

TANZANIA / JUDGMENT

the republic vs george wambura nyangare sura 2023 tzhc 21441 25 september 2023

COURT
TZHCDECIDED
25 September 2023

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THE UNITED REPUBLIC OF TANZANIA (JUDICIARY) THE HIGH COURT (MUSOMA SUB
REGISTRY) AT MUSOMA ORIGINAL JURISDICTION CRIMINAL SESSIONS CASE No. 181 OF 2022
THE REPUBLIC v. 1. JOHN MBATIRA @ MTUKE

2. SADICK SHABANI @ YOHANA

3. MANGA MGONOKI

4. STEVEN AUGUSTINO @ ODIERO RULING [TRIAL WITHIN TRIAL] 23 09 2023 & 2S.09.2023
Mtulya, J.: In the course of hearing the present case, Police Officer G. 7338 D/Cpl. Haruna (PW5) prayed to tender cautioned statement of Mr. John Mbatira @ Mtuke (the first accused) allegedly made before PW5. However, the prayer was protested by the defence attorneys for two (2) reasons, viz. first, it was made after a lapse of four (4) hours' time period as per section 50 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the Act); and second, the first accused was tortured by the police officers during recording of the cautioned statement. Following the contest, Mr. Tawabu Yahya Issa, learned State Attorney for the Republic prayed the matter be resolved as per directives of the Court of Appeal in Paulo Maduka & Four Others v. Republic, Criminal Appeal No. 110 of 2007. The prayer was supported by the Defence Attorneys. I have read the decision in i Paulo Maduka & Four Others v. Republic (supra) and Twaha Ali & Five Others v. Republic, Criminal Appeal No. 78 of 2004 and found that when an objection is raised in the circumstances, like in the present case, everything must stop in favor of the inquiry or a trial within trial to determine voluntariness of the alleged confession. The trial within trial was conducted in the present case and the Republic had marshaled a total of two (2) witnesses, namely H. 83 D/Cpl. Onesmo (TWP1) and G. 7338 D/Cpl. Haruna (TWP2) to testify in the trial. According to TWP1, he had arrested the first accused on 6th July 2022 at around 04:00 hours at his home residence at Mwanzaburiga Village within Butiama District and remanded him in Police Custody at Butiama Village at 05:00 hours. Regarding the reason of one hour time period from 04:00 hours to 05:00 hours, TWP1 testified that it was for movement from Mwanzaburiga Village to Butiama Village by use of police vehicle. On his part TWP2 testified

that he recorded the first accused cautioned statement on the same day at 08:00 hours after following all necessary procedures, including explaining his rights before recording the statement. In his testimony TWP2 stated that he recorded the statement without any torture or threat in a special interrogation room attached with papers, chairs and tables aimed at recording witnesses and accused persons statements. According to TWP2, after recording the first accused's cautioned statement, the 2 first accused authenticated the same by entering his signature both in writing and thumb print. On the other hand the defence side had summoned one witness, the first accused (TWPl), who testified that he was arrested at his home residence at Mwanzaburiga Village within Butiama District on 5th July 2022 at 23:00 hours with a bundle of police officers and was brought before Butiama Police Station where he was tortured on legs to confess the killing of Rashid Ally Hassan (the deceased) and that the police had kept him in custody for a month up to 5th August 2022, and he was recorded the alleged cautioned statement on the second day of the arrest 7th July 2022. According to him, he cannot recall the recorded statement and he does not know the deceased, Mr. Sadick Shabani (the second accused) and Mr. Manga Mgonoki (the third accused). In the opinion of TWPl, he admitted the offence and signed the cautioned statement to save his life. I have carefully considered the materials brought by the parties in the present contest and perused the alleged cautioned statement of the accused, which was admitted as exhibit TW1, for purposes of the scrutiny. I have also consulted the law regulating confession as enacted in section 27 (1) & (3) of the Law of Evidence Act [Cap. 6 R.E. 2022] (the Evidence Act) and its interpretation borrowed in *Tuwamoi v. Uganda* [1967] EA 84, where the East African Court of Appeal had resolved that, the main essential for the validity of a 3 confession is that it was voluntary, whereas section 50 (1) (a) of the Act provides for four (4) hours within which confession must be extracted. Regarding the hours in taking the alleged confession, TWP2 shows that it was recorded within four (4) hours as the accused was brought at Butiama Police Station around 05:00 hours and was recorded the cautioned statement at around 08:00 hours on the same day of the arrest 6th July 2022, whereas TWDI testified to have been recorded the statement on the second day, 7th July 2022. I have scanned TW1 and noted that the recording started at 08:00 hours and ended at 10:08 hours on 6th July 2022. However, exhibit TW1 is silent on when the accused was brought before Butiama Police Station. I am aware there is a statement in TW1 that the accused was arrested on 5th July 2022 at 23:47 hours with a bundle of police officers, and did not directly went to Butiama Police Station, but they went through searching other accused persons in the residences of Mr. Osingo James and the third accused and finally the officers successfully arrested the third accused. It is unfortunate in the present record, TW1 is silent on when the exercise of searching accused persons ended. In that case, on the record, I remain with contesting evidence of TWP1 and TWDI with regard to the time of detention. I have however gone further and noted that the alleged cautioned statement of the first accused explains clearly how the murder 4 incident was planned, the motive behind and how was executed. There is also in the statement detailed information on family matters of the accused that could only be produced by the first accused. I am aware the accused has complained on torture and threats was forced to sign TW1. However, in the totality of

evidence registered on this trial within trial, I believe that the accused was not tortured. He may have produced the statement freely and voluntary before TWP2. The statement may therefore be lawfully admitted in the main trial. In that case, the points of objection raised by the Defence Attorneys are hereby overruled. Judge 25.09.2023 ^Tte^Wgwas pronounced in open court in the presence of the accused persons, Mr. John Mbatira @ Mtuke, Mr. Sadick Shabani @ Yohana, Mr. Manga Mgonoki, and Mr. Steven Augustino @ Odiero, and their learned Defence Attorneys, Mr. Baraka Makowe, Mr. Daud Mahemba, Mr. Amos Wilson and Mr. Victor Kisaka and in the presence of Mr. Tawabu Yahya Issa and Ms. Evangelina Ephrahim Mukarutazia, learned State Attorneys for the Republic. F. H. Mtulya Judge 25.09.2023 5

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