

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

SITTING AT NJOMBE

CRIMINAL SESSIONS CASE NO. 118 OF 2021

REPUBLIC

VERSUS

1.GEORGE MENSON @SANGA.....1ST ACCUSED

2.OPTATUS NKWELA.....2ND ACCUSED

3.GOODLUCK OYGEN @MFUSE.....3RD ACCUSED

RULING

8th & 9th November, 2023

MRISHA, J

The present ruling emanates from the objections raised by the counsel for the first, second and third accused persons namely George Menson @Sanga, Optatus Nkwela and Goodluck Oygen @Mfuse respectively, against the prayer of the fourth prosecution witness one G 8387 D/C Anjelo (PW4) that the cautioned statement he recorded from the second accused person, be admitted as an exhibit in order to form part of the prosecution evidence.

Save for the objection of the counsel for the second accused which inter alia appears to question the voluntariness of the cautioned statement allegedly made by the second accused (the cautioned statement), the ones raised by the counsel for the rest of the two accused persons herein, are solely based on points of law.

However, since the counsel for the second accused reserved his submission in respect of the first limb of his objection which is all about voluntariness of the document in dispute, and opted to submit only on matters of law like his learned friends from the defence camp, this ruling will therefore focus on objections relating matters of law which are intended to test the competency/legality of the document in dispute.

At the hearing of the objections, the second accused person was represented by Mr. Jeremiah Mtobesya and Mr. Michael Mwangasa, learned advocates, whereas the first accused person was represented by Mr. Chance Luoga and Mr. Innocent Kibadu, learned advocates and the third accused person had the legal services of Mr. Frank Mwanifunga and Mr. Emmanuel Chengula, also learned advocates.

On the other hand, the respondent Republic was represented by Mr. Tito Mwakalinga, learned State Attorney who was assisted by Ms. Dhamiri Masinde, also learned State Attorney.

As the rule of thumb directs, it was the objectors, who were the first to take the flow by submitting against the prayer of PW4 that the document in dispute be admitted by the court as an exhibit so that it forms part of the prosecution evidence.

Submitting in respect of the second limb of his objection, Mr. Mtobesya submitted that the provisions of sections 57 and 58 of the Criminal Procedure Act, Cap 20 R.E. 2022 (the CPA) which appears to have been used interchangeably in the preparation of the cautioned statement, provides a different manner of recording the suspect's statement.

For instance, he submitted that whereas section 57 of the CPA is normally applicable during an interview between police and the suspect of a criminal offence, section 58(6)(b) of the CPA is applicable where the suspect requests to write his statement before a police officer and ask the said police to certify the statement where there are alterations in the statement previously made.

Due to the above reason, Mr. Mtobesya submitted that it is impossible for the cautioned statement to be taken either under section 57 or under section 58 of the CPA as it appears in the cautioned statement in dispute. Hence, it was his view that such anomaly makes the cautioned statement to be incurably defective and the consequence thereof, is to

reject the said cautioned statement because it is unknown under which provision of the law the said cautioned statement was taken.

He also submitted that if the cautioned statement was made under section 57 of the CPA, then there ought to be a caution with time and date as per section 57(2)(d) of the CPA, but looking on the cautioned statement sought to be tendered in evidence, there is no caution and time, thus makes it to be fatally defective and subject to court's rejection.

The counsel for the second accused also submitted that looking on the cautioned statement, it appears that the second accused cautioned by PW4 that he was charged with murder contrary to section 196 of what is termed to be "*Sheria ya 16*".

However, according to the defence counsel, there is no such law in our statutes; therefore, it as good as if there was none citation of the law which creates an offence of murder, thus making the caution not to be complete. He further submitted that being a layman, the second accused person was entitled to know the law which created an offence he was charged with. Hence, the absence of the proper citation of the relevant law, makes the cautioned statement to be defective.

In regard to the point of certification, Mr. Mtobesya submitted that the cautioned statement reveals that the certification was made under "*section 58(6) (B) of the CPA*" which is not among the provisions of the CPA.

He further submitted that in the course of adducing his evidence before the court, PW4 narrated that he was instructed by his superior boss to go and interrogate the suspect (now the second accused), while the provisions of section 58 of the CPA, requires that the suspect should either write the statement on his own volition and let the investigating police officer to make certification.

