

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 36 OF 2010

REPUBLIC

VERSUS

MBEGU JUMA @ PAZI

Date of last order: 21/07/2014

Date of Ruling: 22/07/2014

R U L I N G

F. Twaib, J:

This ruling is made in a trial within a trial, conducted after the accused repudiated his cautioned statement.

When PW1 Det. Cpl. Charles tried to move the Court to admit the accused's cautioned statement, Mr. Nkwera, learned defence counsel rose up with an objection, saying that his client did not sign the said statement, thereby disowning the same. Counsel later added another point: that the second page of the statement contains no signature at all, contrary to section 58 (2) of the Criminal Procedure Code.

This is what led to the trial within a trial. The prosecution called PW1 Det. Cpl. Charles, who basically told the Court that he had taken the accused's cautioned statement after he had followed the required procedure: He identified himself to the accused, he told him that he was going to take his statement, which could be used against him at

the trial, and that he was entitled to have the presence of his relatives or friends during the interview. The accused then narrated the story to him, starting with earlier criminal incidences in which he was allegedly involved, and finishing with his participation in the robbery that resulted in the fatality leading to this indictment. PW1 further said that after he had written the statement, he read it out to him before asking him to sign it, and he signed it in appropriate places. PW1 told the court that he could remember the accused's signature, which was in form of the accused's name. He pointed to several areas where the accused's name appears in a distinct handwriting.

Responding to Mr. Nkwera's cross-examination, PW1 admitted he could not remember the day of the week he took the accused's statement or the colour of the shirt he was wearing. He said he gave him the opportunity to call anyone he felt should be present when he gave his statement, but the accused said he did not need one. PW1 did not see the need of taking the accused to a justice of the peace, as he was equally qualified to take his confession statement. He maintained that he did not force him to say anything or to sign anything, and that what showed that the statement was voluntary were the various stories he told him of earlier robbery and burglary incidences, and his signatures on the statement.

When Ms Mkonongo re-examined him, PW1 said that three things he did during the interview that he was required to do so were that he identified himself to the accused, he told him he was a murder suspect, and that he had a right to have a relative or friend present during the interview. The accused himself did not want to take up that option.

The accused was called to give evidence in the trial within a trial as DW1. He made a lengthy testimony, telling the court how he was arrested, subjected to severe torture by the Police and threatened

with death if he did not name his fellow culprits. He was taken in the middle of the night to a deserted place where he was told he would be killed unless he did what he was told. Seeing that his life was in danger, he succumbed and took the Police to a house in the neighbourhood where his friends lived.

Once there, the accused called one of them (Saidi) and asked him to open the door for him. Saidi opened the door, and three were arrested: Saidi, Shija and Mahamud. The accused said that PW1 did not use any threat against him, but that what he (the accused) did not know what he had written when he took his statement. He said he had asked him ordinary things, and it was only the next day that he came with a piece of paper and told him to sign. He put his thumbprint thereon, not his name. He said though he could read and write, he only put his thumbprint on the statement. He denied having signed his name on the statement. He said he was told by PW1 that once he signed, he would be allowed to go home. Since his mother and father were there (they had sent him some food), he believed what PW1 told him, which is why he agreed to put his thumbprint. However, he was not given bail, and was instead charged with murder.

During cross-examination, Ms Mkakatu made the accused write his name on a piece of paper and asked him whether there was any difference in the handwriting. The accused said the letters in the statement were more condensed than the ones on the paper he had written in court.

That was all the evidence adduced at the trial within trial. The prosecution is seeking a statement allegedly made by the accused to be admitted in evidence. The issue whether it was signed by the accused as required by law. The accused says he did not sign it, and that what he signed, he did it by imposing thereon his thumbprint and not by writing his name?

This is a question of fact. I have taken time to study the two handwritings (the one on the statement, and the other one he signed in court during cross-examination). I am convinced that they were written by the same person. This is the most crucial point in this otherwise hard question. I am thus of the settled view that the accused person signed the cautioned statement where his name appears in his own handwriting, as PW1 asserts. I hold, therefore, that the signatures appearing on the statement belong to the accused.

The defence did not raise any objection as to the voluntariness of the statement. But the accused person made a long testimony detailing how he was tortured by Police Officers (other than PW1). The prosecution did not bring any evidence to counter this piece of evidence, probably because it was not raised as a point of objection. For that reason, I do not see the need to determine that issue.

On the issue of the second page (overleaf the first page) not containing the accused's signature, it is true that not a single signature appears on that page. Even his initial does not appear. This is contrary to section 58 (2) of the Criminal Procedure Act, which states as follows:

- (2) Where a person under restraint furnishes to the police officer a statement that he has written out, the police officer shall write, or cause to be written, at the end of the statement a form of certificate in accordance with the prescribed form, and shall then—
- (a) show the statement to the person and ask him—
- (i)[not relevant];
 - (ii) to sign the certificate set out at the end of the statement; and
 - (iii) if the statement extends to more than one page, to **initial each page that is not signed by him;** [emphasis mine]

What is the effect of this omission? It means that the statement appearing on the second page cannot be accepted in evidence. And since it is overleaf the first page, I order that only the first and third pages of the cautioned statement shall form part of the record of evidence admitted.

Consequently, the first and second pages of the accused's cautioned statement are admitted. The second page (overleaf the first page) is not admitted and shall thus not be relied upon by the court.

DATED and DELIVERED at Dar es Salaam this 22nd day of July 2014.

Fauz Twaib
JUDGE