

TANZANIA / JUDGMENT

Alex Ruling2

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA JUDICIARY BUKOBA SUB
REGISTRY AT KARAGWE ORIGINAL JURISDICTION CRIMINAL SESSIONS CASE NO. 34803 OF
2024 THE REPUBLIC VERSUS ALEX FAUSTINE ----- ACCUSED
RULING OF THE COURT Date of last Order: 18/03/2025 Date of Ruling: 19/03/2025 BEFORE: G.P.
MALATA, J When this case came for hearing on 19/03/2025 both parties appeared in court The
republic appeared represented by Mr. Lugano Mwasubila learned State Attorney and Mr. Erick
Mabagala learned State Attorney whereas the accused appeared through Mr. Jamal Chamani
learned counsel. In an attempt to tender cautioned statement by the Republic, Mr. Jamal
Chamani learned counsel raised objection touching competence of the cautioned statement. He
stated that the cautioned statement is incompetent on the grounds that; 1

1. There are two times for commencing recording cautioned statement.
2. The cautioned statement was written beyond the time limit prescribed by law section 50 and 51 of the Criminal Procedure Act, Cap.20 R.E.2022.
3. The caution part and reply to it was effected to different person, thus invalid. Arguing in support of first point of objection, Mr. Jamal Chamani learned counsel submitted that, the cautioned statement indicates for different times alleged to be time for commencing recording the statement. paragraph 2 last line indicates that, the time for commencing recording the cautioned statement is 07.20hours whereas on the last paragraph states that, it is 07:23 hours. In view thereof, there is two time for commencing recording the statement which is 07:20 hours and 07:23 hours. This is in contravention of section 57 (2) of Criminal Procedure Act (CPA) which requires for indication of specific time for commencing and completing interview. As to the second objection, Mr. Jamal Chamani learned counsel submitted that, the cautioned statement was taken beyond time. He stated that, the accused was arrested on 04/09/2023 in the morning by Police officers from Murongo Police Station. Accused was interviewed and recorded statement on 05/09/2023 from 07:20 hours to 08.00 hours. Section 50 (1) (a) of the CPA provides that, interview and recording 2 accused's cautioned statement has to be effected within four (4) hours from the time of arrest. If the police officer fails to do so within four hours, then, must state reasons for his failure to do so under section 50 (2) of the Act or apply for extension time under section 51 of the CPA. To cement the position, he cited the case of Pambano Mfilinge V. R Criminal Appeal No.

283/2009 TZCA where the court of appeal insisted on strict compliance of the section 50 and 51 of the CPA. In the said case, there was no compliance, the court ended expunging the cautioned statement written in contravention of Section 50 (1) (a) and 51 (1) (a) and (3) of the CPA. As to the third point, Mr. Jamal Chamani learned counsel submitted that, the accused who was cautioned under section 57 and 58 of the CPA is Alex Faustine by E. 8176 D/SGT Masatu whereas the response was made by Alex s/o Faine. In that regard, Alex Faustine did not respond to the caution as required by section 57 (1) (a) and (d) of the CPA. He thus prayed that, the cautioned statement be rejected. In reply thereof Mr. Lugano Mwasubila learned Senior State Attorney submitted that, the document sought to be tendered clearly states that, the commencing time for recording statement was 07.20 hours and completed at 08.06 hours. The original copy has no problem save for the typed copy which has typing error pointed by the defence counsel. He submitted that, that is minor error which do not go to the root of justice. To cement the point, he cited the case of Molanied Ham Sakis v. R. Criminal Appeal No. 97/2008 TZCA, 2008 where the court held that, not every procedure error vitiates the proceedings. He also cited the case of Yustas Katoma v. R Criminal Appeal No. 242/2006 where there was no indication of completion of time and certification. The court went on stating that, the errors were minor. As to the second ground, Mr. Lugano Mwasubila learned Senior State Attorney submitted that, the accused recorded statement within four hours' time from arrest. Reading evidence by PW7, it is evident that, accused arrested on 04/09/2023 at about 07:00 and transported to Kagenyi Police Station on 05/09/2023. They arrived at Kagenyi Police Station at 05.15 hours. That, section 50 (2) (a) CPA requires that, the time for transporting accused to the police station shall be excluded. To cement his position, he cited the case of Michael Mgowe and another vs. R Criminal Appeal No. 205/2017 and Antidius Songolo and 2 others v. DPP Criminal Appeal No. 373/2017. As to the last point of objection, Mr. Lugano Mwasubila learned Senior State Attorney submitted that, the document sought to be tendered has no variation save for the typed one. He prayed that, this Court be pleased to invoke Section 169 of CPA. Finally, he prayed that, the objection be overruled. 4 By way of rejoinder by Mr. Jamal Chamani defence counsel submitted that, in respect to the second ground that, PW7 testified that, he was an investigator and went to collect the accused. That, PW7 testified that, he is the OCCID of Kyerwa District and the incidence occurred within his jurisdiction. In view thereof, the OCCID and other investigators in accompany had all mandates to conclude the matter at his office at Murongo police station. He ended submitting that, the cited case of Michael Mgowe is distinguishable. On the strength of the raised points raised, this court has decided to deal with second point of law considering its effect as well settled by court of appeal if sustained. The point of is to the effect that, "The cautioned statement was written beyond the time limit prescribed by law, section 50 and 51 of the Criminal Procedure Act, Cap.20 R.E.2022". In my view, sections 50 and 51 of the Criminal Procedure Act, Cap.20 R.E.2022 are cornerstones in writing confession statement due to strict effect in case of noncompliance. The rationale behind it is that, all allegations of involuntariness such, threat, torture, coercion and intimidation by the accused are said to have been effected during that particular time before recording the cautioned statement. Unless there are cogent and justified reasons for failure