It was due to such reason, that the counsel for the second accused submitted that the certification of the cautioned statement in dispute, is defective to that extent. He also contended that even if the statement could have been recorded under section 58 of the CPA, still it could be defective because section 58(6)(b) of CPA is normally used to certify the cautioned statement where there are alterations, otherwise PW4 could have certified the said statement under section 58(2)(b)(ii) of the CPA.

To bolster his argument, Mr. Mtobesya referred the court to the case of **Juma Omary vs Republic**, Criminal Appeal No. 568 of 2020

(unreported) whereby at page 15 of its judgment, the Court of Appeal sitting at Dodoma stated that:

"Certification has a purpose of authenticating the truth of what the police officer had recorded. Failure to do so, or doing so under a none existing law would render the same as if certification was not done at all."

Mr. Mtobesya submitted further that since at page 16 of the said judgement the cautioned statement was expunged by the Court of appeal due to the fact that the police officer failed to comply with the requirement of the law, then it was his argument that the effect of none compliance at the trial stage as in the present case, is to reject the cautioned statement because that goes to the issue of fair trial.

He thus, urged the court to find that the cautioned statement in question, lacks authentication and proceed to reject it. In conclusion, Mr. Mtobesya submitted that due to all the defects he had pointed out in his submission regarding the cautioned statement of the second accused person, none citation of the law and authentication of the same, generally make the alleged cautioned statement to be incurably defective. Hence, it was his humble prayer to the court to find that the said cautioned statement is defective and reject it.

On his side Mr. Kibadu, submitted that they have three points of objections. First, he submitted that the first point refers to the right of an accused person to be informed that he has a right to either write his statement or to have his statement be recorded by the interviewing police officer.

He also stated that as per section 58(1) of the CPA, the investigating police who in this case was PW4, ought to have asked the second accused person if he would like to write his statement or let him to record his statement.

That, PW4 ought to have asked the second accused whether or not he knew how to read and write, but looking on the cautioned statement, it appears that the said cautioned statement was recorded under section 58 of the CPA and not section 57 of CPA which is about recording the statement of the accused person in the manner of an interview.

To bolster his argument, the learned counsel cited the case of **Petro Sule & Three others vs R**, Criminal Appeal 475 of 2020 (unreported) at pages 27 to 28, which makes a distinction between application of section 57 and 58 of the CPA, and went on arguing that since PW4 omitted to inform the second accused of his rights as per section 58 of the CPA, it is obvious that the document in dispute is not supposed to be

admitted in evidence because such contravention of the law vitiates the whole statement which is sought to be tendered as an exhibit.

Mr. Kibadu also referred the court to page 28 of the said judgment in which the Court of Appeal expunged the caution statement due to similar irregularities, and in the same line he prayed to the court to reject the said cautioned statement due to the above anomalies.

Turning to his second point of objection, Mr. Kibadu had it that looking on the same document, it is obvious that the statement contained therein contravenes **paragraph 5** of the Police General Order No. 236, provides that:

"When a statement is recorded on more than one page the person making it will sign in the left margin at the foot of each page."

In connection to the above paragraph, the learned counsel submitted that looking on the cautioned statement, it appears that it contravenes the above general order because pages 2,4 and 5 were not signed by the second accused at the foot contrary to what the above cited general order provides.

Mr. Kibadu contended that the gist of signing at the foot is to acknowledge what was written in a particular page. According to him,

what appears in the cautioned statement, is that there is the name of "O. Nkwela" at the left side of the document in dispute which is written out of the margin.

It was therefore, his prayer that the cautioned statement sought to be tendered by PW4 as an exhibit, should not be admitted as an exhibit.

As for the third point of objection, Mr. Kibadu submitted that the same is based under paragraph (a) of Order 236(6)(a) of the PGO which provides that:

*"(a) Every statement will end with the following certificate: -
"Statement read over and found to be correct".*

Having referred the court to the above Order, the learned defence counsel submitted that the objective behind that closing statement, is to restrain the writer or any other person to insert another statement not made by the maker. It was his submission that the document in dispute does not have such closing statement which is required by the Police General Order. Finally, Mr. Kibadu humbly prayed that the document in dispute should not be admitted in evidence due the anomalies he had pointed out in his submission in respect of all the three points of law because the statement has not complied with important matters prescribed by the law.

