to show that accused was not only received in a good state, but also that his stay there was uneventful and complied with law.

Given the nature of the complaint upon which the objection was based, it raised the question as to whether the accused was coerced to sign the statement, definitely if coercion, it was not done at the CRO or in Police cells, it was done in office where the said accused was being interrogated.

Therefore I find no relevance of calling an officer from the CRO or an officer in charge of the station or even tendering the Detention Register because at Mbweni Police Station the issue was not whether the accused was detained or not the issue was whether he was threatened torture and coerced to sign the statement. Therefore the cited case of **Azizi Abdallah versus Republic,** (supra), is distinguishable.

That said, and with all that I have said, I find no evidence proving that, that the 3rd accused was coerced to sign the cautioned statement sought to be admitted while at Mbweni Police Station. It has not been made clear that, if he was coerced, which has not been proved, was it on 09/08/2020 or 10/08/2020. That said, I find the second limb of objection to have no merit and it is also overruled for the reasons given.

Now having resolved the two objections which were the subject of the trial within trial, I now turn to the objection based on non compliance with the provision of Criminal Procedure Act (supra). In this category of objection I will start with the third ground of objection which is styled that,

"the 3rd accused's statement was recorded beyond the statutory prescribed time limit of four hours contrary to the mandatory provision of section 50 (1) (a) of the Criminal Procedure Act [Cap 20 R.E. 2019]. The accused was arrested on 05th August 2020 at 13.00hrs and his statement was recorded on 09th August, 2020."

In dealing with this, I should start by making it clear that section 50(1) (a) of the CPA (supra) provides four hours commencing at the time the suspect was taken under restraint in respect of the offence as the basic period available for interviewing the suspect unless the same is extended under section 51 of the same law.

In this case the 3rd accused was arrested on 05/08/2020 at 13.00hours, but the cautioned statement which is sought to be admitted was recorded on 07/08/2020 at 08.10hrs. Although this date was disputed by the defence as indicated in the above resolved ground of objection, my discussion will centre on the statement tendered for admission which is dated 07/08/2020

The prosecution side is of the opinion that, the cautioned statement under scrutiny was recorded within the prescribed time in terms of section 50 (2) of the Criminal Procedure Act (supra) which creates exception to section 50(1)(a) of the same law by providing that, in calculating the period

available for interview, the period used by the investigator in causing a suspect to do any act connected with investigation of the offence or when a suspect is being conveyed to a police station or other places for any purpose connected with investigation of the offence is excluded.

In this case they relied on the evidence of PW1 ACP Ramadhani Kingai, PW7 Insp. Mahita Omari Mahita and PW8 SP Jumanne Malangahe in the main case. I would add that, they also relied even on the evidence of PW1 (TWT) and PW3 (TWT) in trial within trial proves that the 3rd accused was arrested at Rau Madukani, area in Moshi District on 05/08/2020 along with the 2nd accused. Upon arrest, both disclosed that they were together with another suspect namely Moses Lijenje who fled shortly before the arrest.

That they spent the whole rest of the day of 05/08/2020 searching for the said Moses Lijenje, under the volunteer ship of the 2nd and 3rd accused persons to lead the investigators to different areas in Moshi Municipality, Bomang'ombe and Machame at Aishi Hotel in Hai District for purposes of tracing and locating the said Moses Lijenje. They also asked the court to base on the evidence that the process went on until 06/08/2020 when the 2nd and 3rd accused persons again led the investigators in the same areas and at Sakina area in Arusha Region where they searched for that person in

vain. That was before they returned to Moshi in the evening of 06/08/2020 and started a journey conveying the two accused i.e the 2nd and 3rd accused persons to Dar es Salaam where they arrived in the morning of 07/08/2020. It is their evidence that soon after their arrival, the 3rd accused's cautioned statement was recorded by PW8 at Central Police Station, Dar es Salaam.

Basing on this testimony, they are of the firm view that the cautioned statement was recorded within the prescribed time in accordance with the provisions of section 50 (2) (a) of the Criminal Procedure Act.

To fortify their arguments, they cited the decisions where the Court of Appeal of Tanzania was faced with similar circumstances in 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. The Republic,** Criminal Appeal No. 163 of 2017, Court of Appeal of Tanzania at Dodoma, (unreported) at page 14, 15 and 16.

