

TANZANIA / JUDGMENT

Criminal Session 7000 of 2024 Ruling MrishaJ

COURT
TANZLIIDECIDED
1 January 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF TANZANIA (SUMBAWANGA SUB-REGISTRY) CRIMINAL SESSION CASE NO. 7000 OF 2024 REPUBLIC VERSUS NCHAMBI S/o IKUMBO @ MBOGOMAJI SED LUSHINDIKA S/O INDIA ACCUSED 07th & 17th March, 2025 MRISHA, J. The prosecution aye r as an exhibit, the cautioned state orded from the second accused by PW7 name No. G.7 D l Ally, was objected by the learned counsel for the first a accused persons and, upon hearing and considering the parties' rival submissions, the court found merits in all objections and rejected the abovementioned cautioned statement. However, the reasons for such rejection, were reserved until today. The duo accused persons were arraigned before this court for the charge of Murder contrary to section 196 and 197 of the Penal Code, 1 Cap 16 R.E. 2022 and one of the documentary evidence the prosecution intended to rely upon in proving such offence, was the abovenamed cautioned statement. The raised objections are two-fold in the sense that the alleged cautioned statement contravenes the provisions of the law and secondly, that the same was not read during committal proceedings which is contrary to the provisions of section 246 (2) of the Criminal Procedural Act, Cap 20 R.E. 2022 henceforth the CPA. Submitting in respect of the first limb of objection, the counsel for the first accused had it that the cautioned statement alleged to have been recorded from the second accused, contravenes the provisions of sections 57 (4) (b) (c) & 58 (4) (b) of the CPA, Order 2 (1) of the Police and Auxiliary Services (Police General Order) Order 2021, GN. No. 315 published on 26.03.2021 and section X of Schedule B of the PGO, at page 619 all of which requires that the cautioned statement of the suspect should bear words which indicate that the a police officer investigating an offence, asked the suspect whether he would like to correct, alter or add anything to the recorded cautioned statement. According to the first accused's counsel whose argument was also backed by the one representing the second, the cautioned statement 2 sought to be tendered as an exhibit, contain words which do not correlate with those used in the standard form and worse still, the words written by PW7 in the contested cautioned statement, do not show if the second accused was given a chance to correct, alter or add anything something which renders the said cautioned statement invalid. To bolster his argument, the learned counsel cite e case of Petro Sule & Others vs Republic, Criminal Appeal 75 020, [2023] TZCA 17777 25 October 2023 Tanzlii, ge nd Mbuzi Lushona Mwangiki & 2 Ot rs iminal Appeal No. 159 of 2022 [2024] TZC 4) Tanzlii, which emphasize on the need for th ly with the aforementioned mandatory provisi w rwise, noncompliance of those provisions wi he ca ed

statement and make it invalid. Regarding th it was the submission of both defence counse t the cautioned statement which the prosecution has prayed to tender as exhibit, shows that it was certified by one Zengo Malelwa who is not the second accused and whose name is Lushindika S/O India, which indicate that the said cautioned statement was not read during committal proceedings contrary to the provisions of section 246