Submitting in favour of the third accused person, Mr. Ngafumika, learned advocate, contended that they object the admission of the second accused's caution statement due to the fact that the statement appears to have been taken under either section 57 or 58 (6) (b) of the CPA, which is not proper.

It was his further submission that if it could be argued that the cautioned statement was taken under section 57 of CPA, it will be invalid because that will be in contravention of section 57(2)(d) of CPA which requires the interviewing police to insert the time in the cautioned statement after completion of the interview.

However, Mr. Ngafumika submitted that the cautioned statement in dispute does not show if PW4 inserted the time after completion of his interview with the second accused person who was the suspect by then. Hence, to him that was fatal and it makes the said cautioned statement to be defective.

He also submitted that if the prosecution will argue that the statement was taken under section 57, then the statement will be in contravention of section 57(3)(a)(iii) of the CPA which requires the maker to initial each page that is not signed by him at every extended part of the cautioned statement because the document shows that maker (the

second accused) of the statement did not initial at the end of that document.

The counsel for the third accused also submitted that the cautioned statement in dispute shows that the recording police wrote the finishing time after making certification of the document, but the whole page was not signed by accused person.

He added that if the prosecution will argue that the statement was taken under section 58(6)(b) of CPA, then the document in dispute will be in contravention of section 58(2)(a) which directs that the suspect should sign or initial every page, but the last page which contains certification and time was not signed by the second accused person.

In addition, Mr. Ngafumika referred the court to the case of **Said Bakari vs Republic**, Criminal Appeal No. 295 OF 2021(unreported) and submitted that the provisions used in the cautioned statement are mandatory because they contain the word "*Shall*", hence since the said provisions were contravened, then it was his prayer that the cautioned statement in dispute should not be admitted by the court.

In reply, Mr. Mwakalinga to reply in the manner used by the counsel for the first, second and third accused persons. He began with the submissions made by Mr. Mtobesya and contended that partly he agrees

with his learned friend's argument on the application of section 57 CPA, but differed with him in relation to application of section 58 of CPA.

He said before the enactment of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2011, the said provision was referring to the statement written by the suspect on his own volition, but due to the said amendment, there are currently two positions; first, the first part entitles the suspect to write the statement on his own volition, and it covers subsection (1) to (3) of section 58.

That, the second part empowers the police officer who investigate the criminal offence or allegation against a suspect who is under restraint, to write his statement. That is provided under section 58(4) up to subsection (6) which contains certification. He argued that the law as it stands here and now, empowers the police officer to write the statement of a suspect under restraint.

Also, Mr. Mwakalinga submitted that the statement recorded under either section 57 or 58 of the CPA are all called cautioned statements. He referred the court to the cautioned statement in dispute and contended that its certification appears to have been made under section 58(6)(b) of the CPA which is the only certification to be made by

the police officer after recording the statement of the suspect which stem from section 58(4) of CPA.

Mr. Mwakalinga referred the court to the case of **Francis Paul vs Republic**, Criminal Appeal No. 251 of 2017, whereby at page 14 of its judgment, the Court of Appeal sitting at Arusha, stated that:

"We gather from the above excerpt that the accused statements whether taken under sections 57 or 58 of the CPA are both cautioned statements. That, a statement taken under section 57 of the CPA should be in question and answer form while that taken under section 58 has to be taken in a narrative form. All the same, as indicated above the appellant's statement was recorded in terms of sections 57 and 58 of the CPA. The irregularity is therefore not fatal."

Having cited the above authority, Mr. Mwakalinga submitted by praying that the first point of objection by the counsel for the second accused be overruled for want of merit.

In regard to the second limb of the objection by the counsel for the second accused, Mr. Mwakalinga submitted that the issue of caution is provided under section 53(c) of the CPA which makes reference to the prescribed forms.

He went on submitting that the gist of caution provided under section 53 of CPA, is to caution the suspect that he is charged with a criminal offence. He indicated that in the document in dispute, PW4 introduced himself to the second accused that he is G. 8387 D/C Anjelo and cautioned the second accused that he is accused of an offence of murder.

The counsel for the respondent Republic also submitted that PW4 went further by mentioning the provision of section 196 of "*Sheria ya 16*" on the part of Caution which Mr. Mtobesya attacked by submitting that there was a none citation of the law.