In addition, they referred this court to its ruling dated 20/10/2021 at page 18 in this case where this court was faced with similar circumstances during the admission of the 2nd accused cautioned statement. This court was of the view that, the recording of the cautioned statement of the 2nd accused at Dar es Salaam Central Police Station on 07/08/2020 was with

plausible explanations and so justifiable under section 50 (2) of the Criminal Procedure Act.

In alternative to what has been submitted above, they referred this Court to the evidence of PW1 in the main case, that the reason for the 3rd accused being conveyed to, and interviewed in Dar es Salaam was due to the serious nature of the offence, public interest and complexity of investigation of the offences. This attributes to the fact that the accused persons had intended to commit terrorist acts in different Regions within the United Republic of Tanzania.

On that base they invited the court to direct its mind to the provision of section 169 (2) and (4) of the CPA which lays down the criteria that the court should take regard in determining the matter at hand. To fortify their arguments, they relied on the authority in the case of **Chacha Jeremiah Murimi & 3 Others vs. Republic,** Criminal Appeal No. 551 of 2015, Court of Appeal of Tanzania at Mwanza, (unreported) at pages 15, 16 and 17.

On the other hand, the defence through the evidence of DW1, the 3rd accused, disputed to be taken out of the Moshi Central Police Station in the search for Lijenje, and disputed to have recorded their statement immediately after being conveyed to Dar es Salaam.

Further to that, through the submissions drawn and filed by the counsel for the 3rd accused, they submitted that, even if we go by prosecution version of story; that the statement was recorded on 07/08/2020, still not less than 40 hours lapsed between 3rd Accused's arrest and his statement being recorded. They cited not only section 50 (1) (a) CPA, but also the case of **Alberto Mendes versus The Republic,** Criminal Appeal No. 473 of 2017 at pages 25, 26 and 27 to the effect that the statement should be rejected.

Further to that they cited **Alphonce Mwalyama and 2 Others versus The Republic,** Criminal Appeal No. 37 of 2004**,** at pages 5, 6 and 7 as well as **Hamisi Chuma Hando Mhoja versus The Republic,** Criminal Appeal No. 36 of 2018, at pages 10, 11, 12, 13, 14, 15, 16 and 17.

As already pointed out, section 50(1) (a) of the CPA provides for a general rule of four hours time limit, while section 50(2) provide for exception to that general rule. Section 50(2) has been interpreted by a number of cases, some of which are those cited by the counsel for the parties, herein above. In all cases cited it is agreed by the counsel that, the application of section 50(2) CPA is justified by the evidence of the followings;

i. A period of any time while the Police Officer investigating the offence refrain from interviewing a person, or

ii. Causing the suspect to do any act connected with the investigation of the offence, or

iii. The time when the suspect held under restraint is being conveyed to a police station or

iv. Where the suspect is conveyed to other place for any purpose connected with the investigation;

v. The period used to arrange the attendance of lawyers, relatives or friends

This provision has been further interpreted by a number of cases and the scope of exception under section 50(2) of the CPA, has been extended. In the case of **Nyerere Nyague versus The Republic,** (supra) it was held *inter alia* that;

> *"Not every apparent contravention of the provision of the CPA automatically leads to the exclusion of the evidence in question."*

Further interpreting the provision, the relatively recent decision of the Court of Appeal of Tanzania in the case of **DPP vs. James Msumule @ Jembe and 4 Others,** (supra) at page 11 and **Yusuph Masalu @ Jiduvi**

& 3 Others vs. Republic, (supra) at page 14, 15 and 16 read together held *inter alia* that,

> *"It is also a principle that a court in exception circumstances has considered the complications in the investigation as a valid ground to take the cautioned statement of a suspect outside the prescribed time."*

From the above authorities, the Court of Appeal in exception circumstances included considered the complication in the investigation as falling under section 50(2) of the CPA.

