

TANZANIA / JUDGMENT

the republic vs david ismail kisalwa

2024 tzhc 869 19 february 2024

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TZHCDECIDED
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THE UNITED REPUBLIC OF TANZANIA (JUDICIARY) THE HIGH COURT (MUSOMA SUB REGISTRY AT MUSOMA) ORIGINAL JURISDICTION CRIMINAL SESSIONS CASE No. 10 OF 2023 THE REPUBLIC v. DAVID ISMAIL @ KISALWA RULING [TRIAL WITHIN TRIAL] 19.02.2024& 19.02.2024 Mtulya, J.: This Ruling emanates from a protest registered by Mr. Evance Njau, learned defence counsel for want of application of section 169 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the Act) on exclusion of illegally obtained evidence. According to Mr. Njau, the evidence of alleged cautioned statement of Mr. David Ismail @ Kisalwa (the accused) was obtained in breach of section 27 (1) & (2) of Evidence Act [Cap 6 R.E 2022] (the Evidence Act) which requires voluntariness of a confession made before a police officer. The objection originated from a prayer of police officer H. 4501 D/Cpl. Fredrick of Butiama District Police Station (TPW1) who was marshalled by the Republic as prosecution witness number six (PW6) to produce evidence against the accused. In the course of producing his evidence, TPW1 prayed to tender the alleged cautioned statement of the accused. According to TPW1, on 19th March 2022, the accused was interrogated and freely confessed to have killed his daughter by poison administered in a soda drink. In his evidence, TPW1 stated i that the accused was interrogated in interrogation room without any other person and was informed all of his rights before the interrogation could take its path. TPW1 stated further that he read the statement before the accused and asked him to sign and he had signed the same by thump-print without any protest. Finally, TPW1 testified that the accused did not complain or report to any authority on the alleged torture or ill-treatment. In defence, the accused stated that he was tortured at Butiama District Police Station by two police officers, Richard and another one to confess the statement hence from the torture he signed unknown paper which it turned to be a confession statement. According to the accused, the detailed information in the paper was produced by his wife, Wakuru Marwa and Mr. Amos Bina, who were the first persons to be interrogated by the police on the subject. Regarding presence of PF.3, scars or wounds in his legs or reporting of the beatings to any authorities before hearing of the case, the accused had replied that PF.3 belongs to the police and cannot be offered in their own cause, he was injured internally without any scars and reported the incident at prisons authorities. The law regulating confession is enacted in section 27 (3) of the Evidence Act which provides that a confession made to a police officer shall be held involuntary if the court believes that it was induced by threat or promise. The provision

had received an interpretation from the celebrated case of *Tuwanoi v. Uganda*. 2

[1967] EA 84, where the East African Court of Appeal held that, the main essential for the validity of a confession is that it is voluntary. In the present contest, the question is whether the confession was involuntarily made. In aid to the resolution of the instant dispute, I have decided to invite and peruse the alleged cautioned statement, admitted in the trial within trial as exhibit TP1 for scrutiny purpose, and found that the accused had produced detailed information with regard to his historical background, home residence, family background, family disputes, activities, travels to Kahama-Shinyanga and Butiama-Mara, reasons and plans to kill the deceased. In his second page of the statement, the accused states that: ...baada ya mgogoro wa kutotoa mahali na kwenda Kahama-Shinyanga...na kurudi baada ya kumuomba msamaha muda wote Hi tu/ee watoto, iakini aiinikataiia, ndipo nikachukua uhamuzi wa kurudi... niiiendeiea kumuomba msamaha, iakini msimamo wake uiibaki pale paie...kwa kuwa niiikuwa bado nampenda na kuipenda famiHa yangu...niiiamua kuingia kwenye maamuzi magumu na kwenda kwenye duka ia pembejeo za kiiimo lililopo Butuguri-Butiama, jirani na maduka ya Mzee Ngabo na kununua sumu ya kuua wadudu katika zao ia nyanya aina ya Mocron kisha kununua soda za kopo nne na kwenda hadi Kijijini Kibubwa a/ipo mke wangu na watoto baada ya kuachana...niiitoa soda ziie na sumu kisha kuzichnganya na 3 kuwapa wanywe nikiwaambia kuwa nimewaletea zawadi... Anna David na Selemani David wao walikunywa, Ha Zai na Ismail wao waligoma kunywa baada ya kuona nazichanganya. The indicated details in the statement would only be produced by a person who has direct knowledge of what had transpired. I am aware that at one point in time it was difficult to grasp the accused as whether he alleged to have been forced to record the statement or he did not record the statement at all. Similarly, it was difficult to follow him as whether he was forced to sign the statement on 19th March 2022 or 20th March 2022. The confusions just shake his credibility and reliability and add more value to the prosecution in considering the details of the statement. Having said so, and considering all circumstance in trial within trial, I am persuaded to believe that the accused was not tortured or forced to confess the statement. The statement was freely and voluntarily made. The same may lawful be admitted in the case. The objection raised by Mr. Njau for want of application of section 169 (1) of the Act and section 27 (1) & (3) of the Evidence Act is hereby overruled. It is so ordered. 4 This Ruling was delivered in the open court in the presence of all accused person, Mr. David Ismail @ Kisalwa and his learned Defence Attorney, Mr. Evance Njau and in the presence of Mr. Abdulkheri Ahmad Sadiki and Mr. Zarubabei Ngowi, learned 5

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