However, it was Mr. Mwakalinga's contention that literally, had it been shown that the document in dispute just ended with section 196 of "*Sheria ya 16*", it could rightly be argued that the second accused person was not properly informed of his offence, but the document in dispute clearly shows that the second accused person was informed that he was accused of an offence of murder, which suffices to show that the second accused person knew the offence he was charged with.

He further submitted that the main purpose of a caution is to let the suspect know the kind of offence he is going to be interrogated for, his will of making his statement without being force, and his right to have

his relative, friend or a lawyer being present when he makes his statement before the police.

Due to the above reasons, Mr. Mwakalinga submitted in their view, the omission to cite the law properly by writing "*Kifungu cha 196 Sura ya 16,*" cannot prejudice the right of the second accused person to know what offence he was cautioned for. Hence, it was his humble prayer that the second limb of objection by the counsel for the second accused, person be overruled as well.

Having submitted on the objection by the counsel for the second accused, Mr. Mwakalinga submitted that in his view, it was section 58(6) (b) of CPA which was used to record the cautioned statement of the second accused and not section 58(6)(B) of CPA which is not existing. He added that the certification ought to have been made under section 58 (2) (a) of the CPA.

The learned counsel submitted that apart for the omission to cite the proper paragraph, the requirements under section 58(6)(a) were all complied with by PW4 when making such certification. He went on submitting that the said provision directs the police officer to ask the suspect to sign the document at the last page and to sign every page if the document extends to another page. He was of the view that the

omission does not prejudice the rights of the second accused; hence, the said irregularity is not fatal.

Mr. Mwakalinga also submitted that the certification in the document in dispute was made under section 58(6)(a) (b) of CPA. He went on submitting that the case of **Juma Omary vs Republic** (supra) cited by Mr. Mtobesya, is distinguishable to the circumstance of the present case arguing that the certifications of the statements in that case were made under section 10 of the CPA, that is why it was held that none citation of the law made the alleged certification as no certification at all, because the cited provision had no any relationship with sections 57 and 58 of the CPA. He therefore, prayed that the said case be distinguished.

The learned counsel for the respondent Republic, also responded to the objection raised by the counsel for the first accused by submitting that section 58 (1) of CPA provides the suspect with the right to make his statement on his own volition either by writing or by requesting the police to record his statement.

He argued that the said provision was not meant to empower police to ask the suspect to ask the suspect if he would like to make his statement or have his statement be recorded, but to facilitate the

suspect with all facilities in order to write his statement. The provision also requires the police to ask the suspect if he has been cautioned.

Mr. Mwakalinga also distinguished the case of **Petro Sule** (supra) by arguing that the circumstances of that case are distinguishable to those in the present case. He referred to page 27 of the above case where it is shown that there was an accused person whose cautioned statement was taken under section 58(2) of the CPA.

According to him, where the cautioned statement is made under section 58(2) of the CPA, then the statement is said to have been recorded under section 58(1) of the CPA. The counsel further submitted that in that case, the police officer did not inform the suspect of his rights as required under section 58(1)(2) of CPA, hence prejudiced the suspect of his right to be informed of his rights.

However, he submitted that the cautioned statement in question shows that the cautioned statement of the second accused was recorded under section 58(6)(b) of CPA which tells that the statement was recorded by PW4 under section 58(4) of the CPA which makes an internal reference to section 53 of the CPA.

Owing to the above reasons, Mr. Mwakalinga urged the court to overrule the first limb of objection by the counsel for the first accused person.

In regards to the second and third limbs of objection which he proposed to argue together since they all relates to the Police General Order No. 236, the learned counsel for the respondent Republic, submitted that Order 236 generally deals with investigation statements and Part I is all about witness statements.

He made reference to sub orders 5 and 6(a) of the Order 236 which is under Part I of Order 236, and argued that the same deals with witness statements, while the cautioned statement in dispute relates to the suspect's statements which he said is provided under Part II of Order 236.

Due to the above submission and distinguishment, Mr. Mwakalinga urged the court to overrule the remaining limbs of the objection by the counsel for the first accused and admit the cautioned statement as an exhibit.