In discrediting the evidence of search for Moses Lijenje and conveying the accused persons in Dar es Salaam. The defence counsel raised four issues which in their opinion, the allegations of searching for Moses Lijenje, and for transporting the 2nd and 3rd accused persons to Central Police Station, Dar es Salaam is riddled with holes; **One,** why didn't they record the statement at Central Police Moshi there being no exclusionary directives from the DCI or any other superior, and no law, be in PGO or CPA, that forbids such a course of action. In their view section 50 (1) (a) was crafted to prevent torture and coercion, they reminded.

Two, if accused self-implicated by volunteering to search for Lijenje, why wasn't section 53 CPA complied with immediately? They also cited further PGO 236 (7) and (14) which makes it mandatory to comply with

Section 53 CPA. **Three,** why wasn't the Detention Register for Moshi Central Police Station brought into evidence to corroborate such a momentous allegation as searching for Lijenje; it would have shown the times of ingress and egress at the Moshi Central cells. **Four**, how plausible is it that terrorism suspects are paraded around Moshi for 2 days despite the obvious risks to all involved? They submitted that, that all doubts be resolved in Accused's favour, and this ground be upheld.

I agree with the defence counsel that these questions unanswered up to the end of the case riddles the evidence with the holes, however, that goes to the weight of the evidence itself not to its admissibility.

In my considered view, it is premature to consider them at this stage of admissibility of the cautioned statement. It should also be noted that, a retracted or repudiated cautioned statement or confession is the evidence which needs corroboration.

In the case of **Joseph Mkumbwa and Another vs The Republic,** Criminal Appeal No. 94 of 2007, which was quoted with approval in the recent decision of **Issa James vs The Republic**, Criminal Appeal No. 110 of 2020, (decided on 05/11/2021) the Court of Appeal of Tanzania, at Musoma faced similar circumstances, it held *inter alia* that;

"Admissibility of the evidence is one thing; its weight or probative value is another. In evaluating the weight to be attached to an alleged confession, a trial Court has the duty to look at all the surrounding circumstances. It also has to see whether the law has been complied with in extracting the statement."

With all due respect to the defence counsel, this is the stage of admissibility; it is not the stage which Courts go to the weight or probative value of the evidence. As valuable as the questions are, they cannot be resolved at this stage of admission.

Regarding the relevance of the decision of **Alberto Mendes versus The Republic, (supra)** in relation to the interpretation of section 50(2) of Criminal Procedure Act, having read the decision and looking at the same in line with the fact of this case, I find the case distinguishable, as unlike this case that case did not involve the conveying the accused person from one place to another, neither did it involve the search of un arrested suspect.

Regarding the case of **Alphonce Mwalyama and 2 Others versus The Republic, (supra)** is also distinguishable as it was dealing with the weight of the cautioned statement, the issue being the conviction of the appellant basing on un corroborated cautioned statement unlike in this case where we are still at the stage of admissibility. Regarding the authority in

Hamisi Chuma Hando Mhoja versus The Republic, (supra) that case is also distinguishable as in that case there was medical evidence of torture unlike in the case at hand where there is no such evidence.

The circumstances under which the exception under section 50(2) may be invoked was made more clear in the case of **Andius George Songoloka and 2 Others vs. DPP,** Criminal Appeal No. 373 of 2017 Court of Appeal, at Mbeya (unreported) at page 20-22. In which it was held that, the fact that, at page 20 last paragraph that;

> *"That the contention by Mr. Mwakolo that the statements could have been recorded in the police station where the appellants were arrested or kept cannot stand because some of them were mere police posts and* ***even the police stations were not seized with the case file."*** *[Emphasis added]*

While at page 21 -22 in that very case the Court of Appeal held that;

> *"In this case since the appellants were still in the course of the investigation after their arrest, for having been conveyed from one place to another and the fact that the statement were immediately after their arrival at the police station were their statements were recorded then we are settled in our mind that section 50(2) of the CPA, covered them hence their statement cannot be expunged from the evidence."*

In this case, as earlier on pointed out, it has been established by the evidence of both sides that, immediately before the arrest, the 2nd and 3rd accused persona were together with one Moses Lijenje who immediately before they were arrested escaped. The prosecution evidence is that they kept on searching for him. This Court has been asked to disbelieve the prosecution account on that aspect on four question highlighted by the defence Counsel at page 47 and 48 of this ruling.