to abide to requirement of section 50(1) (a) of the Criminal Procedure Act, none compliance of such requirement is fatal. Any evidence procured in contravention of section 50 5

- (1) (a) of the Act, renders the confession statement incompetent and illegal thus not subject for further consideration due to incompetence. The section reads that;
- (1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-
 - (a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;
 - (b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended. In *Joseph Mkumbwa and another vs. The Republic*, Criminal Appeal No. 94 of 2007 (unreported) the Court interpreted what is meant by being "under restraint" and when the basic period commences and stated that: - "In our view a person is deemed to be taken under restraint when he is arrested in respect of an offence, and that is when the basic period commences." The time of four (4) hours stated in section 50 (1) (a) of the Criminal Procedure Act is basically reckoned from the time the accused is arrested and placed under police restraint. When the accused is arrested by civilian or militiamen, the time so stated does not commence to run until the accused is rearrested and placed under police custody. Section 50(2) of the CPA provides for exclusion of time where certain intervening factor happens. It provides that;
- (2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence-
 - (a) while the person is, after being taken under restraint being conveyed to a police station or other place for any purpose connected with the investigation;
 - (b) for the purpose of-
 - (i) enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer; (ii) enabling the police officer to communicate, or attempt to communicate with any person whom he is required by section 54 to communicate in connection with the investigation of the offence; (iii) enabling the person to communicate, or attempt to communicate, with any person with whom he is, under this Act, entitled to communicate; or (iv) arranging, or attempting to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an interview with the person under restraint or while the person under restraint is doing an act in connection with the investigation;
 - (c) while awaiting the arrival of a person referred to in sub paragraph (iv) of paragraph (b); or

- (d) while the person under restraint is consulting with a lawyer. The interpretation of section 50 (2) of the Criminal Procedure Act entails nothing but that, there must be stated reasons by the interviewing police officer as to why the statement was taken beyond time falling within section 50 (2) of the Act. Certainly, the same will be reflected in the cautioned statement stating; one, where the accused was arrested, two, at what time, three, by whom, four, where he was kept, five, at what point in time he commenced a journey to another police station, six, who transported him, seven, on which date and time did they arrive at the said police station. Besides, if the accused is arrested by police officer within the jurisdiction where the incidence occurred and if he is kept in one of the police stations beyond four hours from within, then the statement has to be written in the said police station unless reasons thereof are stated. 8 Unless section 50 (1) (a) and (2) of the Criminal Procedure Act is complied with, shot of that, the import of section 51 of the CPA comes play. The above position cemented insisted by the court in the case of Joseph Shabani Mohamed Baya and Three Others Versus the Republic, Criminal Appeal No. 399 of 2015 where the court of appeal propounded that; "It is apparent that the time allowed for interviewing a person is ordinarily within four hours from the time of arrest and in case an extension is required, for the following eight hours, the Officer In charge conducting the interview must inform the accused and where more than the eight hours is required, a permission by a magistrate is required". The effect of non-compliance of section 50 and 51 of the Criminal Procedure Act, Cap. 20 R.E. 2022 assembled from many decisions by the Court of Appeal. One of is the decision in the case of Marceline Koivogui Vs Republic, Criminal Appeal No. 469 of 2017 where the court that; "We begin with the position of the law regulating the periods available for interviewing a person under restraint which is stipulated under section 50 of the CPA as follows:
- (1) For the purpose of this Act the period available for interviewing a person who is in restraint in respect of an offence is-
- (a) subject to paragraph (b), the basic period available for interviewing the person that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence; 9
- (b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.It is not disputed that, the cautioned statement was taken at 17.00 hours out of prescribed time taking in account that the appellant was arrested on 19/5/2012 between 03.00 hours and 16.00 hours, and by 11.00 hours she was already at Anti-Drug Offices at Kurasini. Four hours later, she was taken to the hospital for examination and went back to ADU offices by 16.45 hours. No reason for the delay was given. We found this to be a serious the appellant was arrested, being aware of the prescribed time limits could have recorded the statement within the prescribed time at the airport. If that was not possible, the statement could have been reasonably recorded between 11.00 hours and 15.00 hours when the appellant was awaiting to be taken to the hospital which was still not the case. We are thus satisfied that having been recorded out of time, the cautioned statement of the appellant was illegally obtained". In the present case, the cautioned statement sought to be

