

TANZANIA / JUDGMENT

republic vs paul zaila 2017

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IN THE HIGH COURT OF TANZANIA (MWANZA REGISTRY) AT SENGEREMA CRIMINAL SESSION
CASE NO.150 OF 2013 REPUBLIC..... PROSECUTOR VERSUS PAUL S/O
ZAILA.....ACCUSED

RULING

BEFORE: MAIGE, J In the course of his testimony in chief, PW-3, E.9411 D/CPL Mohamed sought to produce the cautioned statement of the accused into evidence. Mr. Sayi, learned advocate for the accused strongly objected to the admissibility of the same on account of two reasons. In the first place, he claimed that the caution statement was procured in contravention of the mandatory provisions of sections 50 (1) (a), 51 and 57(4) of the Criminal Procedure Act, Cap. 20 R.E 2002, ("CPA"). In the second place, it was his contention that the same was not procured freely and voluntarily as the law requires. The appellant has sought to withdraw the application with a liberty to refile. The prayer for withdrawal which was conceded by the counsel for the respondent was made when neither of the parties had raised a preliminary objection. As I narrated elsewhere in this ruling, the issue of maintainability of the appeal was raised by the court on its own motion. The prayer for withdraw can thus not have any effect of preempting a preliminary objection. The issue which calls for a judicial answer is whether the instant appeal is capable of being refilled afresh so that the order as to a liberty to refile it can be relevant. The answer to this question is obviously no. The reason being that you cannot grant leave to appeal against a decision which is not appealable. In any event, an order withdrawing an appeal without a liberty to refile operates as a constructive res-judicata to a subsequent appeal and not a different action such as reference. For those reasons therefore the appeal is hereby marked withdrawn without a liberty to refile. I make no order as to costs. It is so ordered. I.MAIGE JUDGE AT MWANZA 12/04/2017 As the objections raised are governed by two different procedures, I requested the counsel to address me first on the issue of legality of the procurement of the caution statement. It was in my mind that; should the issue of admissibility of the confession survive upon disposal of the issue of non- compliance of the law, a trial within a trial would be conducted to determine the voluntariness of the caution statement. In his brief submissions, Mr. Sayi was of the humble opinion that, the caution statement of the accused was recorded outside the statutory period. He submitted that, from 20.11.2012 when the accused was put into restraint

to 22.11.2012 when his cautioned statement was recorded, there is a difference of two days, while the statutory period available for recording of such a statement according to section 50 (1) (b) of the CPA, is four hours from the time when the accused was put under restraint. He submitted further that; where the failure to observe the time limit has plausible explanations, the investigating officer is entitled, under section 51 of the CPA, to apply for extension of time to a magistrate. The counsel concluded, relying on the authority of the CAT in RAMADHANI SEIFU @ BAHARI AND TWO 2 OTHERS VS. REPUBLIC, CRIMINAL APPEAL NO. 221 of 2010 that; as the caution statement was recorded after expiry of the statutory limit without an extension order from the magistrate being sought, it was illegal and inadmissible in law. On her part, Miss. Fyelegete, learned state attorney, much as she admitted that the cautioned statement was recorded out of time, she was quick to retractor the effect of the same by submitting that, there was a justification for the delay. She referred the Court to the evidence of PW-3 that, he could not record the statement on 20.11.2012 because they had arrived at the police station during night and there was no electric power. He could either not record on 21.11.2012 because he was taking part in a special operation to control an illegal demonstration at Nyaunge village. In her submissions, Mr. Fyelegete, has urged the Court to invoke its absolute discretion under section 169 (1) of the CPA and admit the caution statement notwithstanding its non-compliance of the law. 3 In his Rejoinder submissions, Mr. Sayi reiterated that the caution statement was illegally extracted. He criticized the learned state attorney for failure to comment on non-compliance of sections 51 and 57(4) of the CPA. It appears not to be in dispute on the mandatory legal requirement that a cautioned statement has to be recorded within 4 hours from the time of arrest and detention of the accused. The line of the contention is whether in the circumstance of this case, the cautioned statement in question can be admitted under section 169 (1) of the CPA notwithstanding that it was time barred. Section 169 (1) and (2) of the CPA upon which the learned state v attorney relies provides that where in the course of the trial, admissibility of a statement is challenged for non-compliance of law, the court shall, in its absolute discretion, not admit the statement unless it is, on the balance of probabilities, satisfied that the admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the right and freedom of any person. Subsection 2 lists the factors that must be considered before exercising the absolute discretion under the respective provision. Under subsection 3 thereof, the duty to prove on balance of probabilities that the document ought to be admitted under section 169 (1) lies to a party in whose favour the document is sought to be produced. In this matter, the provision of the law which is claimed to have been violated is contravention of section 50 of the CPA which set out time limit within which a cautioned statement can legally be extracted. The learned state attorney opines that the reasons adduced by PW-3 in his evidence suffices to justify invocation of the discretion under section 169 of the CPA. It sounds to me to be the position of the law that, where the prosecution intends to rely on a caution statement, the date of the arrest and detention of the accused and the surrounding circumstances, including the reasons for delay to take caution statement, must be put clear in the factual allegation laying the foundation of the charge. They must be reflected in the witness statements exposed during committal proceedings. The trial court cannot rely on the evidence of the police officer who recorded the cautioned statement to resolve the issue of where and when the accused was arrested for the purpose of determining