It is without doubt that if really the police officers intended to arrest the three suspects and one escaped, it defeats reasons to believe that the police who believe in the information they had that the suspect were to commit a terrorist act, which according to the information they had they were in the process of executing the said unlawful purpose of seriously injurying Lengai Ole Sabaya. It defeats reasons that they really sat down and relaxed, without making effort of searching for the un arrested suspect.

It is also evident that the 2nd and 3rd accused persons were arrested at Moshi and according to the evidence of PW1 and PW8; there was no case file at Moshi. It has been proved also that, the accused were conveyed to Dar es Salaam where according to the cautioned statement sought to be admitted, it was recorded soon after the arrival to Dar es Salaam, the

above cited authority is relevant and section 50(2) of the CPA applies in this case as well.

Having held as hereinabove, I find the objection to have no merit, given the nature of the case and the reasons given herein above as sanctioned with the authorities of the Court of Appeal of Tanzania which I am bound to follow. I thus find that, the prosecution was justified to record the statement of the 3rd accused beyond the four hours time limit in terms of section 50(2) of the CPA. The objection is thus overruled for the reasons given.

On the fourth point of objection which challenges the cautioned statement to have been purportedly recorded under the proper law but verified under the non existing law, that is [Cap 20 R.E 2018] which is prejudicial to the accused. In support of the ground the counsel for the defence in their submission were of the view that; verification is the most important aspect of a statutory document; its requirement is akin to verification in an affidavit, for both verify the truthfulness of the contents of statements.

In support of that proposition they cited the authority in the case of **Rutagatina C. L versus The Advocates Committee and Another,** Civil Application No. 124 of 2006, to the effect that wrong citation of law is fatal.

They submitted that no correctional motion was made by PW1 (TWT), PW8 (TWT) SP Jumanne Malangahe, when he sought to tender the said statement. They insisted that, any legal document, motional or otherwise, that is statutory must comply with law. According to them, a distinction has no basis in law; why the requirement to cite any law, then? They asked.

By way of insistence, in their view, an accused who does not understand the law under which his rights to freedom are to be taken through a purported cautioned statement suffers irreparably. In their view the entire legal exercise becomes a nullity. According to them, failure to comply with cautionary provisions offends the law itself, and is prejudicial to the law, to Public Police (sic), to purpose of enactment, and to the accused. No evidence needs to be led, they submitted.

Distinguishing all the decisions with the different legal stand, they further submitted that, those decisions that have held that no prejudice has been occasioned by wrong citation are appellate decisions; which have the benefit of hindsight, and were not made in real-time; as in those decisions the appellate analysis was done retrospectively to assess whether accused suffered prejudice throughout the trial by way of understanding the charges etc. In their view it is wrong to equate such dicta with an objection that is raised immediately. They prayed that this ground be upheld.

On that point, the prosecution side was of the view that failure to properly cite at the certification part of the statement, the year within which the law was revised is not fatal. They further submitted that, the error is procedural rather than substantive, as such, the accused was not prejudiced. They supported their arguments by the fact that the defense does not dispute the existence of the substance of the certification or that the matters which the recording officer purported to verify were not done by him.

They thus submitted that, the complaint by the defense that the accused were prejudiced in preparing their defense lacks merit. They referred this court to the case of **Ally Ramadhani Shekindo and Another vs. The Republic**, Criminal Appeal No. 532 of 2017, Court of Appeal of Tanzania at Arusha (unreported) at page 14 as well as the ruling of this court dated 9th November, 2021 at pages 16 and 17 where this court was faced with similar circumstances during the admission of the certificate of seizure (P.11).

They also referred this court to the decision of **Mohamed Hamisi @ Sakis vs. The Republic,** Criminal Appeal No. 97 of 2008, Court of Appeal at Mbeya (unreported) at page 12 &13 and **DPP vs. James Msumule @ Jembe and 4 others**, (supra), where the Court of Appeal of Tanzania

found that irregularities and even lack of certification did not invalidate the cautioned statement.

From the arguments in the submissions made and filed by the parties, and on a glance on the verification of the cautioned statement sought to be admitted, it is apparent that, the same is verified under section 57(3) of [Cap 20 R.E 2018] which is a non existing law.