- (2) of the CPA. 3 He also submitted that where it appears that the cautioned statement which was read during committal proceedings differs with the one sought to be tendered in evidence, it is a trite law that both statements must be considered to have not been read during committal proceedings, as it was stated in the case of Simon Shauri Awaki @ Dawi vs Republic, Criminal Appeal No. 62 of 2020 [2022] TZCA 51 of (23 February, 2022) Tanzlii. A Thus, due to the foregoing submissions, the learned defence counsel urged the court not to admit the said cautioned statement in evidence. Their objections were however, contested by the learned State Attorney due to several reasons. W Starting with the first limb of objection, it was submitted that the provisions of the CPA and those of the PGO were complied with. Regarding the submission that the statement sought to be tendered as an exhibit contain words in the certification part which do not show if the second accused was given an opportunity to correct, alter or add anything on the record, the learned counsel for the prosecution Republic submitted that it is true that the same does not reflect the exact words as those appearing in the standard form, but that does not eliminate the 4 truth that the said cautioned statement complied with the provisions of the law. He also submitted that in the evidence of PW7 it is shown that the cautioned statement he prays to tender as an exhibit, is a standard form and by virtue of section 64 of the Interpretation of Laws Act, Cap 1 R.E. 2019, it is provided that deviations not affecting the substance and not calculated to mislead, may not vitiate the contents of the standard form. In the light of the above reasons, it was their view that the case of Petro Sule vs Republic (supra) is distinguishable to the circumstances of the case at hand for it does not prescribe how the cautioned statement should be recorded. Responding to the second limb of objection, the learned State Attorney contended that such objection has no merit because the second accused cautioned statement was read during committal proceedings. Also, while conceding that there is a difference between the cautioned statement sought to be tendered as an exhibit and the one served to the counsel for the second accused through dock brief, the learned State Attorney submitted that the contents of both statements are the same, save for the names of suspects. 5 He also submitted that even the first page of the document in possession of the learned defence counsel, bears the name of the second accused and, the said accused has not denied that his cautioned statement was recorded by PW7. Based on the foregoing reasons, it was the submission of the learned State Attorney that the objections raised by the learned defence counsel have no merits. He also urged the court to overrule the same and admit the cautioned statement of the second accused. In rejoinder, the learned defence counsel submitted that the counsel for the prosecution Republic has failed to tell which one between the two documents was read during committal proceedings which makes it difficult to ascertain whether it was the one bearing the name of Zengo Malewo or the one which bears

the name of the second accused. It was due to such uncertainty that the learned defence counsel urged the court to follow the decision of the Court of Appeal in the case of Simon Shaun Awaki (supra) and find that both statements were not read during committal proceedings. He also submitted in relation to the first limb, that the provisions of section 64 of the Interpretation of laws Act are irrelevant because the inflation noted on the certification part, has affected not only the substance of the intended cautioned statement, but also it has prejudiced the second accused. He added that the counsel for the prosecution Republic has not commented anything on the case of Mbuzi Lushona (supra) which justifies his concession on the argument that PW7 did not comply with the abovementioned provisions of the law. As indicated above, there are two objections used by the learned defence counsel with respect to the prosecution's prayer regarding the cautioned statement which have been recorded from the second accused. Having read and considered the objections and the parties' rival arguments, I find that the second limb of the matter is at hand. I say because it has been conceded by the learned counsel for the prosecution that there is a variation of names of suspect in the cautioned statement sought to be tendered by PW7 and the one served to the learned defence counsel. This is because in the cautioned statement sought to be tendered by the prosecution Republic, the name appearing on the certification part is that of the second accused, but in the cautioned statement which was served to the counsel for the second accused through dock brief, the suspect's name appearing therein, is that of another person whose name is Zengo Malelwa. In the case of Simon Shauri Awaki @ Dawi vs Republic, the Court of Appeal stated inter alia, that: "...since it is not certain as to which handing over certificate was read out during committal, it is not safe to conclude that any of the certificates was read out to the accused at the committal to enable the appellant to know the nature of evidence against him. This offended the provision of section 246 (2) of the Criminal Procedure Act, Cap 20 R.E 2019 (the CPA)." Despite the fact that the contested documents in that case were the handing over certificate, I still find that such case is relevant to the circumstances of the case at hand where it has not been disputed that there is variation of names of suspects in the document sought to be tendered as an exhibit, and the one served to the learned defence counsel. What the law requires is that all documents intended to be relied upon during trial of the accused person, need be read over to the accused during committal proceedings. It is also expected that such document should bear the same name of suspect at the time of tendering it as an exhibit during trial, and not as it has been observed in the case at hand. In our case, since it is not certain which one between the two cautioned statements was read out during committal proceedings, it is then my settled view that it is not safe to conclude that any of the statements was read out to the second accused at the committal to enable the said accused to know the nature of evidence against him. In the circumstances, I find and hold that the document sought to be tendered as an exhibit in this case, offended the provisions of section 246 (2) of the CPA. It is thus, due to the foregoing reasons that the court rejects such document to be tendered as an exhibit. Order according to DAT at SUMBAWA. A this 17th day of March, 2025 A.A. MRISHA JUDGE 17.03.2025

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/338935/source_file/55828cf00224ebd3/Criminal_Session_7000_of_2024_Ruling_MrishaJ..pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/Admissibilityofevidence-tanzlii-2024--6a3ea52d3b1caa9129826cb5>

Prepared on 14 October 2026 · Esheria