

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 IN TERMS OF SECTION 289 (1) OF THE CRIMINAL
PROCEDURE ACT [CAP. 20 R.E. 2022]**

25.09.2023 & 25.09.2023

Mtulya, J.:

In the course of hearing the present case, **Mr. Tawabu Yahya Issa**, learned State Attorney for the Republic, registered a notice to summon additional witness via section 289 of the **Criminal Procedure Act [Cap 20 R.E. 2022]** (the Act) to call witness **G. 7338 D/Cpl. Haruna** (PW5), a police officer of Butiama Police Station, who had recorded cautioned statement of **Mr. John Mbatira @ Mtuke** (the first accused).

The purpose of marshalling PW5 was to testify on the arrest, recording and tendering of the first accused's cautioned statement. The notice was filed on 22nd September 2023 and the witness was marshalled today, 25th September 2023 to produce his evidence in favor of the Republic.

However, when PW5 was summoned to testify today evening in the case, the Defence Attorneys joined hands and registered four (4) points of protest namely: first, section 289 (1) of the Act provides that no witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial, unless the prosecution has given a reasonable notice in writing to the accused person or his counsel on the intention to call such witness; second, the notice was registered on 22nd September 2023 without good cause; third, **Mr. Baraka Makowe** and **Mr. Daud Mahemba** held brief of **Mr. Amos Wilson** and **Mr. Victor Kisaka** in the case on 22nd September 2023, without details on how to proceed with case and finally, the prosecution had declined to say when they became conversant with the nature of the witness's evidence, as required in section 289 (3) of the Act.

Replying the submission of the defence side, **Mr. Tawabu Yahya Issa**, learned State Attorney for the Republic submitted that section 289 (1) of the Act allows witnesses statement or substance of evidence which was not read during committal proceedings to take its course during hearing of the case. In his opinion the provision of section 289 of the Act was enlarged by **Act No. 1 of 2020** to insert sub section (4) in section 289 of the Act to reduce the confusions in the enactment of section 289 (1) of the Act. Mr.

Tawabu thinks that the substance contained in a document, record or any other tangible object may be invited in the case. According to him, PW5 is called to produce substance of the evidence of the cautioned statement of the first accused which was read during committal proceedings at the **Resident Magistrates Court of Musoma at Musoma in PI Case No. 8 of 2022**. Regarding reasonableness of time of filing the notice, Mr. Tawabu thinks that, impliedly this court's hands are tied to determine issues related to time of the notice under section 289 (1) & (4) of the Act.

Regarding the contest on holding brief of the learned minds Mr. Amos and Mr. Kisaka, Mr. Tawabu submitted that the defence side wants to open **Pandora's Box**, which they cannot shut, on the law regulating the extent of legal representation with regard to holding of brief. In his opinion, if that point is allowed by this court, it will go to the extent of resolving further questions, and that the practice will be unfortunate to the proceedings of 22nd September 2022 and any other proceedings brought in this court.

Rejoining the submission, Mr. Makowe insisted his earlier submission contending that section 289 (1) of the Act provides for witness statement or substance of evidence which was not read at committal proceedings, and that if PW5 is allowed to testify, it will violate section 289 (1) of the Act. Mr. Makowe also insisted his

earlier position on the want of reasons of inviting PW5 and as to when the Republic was acquainted on the materials to be brought by PW5 and holding brief of learned counsels on 22nd September 2023.

I have read the record of this court conducted on 22nd September 2022 and found that Mr. Makowe and Mr. Mahemba are recorded to hold brief and mandate to proceed with the case hearing. The record shows further that all accused persons were consulted on the process and registered their consent without any protest. In any case, Mr. Amos and Mr. Kisika appeared today morning and did not protest or inquire on the proceedings of 22nd September 2023. In that case, it is obvious that the learned minds and their clients consented on the proceedings. This specie of contest, cannot, at any rate, detain this court.

Similarly, the notice to produce further witness was filed in this court on 22nd September 2023 and PW5 was called today to testify. I think the issue of reasonable notice in the circumstances of this case cannot hold any merit. Regarding what PW5 is bringing in this court, Mr. Tawabu has already registered materials in support of the move. In any case, this is criminal session case and the defence side will cherish the right to cross examine PW5 in all that they consider are important matters. I have read the notice and its title reads: *notice for calling additional witness made under section 289 of the Criminal*

Procedure Act [Cap 20 R.E 2022] and its contents categorically stated that the intended witness is related to the cautioned statement of the first accused. However, the notice is silent on the intended PW5 statement. The record shows that the intended witness is not displayed on committal proceedings conducted at the Resident Magistrates Court of Musoma at Musoma hence his statement was not read in the committal proceedings.

This is exactly what section 289 (1) of the Act provides. In that case calling the intended PW5 does not breach any provision of the Act. I have read the precedent of the Court of Appeal in **Abas Kondo Gede V. Republic**, Criminal Appeal No. 472 of 2017, and found that the Court of Appeal has already resolved similar issue in favor of the Republic. This court is lower to the Court and is bound by the decisions of the Court. I shall follow the course without reservations.

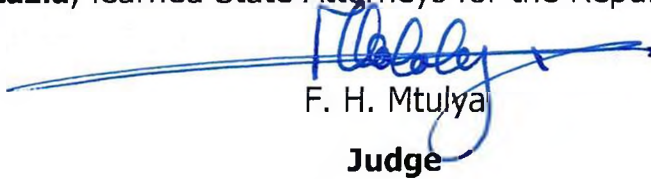
Having said so, I allow the Republic to call the intended PW5, **G. 7338 D/Cpl. Haruna** of Butiama Police Station to appear and testify for the Republic in the case and the defence side will enjoy the right to cross examine PW5.

It is so ordered.




F. H. Mtulya
Judge
25.09.2023

This Ruling was pronounced in open court in the presence of the accused persons, **Mr. John Mbatira @ Mtupe, 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