I entirely agree with the counsel for the 3rd accused that verification is the most important aspect of any statutory document; its requirements are akin to verification in an affidavit, for both verify the truthfulness of the contents of documents.

I entirely agree with the principle in the case of **Rutagatina C. L versus The Advocates Committee and Another,** Civil Application No. 124 of 2006 in as far as the importance of citing the proper provision is concerned and the effect thereof. However it should be noted that, as held by this Court in the ruling dated 09th November, 2021, when it relied on the authority in the cases of **Charles Mkande vs R,** Criminal Appeal No. 270 of 2013 (unreported) **Jamal Ally @ Salum vs R**, Criminal Appeal No. 52 of 2017 (unreported) the Court of Appeal held *inter alia* that,

> *"Recently the court has taken different stance on defective charges and none or wrong citation of the law,*

that as long as the accused has not been prejudiced, the non or wrong citation is curable under the provision of section 388(1) of the Criminal Procedure Act, [Cap. 20 R.E 2019]"

In that ruling, this court held *inter alia* that, since the non or wrong citation of the charge or motion document as serious as it is, is curable unless the person pleading it establishes that he was prejudiced, there cannot be a way for the failure to cite proper law at the verification of the cautioned statement can be fatal and vitiates the said cautioned statement unless the objector has specifically told the court the personal prejudice he encountered.

Further to that, the Court of Appeal of Tanzania as held in the cases of **Mohamed Hamisi @ Sakis vs. Republic,** Criminal Appeal No. 97 of 2008, CAT, at Mbeya (unreported) at page 12 &13 and **DPP vs. James Msumule @ Jembe and 4 others**, (supra), that, irregularities and even lack of certification did not invalidate the cautioned statement and condemned the trial court for wrongly rejecting the cautioned statement.

Regarding the argument advanced in distinguishing all the decisions with the legal stand needing the proof of prejudice, on the ground that, those decisions are appellate decisions which have the benefit of hindsight, and were not made in real-time; as in those decisions the appellate analysis

was done retrospectively to assess whether accused suffered prejudice throughout the trial by way understanding the charges etc, and that in their view it is wrong to equate such dicta with an objection that is raised immediately.

In response to this, I should point out that, it is true that most of the decisions are appellate, but with due respect, they were made while interpreting what happened at trial. Further more some of them as indicated herein above have gone further and criticised the trial Court for wrongly rejecting the cautioned statement at trial. For that reasons, I find the arguments trying to distinguish the cited cases wanting, and deserve to be rejected. That said I find the fourth objection to have no merit and overrule it.

On the fifth point of objection which is styled that; "The 3rd Accused was not properly cautioned by PW8 for failure to cite the specific subsection of the law under which the said caution was issued versus the establishing offence. Also that he was cautioned under the non existing law, that is which is "Prevention and Combating of Terrorism Act", instead of The Prevention of Terrorism Act."

In support of the said point of objection, the defence submitted that, it is clear from the statement that constitutes documents supplied to the 3rd

accused as part of committal proceedings, that no specific sub-section of Section 24 of the Prevention of Terrorism Act is cited. It is also clear that Section 24 (1) PTA, establishes a completely different offence from that in Section 24 (2) PTA. With the same purpose and effect as in ground number four, they cited **Rutagatina C. L versus The Advocates Committee and Another,** Civil Application No. 124 of 2006 to the effect that failure to cite a specific subsection is fatal.

In their view, cautioning, presupposes that an accused/suspect fully comprehends not only the specific offence, but also the law in question. Failure to disclose a specific sub section defeats the informative value of the caution rendering no caution in law. They submitted that, the 3rd accused is prejudiced by failure to comprehend what subsection he was charged, and thus cautioned under; in their view such anomaly cannot lawfully be cured in any way or manner.

Further to that, they submitted that a cautioned statement has motional value; for it seeks to introduce not only itself on basis of full compliance, but also of the statements constituted therein. It is not, thus, just an odd document; it has motional implications; which the Court may use against the 3rd accused.