As for the objection raised by the counsel for the third accused, Mr. Mwakalinga submitted that since certification in the cautioned statement shows that it was made under section 58(6)(b) CPA, then that is a proof that the said statement was actually made under section 58(4) of the CPA. In the circumstance, he was of the view that the contravention of the law indicated by the counsel for the third accused, is not related to the statement recorded under section 58(4) of the CPA. He thereafter,

implored me to overrule the said first limb of objection raised by Mr. Ngafumika.

Secondly, Mr. Mwakalinga submitted that section 58(3)(a) of the CPA cited by his learned friend, is applicable where the suspect had written the statement on his own volition, but the statement sought to be tendered as an exhibit, was made under section 58(6)(a) of the CPA. The learned counsel further submitted that the gist of that requirement is to ensure that there is no possibility for anyone to alter the statement recorded.

He further submitted that pages 2, 3, 4 and 5 of the cautioned statement which basically carries the statement of the second accused, were all initialled by the second accused person. He also argued that the only page which appears not to be signed by the accused person, is the sixth page which bears the certification of the police officer who recorded the statement and does not contain the statement of the second accused person.

In the circumstance, it was his submission that the omission to initial the last page, though appears to be a contravention of the law, has not prejudiced the second accused person.

He further submitted that due to the fact that the offence the second accused stands charged, is a serious one and attracts a public attention, it is his humble prayer that the court be pleased to admit the cautioned statement under section 169 (1) (2) of the CPA by looking on the nature and seriousness of the said offence and see whether the alleged contravention has prejudiced the rights of the second accused person.

He went on submitting that not every contravention of the provisions of the CPA can make the document not to be admitted as an exhibit. To support his argumentation, the counsel for the respondent Republic cited the case of **Chacha Jeremia Murimi and Others vs The Republic**, Criminal Appeal No. 551 of 2015 CAT at Mwanza (unreported) in which the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported), was referred by the Court of Appeal.

In conclusion, Mr. Mwakalinga humbly prayed that all the objections raised by his learned friends, be overruled and the cautioned statement be admitted as an exhibit so that the court can make its decision.

In rejoinder, Mwangasa submitted that his learned friend has basically conceded that there was a contravention of law on the use of sections

57 and 58 of CPA when recording the cautioned statement of the second accused person.

He submitted that the case of **Francis Paul vs Republic** (supra) cited by the counsel for the respondent Republic, is distinguishable to the case at hand, because in that case there was no such contravention. He also submitted his learned friend cited the Written Laws (Miscellaneous Amendments) Act, 2011 to justify the defects spotted in the document in dispute, but on their side, they applied the Criminal Procedure Act, Cap 20 R.E 2019 which is the current one and it has the provisions of the law contravened.

He also challenged the submission of the counsel for the respondent Republic who argued that sections 57 and 58 can be used interchangeably, arguing that the said provisions have different procedures and certifications; hence, it is fatal to use them interchangeably since one cannot record the statement under section 57 or 58 of the CPA and make certification by using a single provision of the law.

He was of the view that if there would be no irregularity by using the said provisions interchangeably, then even the CPA could not have incorporated sections 57 and 58, nor could it import the word "*Shall*".

Hence, it was his submission that the use of those provisions interchangeably in the alternative, is fatal and makes the document in dispute incurably defective.

He further submitted that a document needs to express by itself and should not require more explanation by the State Attorney. In the end, it was his humble prayer that the document in dispute should not be admitted in evidence due to the fatal irregularities he had pointed out in his submission.

Submitting in respect of the second limb of objection, Mr. Mwangasa submitted that the cautioned statement show that it was made under what is termed to be "*Sheria ya 16*" which according to him does not exist in the eyes of the law, nor even in our laws, consequently the rights of the second accused were prejudiced and the caution was not complete.

He also submitted that the prosecution counsel tried to rectify the error by citing several provisions of the law which are not in the document in dispute. He reiterated his previous stance by submitting that the defects in the said document, cannot be cured by the statement from the bar which is not part of the said document.

In connection to improper citation of the law, Mr. Mwangasa submitted that since the cited law is not existing, it was his prayer that the document in dispute should not be admitted as an exhibit because the caution contained in that document is invalid.

In regard to the third limb of objection which refers to certification, Mr. Mwangasa submitted that his learned friend submitted that the certification was made under section 58(6)(b), but according to him, those were mere words of the counsel for the respondent Republic because the document in dispute shows that the certification was made under "*section 58(6)(B)*" which is not existing. Hence, he submitted that the mere words from the prosecution counsel cannot be considered. The learned defence counsel also maintained his position that since the cited provision is not existing, the certification in that document became incurably defective.