an objection as to admissibility of a caution statement, if the same is not founded on the factual allegations in PH and 5 Committal Proceedings. The rationale behind is to avoid possibility of there being manufactured new facts to escape the effect of non-compliance of law. Besides, it would not be safe for the Court to rely on the evidence of the investigating officer who is yet to be subjected to cross examination. In this matter, the reasons for delay in the evidence of PW3 is coming for the first time in trial. It is neither in the witness statement of PW3 which was exposed during committal proceedings nor in the summary of the facts of the case which was exposed during preliminary hearing. I understand that, the witness statements become part of the record for the purpose of the trial after being admitted into evidence. I am firm however that, for the purpose of determining a preliminary objection as to admissibility of a cautioned statement pertaining to pure points of law, the proceedings in the preliminary hearing and committal proceedings are quite relevant. I have been called upon to exercise my absolute discretion under section 169 (1) of the CPA. I am aware that the respective provision has been •. judicially considered by the Court of Appeal in NYERERE NYAGUE VS. 6 REPUBLIC, CRIMINAL APPEAL NO. 67 OF 2010 to mean that in fit cases, the trial court may, under the discretion in the respective provision, admit a caution statement which has been procured outside the statutory period. The discretion, according to the said authority, has to be exercised judiciously and the factors listed in items (a), (b) and (c) of subsection 2 must be accounted for. The factors listed in the respective items are seriousness of the offense involved, nature and seriousness of the non-compliance of the law and the extent to which the evidence sought to be produced might have been obtained legally. The use of the words "as to include" in subsection 2, in my knowledge, connotes that the factors listed in items (a), (b) and (c) are not the only factors to be considered. The court may consider other factors in addition to those in the subsection. Let me examine the reasons of the delay in relation to the three factors. I will commence with the first factor as to seriousness of the offense involved. The offense involved in this matter, is murder. This is one of grievous offence which attract death penalty. In my view, the quality of evidence in cases of this nature must be of the highest level to reflect the seriousness of the offense. I do not think under the circumstance that, the first factor can operate in favour of admission of the caution statement. I will now consider the second factor which is seriousness of violation of the law or non-compliance. In this case, the non-compliance at issue is failure to extract a cautioned statement within the statutory period. The Court of Appeal has held from time to time that, the omission is a mere technicality but an incurable defect. (See for instance PAMBANO MFIHINGE VS. THE REPUBLIC, CRIMINAL APPEAL NO. 283 of 2009, THE COURT OF APPEAL TANZANIA AT I RING A (UNREPORTED) and PETER KIDOLE VS THE REPUBLIC, CRIMINAL APPEAL NO. No. 66/2011, COURT APPEAL OF TANZANIA, I RINGA (UNREPORTED)). In my opinion therefore the second factor is also against the admission of the document. Let me wind up with the third factor as to the possibility of the evidence in question being obtained lawfully. In this matter, it is apparent that the extraction of the caution statement was hopelessly late. Both in fact and evidence, the prosecution has not bothered to explain why didn't they apply for extension of time in terms of section 51 of the CPA. The inference that can be drawn is that, in extracting the caution statement without applying for extension of time, the investigating police officer was taking the law on his hand. This is a clear implication that the evidence was procured illegally. In my

opinion therefore, the third factor is also against admission of the document. It was also submitted for the Republic that; the inadmissibility of a time barred caution statement is implied in the authority in RAMADHANI SEIFU @ BAHARI AND TWO OTHERS VS. REPUBLIC not to be absolute. She inferred it from page 8 of the judgment where the Court of Appeal criticized the prosecution for failure to justify the delay. I have read the respective page of the judgment and, in my humble opinion, it does not expound any principle of law. Indeed, it does not ever seem to have formed part of the rationale behind the decision. The principle of the law stated in the said decision, I would agree with Mr. Sayi, learned advocate is that, failure to record the cautioned statement within four hours from the date when the suspect was put under restraint is, unless there is an extension so to do, an incurable defect. 9 In view of the foregoing discussions, I find that the preliminary objection has merit and it is hereby sustained. The caution statement of the accused shall not be admitted into evidence. I.MAIGE JUDGE At Senaerema 24/ 10/2017 10

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