In their view, a motional document is not limited to one that seeks reliefs, it involves one upon which a party seeks to introduce certain facts or to obtain certain adversarial benefits, into the record; that will aid his motion to have the 3rd accused found guilty. In cognizance of the fact that a caution statement is a motional document, the law has enacted a multitude of caveatorial provisions and guidelines to ensure that there is compliance.

Citing those caveatorial provisions, they cited PGO 236 in its entirety, but in particular (18), Standard Guide for Police Officers, as well as the Judges Rules per PGO 236 (2). They further cited Article 13 (6) (a) of the URT Constitution, 1977 as amended, Article 15 (2) (a) of the same Constitution and further John Chapter 7 Verse 51 (7;51) to the effect that we cannot condemn anybody before hearing him and finding out what he has done. According to them, properly notifying a suspect of the law is part of this divine-guided process. Even GOD properly notified Adam, and later, Cain prior to charging them. They prayed that this ground be upheld.

Arguing against the objections the prosecution submitted that, looking at the statement sought to be admitted, the accused has been cautioned for the offence of conspiracy to commit terrorist acts under section 24 of the Prevention of Terrorism Act. They submitted that, the accused was properly cautioned on the offence he is charged with as manifested by his

answers to the caution and the statement itself. They submitted that, in law, it is sufficient to explain to the accused person the nature of the offence he is cautioned for without necessarily citing the provision creating the offence and the law as per the dictate of section 53 (b) of CPA.

In their view, failure to indicate the law and specific subsection of the provisions under which he was cautioned does not itself vitiate the cautioned statement, provided that the offence which he was cautioned was recorded. To support our arguments they referred this court to the case of **Andius George Songoloka and 2 Others vs. DPP,** Criminal Appeal No. 373 of 2017 Court of Appeal at Mbeya (unreported) at page 22-23 and **Issa James vs. Republic,** Criminal Appeal No. 110 of 2020, Court of Appeal at Musoma (unreported) page 15-16.

In a bid to satisfy myself I have painstakingly passed through the PGO 236 in its entirety, but in particular PGO 236 (18) Standard Guide for Police Officers, as well as to Judges Rules per PGO 236 (2). Reading the PGO as a whole, at least one thing can be gathered that, it insists on the Police Officers to follow procedure stipulated under section 53 of the CPA which mainly is to make sure that the accused has been cautioned by the Police Officer by telling the accused his name and rank, informing him in a language in which he is fluent, in writing and, if practicable, orally, of the

fact that, he is under restraint for the offence in respect of which he is under restraint. Also that he is not obliged to answer any question put to him by a Police Officer, other than a question seeking particulars of his name and address; and that he may communicate with a lawyer, relative or friend.

I have also passed through the sub PGO (18) and the standard guide for Police Officers, at Appendix "A" to the PGO 236 under the guide as well as to Judges Rules per PGO 236 (2). They all insist that the suspect be cautioned. However, none of them is providing or even suggesting that, it is a must that the caution must mention or cite the law upon which the person is accused or restrained. What is important is that, the accused be informed just the nature of the offence that is all.

Article 13 (6) (a) of the URT Constitution, 1977 as amended, one of the most cited provision in our Constitution, as equality before the law and the right to be exhaustively heard, while Article 15 (2) (a) of the same Constitution provides for right to freedom. John Chapter 7 Verse 51 (7:51) insists of the importance of hearing a person before condemning him.

My comprehension of the scripts is that, what is important under them, a person accused must be informed the substance or nature of his charge.

In the case of **Andius George Songoloka and 2 Others vs. DPP,** (supra) at page 22-23 the Court of Appeal of Tanzania was called upon to decide a ground of appeal which was challenging the cautioned statement in which the accused person was cautioned of the offence without citing the relevant law, the Court of Appeal held *inter alia* that;

> *"Under section 53(b) of the CPA,* ***what is required is to explain the nature of the offence*** *which we think was sufficiently done to enable him understand the offence he stood charged with."*

The other authority cited by the prosecution is the case of **Issa James vs. The Republic,** (supra) in which the Court of Appeal also faced with similar circumstances held *inter alia* that;

> *"The omission of not cautioning the appellant on a specific offence and failure to indicate the offence section in the cautioned statement cannot vitiate the entire exhibit P3. We think the omission is not fatal as no serious miscarriage of justice was occasioned in view of the substance of the cautioned statement which reflects the role of the appellant in the offence of cattle theft...."*

That being the stand of the law given by the Court of Appeal of Tanzania which I am obliged to follow, and looking at the cautioned statement sought to be admitted which has similar characteristics with the

ones in the authorities above, I find the caution containing the explanation of the offence under which the accused is charged, therefore the omission to cite specific subsection and failure to cite the law correctly do not vitiate the said cautioned statement. The objection in the fifth point is also overruled.

