

TANZANIA / JUDGMENT

republic vs abdallah rajabu mwaliimu 2016 tzhc 1 15 may 2016

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
CRIMINAL SESSIONS CASE NO. 17 OF 2015 REPUBLIC VERSUS ABDALLAH RAJABU MWALIMU

RULING

W.B. Korosso, T.: The ruling relates to a trial within trial conducted to inquire on the voluntariness of a cautioned statement by Abdallah Rajabu Mwalimu sought to be tendered as evidence by the prosecution and upon objection raised by the defence on its admissibility. In this case, Abdallah Rajabu Mwalimu is charged with Trafficking in Narcotic Drugs contrary to section 16(1) (b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95 R.E 2002. The particulars of the offence being that on or about the 4th day of February 2011 at the Julius Kambarage Nyerere International Airport area, within Ilala District, Dar es Salaam Region, the accused person was found trafficking into the United Republic of Tanzania fifty four (54) pellets of narcotic drugs, namely cocaine hydrochloride weighing 716.5 grams valued at Twenty Eight Million Six Hundred Sixty Thousand shillings (28, 660,000/-). To prove their case the prosecution ventured into calling two witnesses who testified before this court. PW9- Inspector Petro Maskamo who averred that he recorded the statement of the accused person Abdallah Rajabu Mwalimu on the 6th of February 2011 from 20.00hrs after being directed by his supervisor, Afande Nzowa. That he had been handed the suspect, by one Staff Sergeant Alphonse at Police Anti-Drugs Unit (ADU) Headquarter offices situated at Kilwa Road Kurasini. The prosecution prayed to the court to tender the said cautioned statement as evidence and it was then that the counsel for the accused person objected challenging its admissibility on the following grounds.

1. That the statement was taken outside the parameters of the legally prescribed period for taking such statement, that is contrary to section 50(1)(a) and 51(1)(a) and (b) of the Criminal Procedure Act citing the case of Shida Luhanda Aidan@Emiliana vs Republic Criminal Appeal No. 192 of 2014 CAT (unreported); Jantwa Komba, Adam Omari, Sefu Omari Mfaume and Cuthbert Mhagama vs Republic, Criminal Appeal No. 95 of 2006, CAT (unreported) to cement his argument that the time prescribed for taking of suspects statement from time of arrest must be complied or otherwise extension of time must be sought from the appropriate authority. That failure to do that rendered the statement illegally obtained and thus inadmissible.

2. That the accused person was not informed of his rights nor provided time to call his advocate or relatives as prescribed by law that is section 54 of the Criminal Procedure Act, Cap 20 RE 2002
3. That the cautioned statement was taken without any caution being given as provided for under section 53© and 57(2)(d) of the Criminal Procedure Act, Cap 20 RE 2002 and in line with the holding in the case of Republic vs 2 Dhoulkefly Awadh Abdallah Criminal Sessions Case No. 22 of 2015 (HC) (unreported). Section 50(2) of the Criminal Procedure Act, Cap 20 RE 2002 provides an opportunity to the Police to extend time to write a statement where investigations are ongoing including the time for the accused to reach the place of inquiry, and that investigation was ongoing and as per the evidence which has been provided and that they will continue to prove the same and that the narrated provisions were complied with and also to prove the cautioned statement was made and that it was made voluntarily, during the trial within trial if the court so directs to proceed. It is trite law that the best evidence in a criminal trial, is that of an accused person who confesses to have committed the crime. It is equally settled law, however, that such a confession should not be readily inferred or taken for granted. In a criminal trial, therefore, as far as alleged confessions are concerned, the prosecution has the duty of proving that: The confession has been made properly and legally made, voluntarily and recorded correctly as held in the case of *A thum ani R ash id v R C rim inal A ppeal no. 138 o f 1994*, CAT Mwanza. In effect meaning that, the accused, by his conduct or words, made a statement, and that the statement or conduct amounting to a confession was made freely and voluntarily. The standard of proof, it must be pointed out, is that of proof beyond reasonable doubt in both instances. It is a principle of law also that where an accused person objects to the admission of an alleged cautioned statement, a trial court must first make an inquiry or go through a trial within trial to establish its voluntariness before accepting it as evidence see *T w aha A li and 5 O thers V R.*, *Crim inal A p p eal No. 78 o f 2004 3* (unreported) and *Paul Maduka & Four Others V R.*, *Criminal Appeal No. 110 of 2007* (unreported). Before we venture further we find it important to consider whether the accused person made the statement because during his defence he repudiated the statement. To repudiate a statement is to deny ever making a statement. It is interesting in this case, where the statement is repudiated and also a challenge is made on the legality of taking the statement and the provisions of taking the statement and the fact he was denied or not informed his rights. In the present case the defence raised an objection to the admissibility of the cautioned statement of the accused person upon reasons of illegality of the statement and lack of voluntariness. At the same time during the testimony of the accused person during the trial within trial he repudiated the statement stating he did not state anything to PW2 and he was not aware of any statement given by him on the 6th of February 2011 recorded by Inspector Petro Maskamo (in trial within trial) PW2 . The Court proceeded to trial within trial to inquire on the accused persons allegations especially on the issue of lack of voluntariness and to some extent the issue raised on illegality in writing the statement which was also addressed by the submissions from the prosecution and the defence. Upon consideration of arguments and