tendered by the Republic depict that, Alex Faustine was arrested by police officers from Murongo Police Station on 04/09/2023 in the morning where he stayed until transported to Kagenyi police station. That, on 05/09/2023 at about 7:20 hours, PW8 commenced writing cautioned statement and concluded at 08:06hrs. Part of the cautioned statement reads that; “..... Nilikamatwa tarehe 04/09/2023 majira ya saa za asubuhi huko Murongo nilikokuwa nimejificha toka mwezi wa 02/2023 na 10 nilikamatwa na askari polisi toka kituo cha polisi Murongo na mara baada ya kunikamata nilipelekwa hadi kituo cha polisi Kagenyj..... UTHIBITISHO: Kwa mujibu wa k/f 57 cha CPA Cap 20 RE 2022.Mimi askari namba E.8176 D/SGT MASSATU ninathibitisha kuandika maelezo ya mtuhumiwa ALEX S/O FAUSTINE kwa makini na sahihi leo tarehe 05/09/2023 kuanzia saa 07:23hrs hadi saa 08:06hrs na ameyasoma mwenyewe ameridhika kuwa ni sahihi alivyoeleza yeye mwenyewe. R/OE.8176 D/SGT MASSATU” PW8, the OCCID who was with other police investigators went to collect the accused where he was kept immediately after arrest testified that; “On 04/09/2023 at around 07.00 hours, I received information from militiaman who were at dorrior at Chabukube that, that, they have seen Alex Faustine on the way to Uganda. I directed him to arrest him and place him under his security. He arrested him and place under his command. I went to Chabukube accompanied with other police officers...” Based on the cautioned statement sought to be tendered as an exhibit, it is evident that, accused was arrest on 04/09/2023 by police officers from Murongo police station, Kyerwa District. PW7 stated that they arrived to collect the accused at 21.30 hours. They took the accused and arrived at Kayengi Police Station on 05/09/2023 at 05:15hours. 11 PW7 testified that, the accused was arrested on 04/09/2023 at around 07.00 hours. Further, the cautioned statement sought to be tendered depict that; “...Mimi askari namba E.8176 D/SGT MASSATU ninathibitisha kuandika maelezo ya mtuhumiwa ALEX S/O FAUSTINE kwa makini na sahihi leo tarehe 05/09/2023 kuanzia saa 07:23hrs hadi saa 08:06hrs...” Having gathered the above facts, it is undisputed that, accused was arrested on 04/09/2023 at around 07.00 hours by police officers from Murongo police station and that accused’s cautioned statement was written by PW8 on 05/09/2023 from 07:20hrs hours to 08:06hours. Moreover, the facts confirm that, the accused person was under police restraint from 04/09/2023 at 07:00 hours and collected by PW7, the OCCID and other police investigators on 04/09/2023 at 21:30hrs. Meaning that, the accused stayed at Murongo police Station, Kyerwa District for 15 hours and 30 minutes. No reasons were given as to why the Police officers of Murongo police station who had all facts of the incidence managed to arrest the accused but failed to write cautioned statement within four hours prescribed by law. PW7, the OCCID with other investigators did not state any reason as to why they failed to record cautioned statement in their office at Murongo Police Station where the accused was kept for 15 hours and 30 minutes which station is within Kyerwa District in their jurisdiction. 12 In my view invocation section 50 (2) of the CPA must be accompanied reasons connected with investigation or transporting accused before recording statement for whatever reasons. I hasten to state further that, cautioned statement can still be written while investigation is ongoing. The section 50 (2) of CPA provides to circumstances for exclusion of time within which to record statement. The section states inter alia while the police officer

investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence- (a) while the person is, after being taken under restraint being conveyed to a police station or other place for any purpose connected with the investigation;

- (b) for the purpose of- (iii) enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer; (iv) enabling the police officer to communicate, or attempt to communicate with any person whom he is required by section 54 to communicate in connection with the investigation of the offence; (iii) enabling the person to communicate, or attempt to communicate, with any person with whom he is, under this Act, 13 entitled to communicate; or (iv) arranging, or attempting to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an interview with the person under restraint or while the person under restraint is doing an act in connection with the investigation;
- (e) while awaiting the arrival of a person referred to in sub paragraph (iv) of paragraph (b); or
- (f) while the person under restraint is consulting with a lawyer. In my view the above is among the factors warranting exclusion of time of four hours within which to write cautioned statement. There is no reason given by police officers arising from the above stated circumstances or beyond. It goes without saying therefore that, the cautioned statement by Alex Faustine is incompetent for want of compliance of mandatory provision of section 50 and 51 of the Criminal Procedure Act, Cap.20 R.E.2022. That said and done, I hereby uphold the second point of objection and consequently order that the prayer for admission of cautioned statement is hereby rejected. IT IS SO ORDERED. 14 DATED at BUKOBA this 19th March, 2025. G. P. MALATA JUDGE 19/03/2025 RULING delivered at BUKOBA this 19th March, 2025. G. P. MALATA JUDGE 19/03/2025 15

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