He further submitted that his learned friend from the adversary side talked generally about section 58(2) of the CPA which was not featured in the said cautioned statement. It was his opinion that no certification had been made in that document which omission made it to be invalid. He humbly prayed that the said document should not be admitted in evidence.

It was also the submission of the learned defence counsel for the second accused that all their three points of objection have merit, and he reiterated his previous humble prayer that the court should not admit the cautioned statement of the second accused as an exhibit.

On his part, Mr. Kibadu submitted that his rejoinder will focus on the first limb only. He went on submitting that Mr. Mwakalinga conceded to the defects pointed out in the cautioned statement. Also, it was the submission of the learned defence counsel that Mr. Mwakalinga misdirected himself by citing the case of **Petro Sule vs Republic** (supra) due to the fact that in the said case there were four cautioned statements with one of them being taken under section 53 of the CPA, the second under section 58 of the CPA, the third under section 57(3) of the CPA and the fourth one was taken under section 58(2) of CPA.

He referred the court to page 27 of the said judgement where the Court of Appeal stated that:

"These provisions apply under different circumstances and imposes different mandatory obligations to the police officer recording the statement and avail certain rights to the suspect which were not clearly observed".

The learned defence counsel submitted that the right of the suspect under discussion is to be asked whether he knows how to read and write and if he would like to make his statement on his own volition, but looking on the cautioned statement in dispute, it is obvious that the second accused person was not availed such rights which is contrary to the direction of the Court of Appeal in the case of **Petro Sule vs Republic** (supra), particularly at page 28 of the said judgment which requires the police officer to ask the suspect whether he knows how to read and right before invoking any provisions of the law.

Due to the above reasons, the counsel for the first accused prayed to the court not to grant the prayer of the fourth prosecution witness regarding the cautioned statement.

The last to make a rejoinder submission, was Mr. Ngafumika. He submitted to the court that the prosecution counsel admitted that the certification made by the second accused ought to have been made under section 58(6)(a) of the CPA instead of sub section (b) as it appears in said cautioned statement, although in his statement he tried to rectify that error by distinguishing the case of **Said Bakari vs Republic** (supra) with the present case by submitting that in that case

there was fatal irregularity due to the use of section 10 of CPA in certifying the statements of witness.

His position was that he does not agree with the distinguishment made by his learned friend because according to him, the proper provision ought to be section 58(6) (a) of the CPA which was not applied in the document in dispute. He finally submitted that where another provision of the law different to the proper one is applied, that is a fatal irregularity.

Submitting in relation to the second point which refers to absence of the accused signature at the last page of the document in dispute, Mr. Ngafumika submitted that essentially, the counsel for the respondent Republic admitted that there was such omission, and that in an attempt to rectify such error, his learned friend referred the court to the case of **Chacha Jeremia Murimi and Others vs Republic** (supra) and urged the court to invoke the provisions of section 169 of the CPA and disregard the above contravention of the law.

However, Mr. Ngafumika disputed the above invitation to the court due to various reasons; first, he submitted that in **Chacha Jeremia Murimi and Others vs Republic** (supra), the Court of Appeal invoked the provisions of section 169 of the CPA while referring to what they had

stated earlier in the case of **Nyerere Nyague vs Republic** (supra). He added that what transpired in the latter case was quite different and could not be equated by any means to the circumstances of the case at hand.

The learned defence counsel for the third accused also submitted that the complaint in the above cited case based under sections 50 and 51 of the CPA which are about the time of recording the statement of the suspect who is under restraint, which is not the complaint in the case at hand; but also, in that case the accused did not object the admission of the caution statement, but he raised his complaint at the appellate stage something which is not disputed in the instant case.

The learned defence counsel also submitted that section 169 of the CPA has limits. For instance, he said subsection (2) of section 169 of the CPA talks about matters which the court can consider before doing away with some contraventions of the provisions of CPA.

The counsel further cited the provisions of sub section (3) of the CPA which burdens the prosecution side to prove certain matters and submitted that the prosecution ought to comply with section 169(3) of the CPA by proving to the court that evidence obtained in contravention of the provisions CPA should be admitted in proceedings, something

which the learned defence counsel said was not done by the respondent Republic.