The **sixth** ground of objection raises a complaint that, the document (purported cautioned statement of 3rd accused) sought to be tendered is not the same as that supplied during committal proceedings; i.e one cites section 24 (2) of the Prevention of Terrorism Act, while the one sought to be tendered cites only section 24 of the said Act.

In support of that objection, the defence counsel for the 3rd accused submitted that, it is trite law that, the whole essence of sections 246 and 249 of CPA is to adequately inform the accused of the charges he is to face; it requires full disclosure, unless departure is sought, explained and granted by the Court after due process.

They further more submitted that, it is also trite law that, documents in Court records by way of committal should reflect those sought to be tendered. In their view, any mis-match affects the authenticity of the same, and must defeat such document. They reminded the Court that PW1 (TWT) did not explain the discrepancy prior to the objection being raised; and no

amount of submissions from the Bar can cure such a discrepancy. They urged the Court to adopt its own dicta when refusing to admit the letter sought to be tendered by the 3rd accused, DW1 (TWT), during Trial within Trial on ground of failure to authenticate document and prayed this ground to be upheld.

Responding to said ground of objection the learned Senior State Attorney admitted that, the statement sought to be tendered by PW8 bears section 24 without subsection and the typed one which was supplied to the court bears section 24 (2). They submitted however that, the variation does not offend the provision of section 53 (b) of the CPA and Rule 8 of the Economic and Organised Crime Control (the Corruption and Economic Crime Division) (Procedure) Rules, 2016.

According to them, the substance of the typed statement availed and read to the accused persons during committal proceedings are the same with those in the original statement sought to be tendered by prosecution. Therefore, the accused persons have not been prejudiced basing on the fact that, the offence which the 3rd accused was cautioned was clearly indicated on the statement as "kula njama ya kutenda vitendo vya kigaidi".

To support their arguments they once again referred this Court to the case of **Andius George Songoloka and two Others vs. DPP,** (Supra) at page 22-23 and **Issa James vs. The Republic,** (Supra) at page 15-16.

I have passed through both the cautioned statement sought to be tendered and the one which was supplied to the 3rd accused person during committal proceedings as contained in the committal bundle, it is true that there is such difference. While the one supplied to the accused as the record of committal has the subsection, i.e 24(2), the one sought to be admitted has not cited a specific sub section i.e 24. On this point I have been referred to the sections 246 and 249 of CPA. It should be noted that while section 246 directs the manner in which committal proceedings should be conducted and the need to disclose the substance of all evidence intended to be used at trial, section 249 of the same law, provides for the requirement of the accused to be supplied with the copy of the proceedings and all documents which are themselves evidence or which contains evidence.

In both case the insistence is on the need of disclosure of the substance of the evidence. Now, the issue is whether the substance of evidence in the two documents is different? If they are different then it is obvious that the accused was prejudiced, but if the substance of the

evidence contained in both documents is the same, it goes without saying that, no prejudice can be said to have occurred. In this case having passed through both documents, I find the substance of the evidence is the same, therefore I conclude that, the 3rd accused has not been prejudiced by the difference. That said, and borrowing the stand of the law as contained in the decisions of the Court of Appeal, cited herein above, I find the objection to have no merit, it is overruled.

Last is the seventh ground which raises a complaint that, the caution statement is bad in law for failure to show under which section between sections 57 or 58 it was recorded? According to the defence, the cautioned statement must be either taken under section 57 or 58 of the CPA; it cannot be taken under both sections like this one sought to be tendered. The objection goes further that, under section 57 (2) (d) of the Act, once a person starts to confess there must be an independent caution, whereby the recording officer must stop and re-caution him. It is also followed by a person to be taken to a justice of peace. While introducing the point, the defence promised to rely on the case of **Seko Samwel vs Republic**, [2005] TLR 371.