submissions of counsels for the defence and prosecution we find as follows: With regard to the first ground, that Section 50(1)(a) and (b) and section 51(1) (a) and (b) of the Criminal Procedure Act, Cap 20 R.E 2002 were contravened in taking of the statement since the 4 hours for which the investigators are given leave to get the statement on arrest of a suspect were not complied with. Arguing that the accused had been arrested on the 4/02/2011 and the statement is alleged to be taken on the 6/02/2011, without any evidence provided that the prosecution had been given an extension of time as required by 4 the averred to provisions. The Principal State Attorney representing the Republic, conceded to the fact that it is true that despite the fact that the accused person was arrested on the 4th of February 2011 his statement which is the subject matter in issue was taken on the 6th of February 2011 from 2.00hrs, but denying that it had contravened the four hour rule or that there was need for application for extension stating there were circumstances that led to the statement being taken on the 6th of February and the time of conducting further investigation and transporting the accused person to ADU headquarters from JNIA where he was arrested should be excluded by virtue of the contents of section 50(2)(b)(iv) of the CPA. Section 50 of the Criminal Procedure Act, Cap 20 prescribes available periods for interviewing persons. Under subsection (1)(a) the basic period is four hours commencing at the time when he was taken under restraint in respect of the offence. Section 51 (1) (a) and (b) of CPA provides for extension of time and that the extension is sought from a magistrate. S. 50(2)(b)(iv) of the CPA states: 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- for the purpose of 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. While for the Republic this means that the time for which further investigations are conducted which require the accused to take part is excluded from the four hours prescribed under Section 50(1)(a) of the CPA for the Defence, this is not the case, that this should be taken in the context of the prescribed four hours especially in view of the existence of section 51 which provides for application of extension of time where it is required. This Court having carefully considered the provisions said provision shares the views by the prosecution that the gist of section 50(2) of the CPA is recognition of time where the suspect/accused person may be part of continued investigation, and there being other factors important for delivery of justice in the particular case essential for both prosecution and defence which should be excluded when counting the four hours and that's why it is within Section 50 of the CPA and not section 51 providing for extension of time application. It is in evidence from the testimony of PW1 (trial within trial) that the accused person from his arrest on suspicion of drug trafficking having swallowed pellets suspected to have narcotic drugs was put under custody to await for him to defecate the pellets which he did from the 5th of February to the 6th of February 2011. It was on the 6th of February at 16.00hrs that there were no more pellets for him to defecate hence he was taken for