Finally, Mr. Ngafumika submitted that if the above provision will be misused, then a lot of dangers will emerge. First, he said that main purpose of using the word "*Shall*" in that provision of the law will be eliminated, secondly; the rights of the suspects mistreated will be unprotected, thirdly; it will be as if the court encourages negligence and lack of professionalism by some of the law enforcement officers which will be at the expense others, and fourthly; the whole society will not be in a good position.

In winding up, the learned defence counsel drew the attention of the court that the counsel for the respondent Republic made reference to page 14 of the case of **Francis Paul vs Republic** (supra) and chose a certain part, but skipped the most important part which shows that the appellant in that case signed the cautioned statement to signify acceptance that the contents thereof were true, but cautioned statement sought to be tendered by PW2 in the present case, shows that the second accused did not sign the document which makes that case distinguishable to the case at hand.

Having heard the rival submissions of the counsel for both parties in this case and gone through the cautioned statement in question, the provisions of the law as well as the authorities referred thereof, I am of the view that the issue for my determination is whether the objections raised have merits.

In the course of submitting against the prosecution's prayer to tender the cautioned statement of the second accused as an exhibit, the learned defence counsel for the first, second and third accused persons had similar observations in respect of the legality of the said document.

This is because, almost all of them challenged the use of sections 57 and 58 of the CPA interchangeably which according to them, created a confusion and made it difficult to ascertain which among the two provisions of the law was used by PW4 when recording the said statement.

In his response to that concern, Mr. Mwakalinga while admitting that what was done by PW4 was in contravention of the law, submitted that the said irregularity had not prejudiced the rights of the second accused because it is not fatal to use either section 57 or 58 of the CPA in recording the caution statement of the suspect.

On my part, I agree with him that under certain circumstances, it may not be fatal to use those provisions interchangeably as it was stated in the case of **Francis Paul vs Republic** (supra), but as correctly submitted by Mwangasa, the above cited case is distinguishable in the circumstances of the present case, therefore, the principle stated therein cannot be applied in this case where it appears that the provision of the law used by PW4 when recording the statement of the second accused, is not existing.

The counsel for the first, second and third accused persons herein, have also challenged the legality of the cautioned statement arguing that the said accused person was cautioned under a none existing law thus prejudicing his right to know the relevant law which created the offence he was charged with.

Responding to that argument, Mr. Mwakalinga has submitted that had it been written that the document just ended with section 196 of "*Sheria ya 16*", it could rightly be argued that the second accused person was not properly informed of his offence, but the document in dispute clearly shows that the second accused person was informed that he was accused of an offence of murder which according to Mr. Mwakalinga,

suffices to show that the second accused person knew the offence he was charged with.

I had enough time to examine the cautioned statement in dispute. It appears to me that the second accused was just cautioned that he is charged with an offence of murder contrary to section 196 of the so called "*ya Sheria ya 16*". When given a chance to respond to the submissions of his learned friends from the defence side, particularly that of Mr. Mtobesya, the learned counsel for the respondent Republic admitted that there was such irregularity, but he went on trying to show that it was not a fatal irregularity.

The above reminds me of the Latin phrase "*Nullum crimen sine lege*" which entails the principle in criminal law that a person cannot or should not face criminal punishment except for an act that was criminalized by law before they performed the act.

The prosecution in this case had enough time to go through the document in order to satisfy themselves whether the same was properly prepared before allowing the matter to be filed with this court for trial.

Being a layman, the second accused was entitled to be informed of the proper law which created the offence he was charged with. The omission to inform him properly about the law which created the offence

he was accused of, was in my considered opinion not proper and it is obvious that his rights which are provided under section 53(a)(b) and (c) of the CPA, were not disclosed to him. That does not appear to have been complied by PW4 in the cautioned statement, as rightly submitted by Mr. Kibadu and his fellow learned friends.

On the issue of certification, all the learned defence counsel for the second and the rest of the accused persons herein have submitted that the cautioned statement in dispute is not in compliance with the law because the provisions of "*section 58 (6)(B)*" used in that document, is not among the provisions of the CPA, thus making the statement not to contain a proper certification.