Although the defence did not argue the point, the prosecution filed their arguments, and since it is on the point of law, then, I felt it imperative to deal with it.

In the argument in rebuttal of the objection, the prosecution submitted that, there is no uncertainty in having both provisions on the statement. This is because; the difference between a statement made under section 57 and that made under section 58 depends on the format. According to them, the statement taken under section 57 is in the form of questions and answers or partly questions and answers and partly narration, while a statement under section 58 is wholly a narration by the suspect without soliciting question asked by the Police Officer recording the statement.

In their view, the citation of sections 57 or 58 in the cautioned statement under consideration is inconsequential and not prejudicial to the accused person. To support their arguments they referred this court to the following cases; **Francis Paul vs. The Republic,** Criminal Appeal No. 251 of 2017, Court of Appeal at Arusha (unreported) at page 13-15, **Flano Alphonce Masalu @ Singu and Four Others vs. The Republic**, Criminal Appeal No. 366 of 2018, Court of Appeal at Dar es Salaam, (unreported) at page 27 and 28 and **Msafiri Benjamini vs. The Republic**, Criminal Appeal No. 549 of 2020, Court of Appeal at Dodoma, (unreported) at page 24. They submitted that, in reference to what is submitted together with the cases cited above, the case of **Seko Samwel**

vs. Republic, [2005] TLR 371 is distinguishable in the circumstances at hand.

Regarding the argument, of taking the suspect to the justice of the peace, it is their submission that, that depends upon the wishes of the suspect himself as provided for under paragraph 6 of the Guide for Justice of the Peace. According to them, this position was well discussed by the Court of Appeal in the case of **Andius George Songoloka and two Others vs. DPP,** (supra) at page 31.

Regarding the argument that, there was supposed to be a second caution, they also submitted that, it is not a legal requirement to make a second caution to a suspect who is confessing to the commission of an offence as section 58 of the CPA, has no such requirement. In law, the caution given before commencing recording the statement is sufficient.

While dealing with this point of objection, a glance on the statement sought to be admitted reveals that, it is true that the statement was recorded under section 57 or 58 of the CPA, [Cap 20 R.E 2019] it has not been specified by the recording officer, that of the two provisions under which one the statement was recorded. Now the issue is whether non specification of a single provision is fatal and vitiates the cautioned statement? In the case of **Francis Paul vs. The Republic, (supra)** where

the Court of Appeal was faced with similar challenge. It was held *inter alia* that;

> ***"...****the accused statement whether taken under sections 57 or 58 is all cautioned statement. The different is the mode of taking them, a statement taken under section 57 of the CPA should be in question and answer form while that taken under section 58 has to be taken in a narrative form. All the same, as indicated above the appellant's statement was recorded in terms of section 57 and 58 of the CPA. The irregularity is therefore not fatal.*

From the position above, what is important is the format of recording the statement, since both provision are listed and since PW1 (TWT) when asked he said he used both provisions, and the format used in the said cautioned statement is clearly a narrative format, unless there is a proof or even allegation of the prejudice to the accused, which in this case there is none, the presence of both provisions on the cautioned statement is not fatal and does not vitiate the cautioned statement. In effect, non citing of one of the provision as between section 57 and 58 have the same effect as to the failure to cite specific provision, the consequence of which have already made clear when deciding on the 4th, 5th and 6th objection as was supported by the authority in the case of **Andius George Songoloka and**

two Others vs. DPP, (Supra) at page 22-23 and **Issa James vs. The Republic,** (Supra) at page 15-16.

I find, as correctly submitted by the Senior State Attorney that, the authority in the case of **Seko Mamwel vs Republic** (supra) is distinguishable. The seventh objection is also overruled for want of merits.

Having overruled all the objections for want of merits basing on the reasons given in respect of each objection, I find nothing material to prevent the admission of the cautioned statement of the 3rd accused, Mohamed Abdillahi Ling'wenya, as the same was voluntarily made at the Central Police Station, Dar es Salaam.

It is accordingly ordered.

DATED at **DAR ES SALAAM** this 14th day of December, 2021

J.C. TIGANGA

JUDGE