interview at ADU offices. It suffices that at the time of arrest from the evidence of Exh P4 (of the main case) the Observation form which was admitted in evidence and referred to by the prosecution in the trial within trial the accused started defecating on the 5th of February, 2011 and it is obvious that without the accused defecating any pellets, there was no offence that the accused could have been charged with. Therefore there is no doubt that from 4th of February 2011 to 6th Feb 2011 the accused person was under restraint doing an act pertaining to an investigation and therefore the said time can be excluded. The time of transporting the accused to the ADU offices is also to be excluded by virtue of the quoted provision and section 50(2)(a) of the , CPA stating; "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". In the case of *ofjanta Joseph Komba and 3 Others vs. Republic*, Criminal Appeal No. 95 of 2006 cited by the defence counsel we find the holding distinguishable in terms of the circumstances, where there was no explanation provided for the delay and nor on the interests of the republic prejudiced as propounded under section 169 of the CPA. From the above reasoning we find that there was no abuse with regard to the time of preparing the statement, since counting from the time of arrival at the ADU offices which evidence from PW1 and PW2 stated was around 17.30hrs to 18.30 and the time when the statement was written was 20.00hrs as can be discerned also from the contents of Exh. ID-1 a, it is 2-3 hours and thus within the four hours prescribed by law. It is important to understand and recognize that investigation of cases related to illicit trafficking of drugs are different and should be considered with their peculiarities, especially where the stomach becomes the storage room as in this case, have to be considered differently, because investigations need to consider the time for defecation/emission of pellets from the body and also to ensure the health of the suspect is also considered because without doubt such act of defecation of matters which are dangerous to the body require the body to recover and requires investigators to ensure that all the pellets are out. Therefore the court has a duty to provide leeway for this, to ensure justice is done and having regard to the position of this Court on this issue it is clear that ground 1 of the objection falls. On the second ground of objection that the accused person was not informed of his rights nor provided time to call his advocate or relatives as prescribed by law that is section 54 of the Criminal Procedure Act, Cap 20 RE 2002. We find that this issue should not take much time, because the evidence of PW2 and DW1 is relevant and that of Exh. ID-P1. PW2 testified that he had informed the accused person of his rights to call an advocate or relative and of not giving any statement but that if he proceeds to give his statement it can be used as evidence against him in a Court of Tribunal, that after that the accused person had signed. It suffices that the accused person did not provide any explanation of the signature purported to be his in Exh. ID-P1, he only stated he was unaware of the statement. At the same time he informed the Court that he was denied access to his aunt saying he had wanted his aunt before making the statement, in effect conceding to the fact that he had been informed of his rights to call a relative or lawyer and also of making the statement. The assertion by the accused in the trial within trial, left the Court with certainty that his denial of knowledge of the statement was an afterthought, but this will be considered in detail if it is to be admitted and when addressing