In his response to that argument, Mr. Mwakalinga has submitted that the case of **Juma Omary** (supra) cited by Mr. Mtobesya is distinguishable to the case at hand because in that case there was a caution statement which showed that the police officer used section 10 of the CPA which does not relate to the provisions of section 57 and 58 of the CPA. However, according to Mr. Mwangasa, that cannot rectify the anomaly which is apparent on the cautioned statement in dispute because it is obvious that PW4 used a none existing provision of law, hence making the document to be defective.

Despite the efforts made by the counsel for the respondent Republic to rectify such irregularity, I am unable to buy his idea that the omission to cite a proper provision of the law in the cautioned statement in question cannot make the said document to become fatally defective, and I also agree with Mr. Mwangasa that a document must speak for itself without requiring more explanations like the ones provided by the counsel for the respondent Republic which are just mere words from the bar.

Due to the above reasons, it is my settled view that what was submitted by Mr. Mtobesya and his fellow learned friends in respect of that point, was correct.

What I can agree with Mr. Mwakalinga is that it was not correct for the counsel representing the first accused person to argue that PW4 contravened the provisions of Part I of Order 236 of The Police General Orders. This is because Part I of the said Order deals with witness statements and not suspects statements.

Another point from the learned defence counsel for the second and third accused persons, is that since the provisions of sections 57 and 58 of the CPA are coached in mandatory terms, then it was incumbent for PW4 to comply with them when recording the cautioned statement of

the second accused depending on the answer given to him by the second accused at the preliminary stage.

In a bid to convince the court to dispense with such mandatory requirement, the counsel for the respondent Republic, contended that not every contravention of the provisions of the CAP can make the document not to be admitted in evidence.

To bolster his contention, the said learned counsel referred the court to the case of **Chacha Jeremia Murimi and Others vs The Republic** (supra) and **Nyerere Nyague v. Republic** (supra) which was referred by the Court of Appeal in the former case. The said counsel went a further step ahead by requesting the court to invoke the provisions of section 169 (1)(2) of the CPA in order to cement his proposition in that aspect.

Admittedly, that is the position of the law. However, as it was correctly submitted by Mr. Ngafumika, the above cited cases are distinguishable to the case at hand because first, in the case of **Nyerere Nyague v. Republic** (supra) the appellant/accused signed the cautioned statement to signify his acceptance of the truth contained therein, and did not object the said document.

Secondly the respondent Republic in the present case have not complied with the requirement of subsection (3) of section 169 of CPA which requires them to prove that admission of documentary evidence obtained in contravention of the provisions of that law will not prejudice the rights of the second accused person.

I may also add that where a provision of the law uses the word "*Shall*", then the function contained therein is mandatory. This is provided under section 53 (b) of the Interpretation of Laws Act, Cap 1 R.E. 2019 which provides that:

*"Where in a written law the word "shall" is used in conferring a function, such word **shall be interpreted to mean that the function so conferred must be performed.**"* [Emphasis is mine]

Reverting back to the present case, it is crystal clear that the word "*Shall*" has been used in both sections 57 and 58 of the CPA. Also, the said provisions do not have a proviso when it comes to recording of a cautioned statement of the suspect either in question and answer form or in the form of an interview, save under exceptional circumstances as described in the case of **Chacha Jeremia Murimi and Others vs The Republic** (supra), which do not apply in the case at hand.

Therefore, due to the foregoing reasons which I have endeavoured to provide above, I am settled that it was imperative for PW4 to comply with the provisions of section 57 of CPA, if he wanted to record the cautioned statement of the second accused in question and answer form, or in narrative form as per section 58 of the CPA, if the accused person had requested to make his statement before him.

Therefore, since it is apparently that the respondent Republic did not comply with the mandatory requirements of section 169 (3) of the CPA, then I cannot go along with their invitation that I should invoke the provisions of section 169 (1)(2) of the CPA to find that the irregularities pointed out the learned defence counsel are curable under such provision and proceed to admit the cautioned statement in dispute as an exhibit.


In the premise, and owing to the foregoing reasons, I am inclined to find that the objections on points of law raised by the learned defence counsel for the first, second and third accused persons, have merits. Consequently, I sustain their objections and reject the cautioned statement sought to be tendered as an exhibit.

It is so ordered.




A.A Mrisha
JUDGE
09.11.2023

DATED at **NJOMBE** this 9th day of November, 2023.


A.A Mrisha
JUDGE
09.11.2023