

TANZANIA / JUDGMENT

RULLING PRARYER

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30 June 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB
REGISTRY AT DAR ES SALAAM CRIMINAL SESSION CASE NO. 35690/2024 REF NO
202412242000035690 REPUBLIC VERSUS EIPHANY JOHN
KAWISHE.....ACCUSED

RULING:

26th & 26th Feb 2025: KIREKIANO J: The accused herein stands charged with one offence of manslaughter contrary to sections 195 and 198 of the Penal Code [Cap 16 R.E 2019]. According to the information filed, it is alleged that on the 30th day of June 2024, at the Kipunguni Matembele area within Ilala District in the Dar es Salaam Region, the accused unlawfully caused the death of Fikiri Festo Faya. The accused pleaded not guilty to the information. When the trial was in progress, the counsel for the accused, Mr Peter Kibatata, prayed to this court to have witness PW3, Dr Ngozi Francis Festo, recalled for 1 further cross-examination. To support his prayer, Mr Kibatata pegged the same under section 147(4) of the Evidence Act cap 6. [RE 2022] The basis of this prayer is that a new fact came to the attention of the defence that, on 3.7.2024, when PW3 did the postmortem examination of the deceased body, he did not possess the requisite accreditation from the Medical Council of Tanzania (MCT) and, thus, was incapable of conducting such a postmortem. Mr Kibatata, thus, urged this court to exercise its discretion, to meet the ends of justice, and if that is done, the republic shall have the right of further re-examination. Miss Werema for the Republic objected to the prayer, arguing that it is an afterthought. She said that when PW3 gave his evidence, he introduced himself by stating his qualifications and where he was trained. The counsel for the accused was present and did not question this. She argued that defence counsel awaited the hearing of all other witnesses and came up with this prayer. Thus, section 147 (4) should not be blindly applied. According to her, granting the application will delay the determination of these proceedings. She beseeched me to refuse the prayer. 2 In his rejoinder, Mr Kibatata argued that if there is no qualification to PW3, then it goes to the root of the case. Thus, since this fact came to light later, it is in the interest of justice that the same be granted. On my part, I note that under section 147(4) of the Evidence Act, Cap 6 [RE 2022], this court has the power to recall a witness, the section provides; The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination and if it does so, the parties have the right of further cross-examination and re-examination

respectively" This is a discretionary power of the court that has to be exercised judiciously. What is clear is that this power shall be exercised to meet the ends of justice. The compelling circumstances in favor of granting the prayer include new facts, unforeseen situations, or inadvertent omissions. A witness shall not be recalled to fill the gaps in the evidence that was given. As such, it is not the first time this court has come to an akin situation. Reference is made to the decision in STANBIC TANZANIA LIMITED VS. SUMRY BUS SERVICES AND FOUR OTHERS, MISCELLANEOUS CIVIL APPLICATION NO. 386 OF 2022, where 3 Kisanya J. held that a witness can be recalled at any time. As such, in Kuringe Real Estate Co. Ltd vs NMB Bank PLC (Commercial Case No. 104 of 2023) [2024] TZHCComD 121 (21 June 2024) this court Mkeha J reasoned that; the determinative factor in permitting the recall of a witness will always be whether the recall is essential to a just decision in the case. I subscribe to this position. In this case, the alleged new facts pertain to the witness's competence to perform a postmortem examination. Like all cases, it is important that this case be decided on evidence whose legality is not questionable. I have also considered the submission by the learned state attorney for the Republic that granting the prayer will delay the proceedings. It is on record that the said witness is in Dar es Salaam and within reach. This court takes note of the tight schedule of the hearing of this case, yet nothing will be rushed if justice demands otherwise. In the upshot, the prayer is granted. The prosecution witness PW3, Dr Ngozi Francis Festo, should appear for further cross-examination to the extent of his qualification. It is so ordered. 4 A J KIREKIANO JUDGE 26.2.2025 COURT: Ruling delivered in presence of Miss Jackline Werema (SSA) and Miss Grace Kibaki, state attorney for the Republic, and in presence of Mr Peter Kibatala for accused via audio link from Kigoma A J KIREKIANO JUDGE 26.2.2025 5

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Prepared on 12 October 2026 · Esheria