the weight to be given. The other issue is assertion by the defence that even if the accused was informed of his rights to have a relative or advocate the time provided to him was not enough to enable him call a lawyer or advocate. The court has carefully considered this argument because it is paramount to furtherance of justice to the accused person and considered the testimony of PW2 who had stated that, he found no need to provide more time because the accused person had stated he did not require a relative or lawyer and stated if the accused had requested for time he would have provided for the time. Having considered both submissions we find that the assertion by the accused person are not substantiated by any evidence as provided hereinabove and that the prosecution have proved to the standard required and that section 54 of the Criminal Procedure Act was complied with and therefore the second ground of objection is overruled The third ground of objection that the cautioned statement was taken without any caution being given as provided for under section 53(c) and 57(2)(d) of the Criminal Procedure Act, Cap 20 RE 2002 and in line with the holding in the case of Republic vs Dhoulkefly Awadh Abdallah Criminal Sessions Case No. 22 of 2015 (HC) (unreported). The learned Principal State Attorney objected to the said assertion stating that the Cautioned statement was taken under section 58 of the CPA and contending that Cautioned statement can be recorded under section 57 and 58 of the CPA. It is clear from the law that a cautioned statement can be taken under section 57 and 58 of the CPA, the difference is how the statement is obtained. If it is obtained by way of interview then it is to be recorded under section 57 and if it is by way of the suspect volunteering to make his statement without being solicited with questions it is to be recorded under section 58 of the CPA this principle is well established in the case of Ramadhani Salum vs. R, Criminal Appeal No. 5 of 2004 which alluded to the fact that though a cautioned statement can be taken under any of the two sections, the circumstances within the statements are taken are different whereas under section 57 it may be a result of either answers and questions asked by a police officer or partly answers an partly volunteered statements while under section 58 it is a result of a wholly volunteered and unsolicited statement by the suspect. From the evidence of Exh. ID-P1, the caution is written to be taken under section 58 of the CPA. PW2 stated he took the statement under Section 58 of CPA and that the accused person was narrating without being solicited after he had been provided with his rights and caution. From the said exhibit for identification this Court finds there is as follows. Maelezo ya Onyo: Kwa mujibu wa K/F 58 cha Sheria ya Mwenendo wa Kesi ya Jinai, Act No. 9 of 1985 Maelezo ya Onyo: Wewe Abdallah S/O RAJABU MWALIMU UNAONYWA NA MIMI ASKARI NA: A/INSP PERTRO MASKAMAO KWAMBA 9 UNATUHUMIWA KWA KOSA LA KUSAFIRISHA DAWA ZA KULEVYA K/F 16(b)(i) CHA DRUGS AND PREVENTION OF ILLICIT TRAFFIC IN DRUGS ACT CAP. 95 RE 2002 HULAZIMISHWI KUELEZA LOLOTE LILE JUU YA SHTAKA HILI BALI KWA HIARI YAKO MWENYEWE YOUTE UTAKAYOYATAMKA YATAANDIKWA NA KUTUMIWA MAHAKAMANI KAMA USHAHIDI PINDI YAKIHITAJIKA. PIA UMEPEWA HAKI YA KUWA NA WAKILI, JAMAA AU RAFIKIWAKATIMAELEZO YAKO YANAANDIKWA. Then there are signatures of the Inspector taking the statement and the accused and also a name of the accused and then there is JIBU LA ONYO stating: SILAZIMISHIWI KUELEZA LOLOTE LILE JUU YA SHTAKA HILI BALI KWA

HIARI YANGU MWENYEWE NA KWAMBA YOTE NIATAKAYOYATAMKA YANAANDIKWA KUTUMIKA MAHAKAMANI KAMA USHAHIDI PINDI YAKIHITAJIKA PIA NIMEPEWA HAKI YA KUWA NA WAKILI JAMAA NDUGU , , AU RAFIKI WAKATI MAELEZO YANGU YANAANDIKWA. ■v , Thereafter there are names of the Inspector and the accused and the accused signature. PW2 had also testified that after writing the statement the accused read the statement and then signed it and every page of the statement and then PW2 wrote uthibitisho and signed. Responding to the objection raised by the defence, the prosecution contended that section. In any case even if taken under section 57, But it is not mandatory for the question and answer style to be used. Section 57 (2) (a) of the Act speaks of "so far as it is practicable to do so", suggesting that where it is impracticable one may dispense with that style. It is true that a statement under section 57(2) has a prescription 10 made in terms of the need for putting the time which is not the case as those taken under section 58 of CPA, the caution has to comply with section 53 and this court looking at the contents of section 53 of the CPA and the caution in Exh. ID-1 finds that there is compliance. We found the case cited by the defence Dhoulkefly Awadhi Abdallah@ Dullah Awadhi Criminal Sessions Case No. 22 of 2015 distinguishable having different circumstances to the present case. Consequently we find that this objection also falls. In the premises the court finds that the raised objection has no merit and it is therefore overruled. The cautioned statement therefore for reasons stated herein is found to be admissible having complied with the required legal provision. 11

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