



ADMISSIBILITY OF CONFESSION STATEMENTS

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OFMEDY MUSSA MTENGA

CRIMINAL PRACTICE MANUAL

ADMISSIBILITY OF CONFESSION STATEMENTS



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FOREWORDS

This Manual will assist criminal law practitioners, be it Advocates, State Attorneys, Public Prosecutors, Honorable Judges, and Magistrates, law enforcement officers as well as law students to determine what confessions are admissible in court and which ones are not. It is also useful in appeal cases as confessions may sometimes determine the whole appeal if no other evidence to rely upon is available.

I have included a good number of current Court of Appeal precedents to update the reader on appropriate legal positions to apply. It is my hope that manual will produce fruitful results in the administration of justice in Tanzania.



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I first and foremost give thanks to the Almighty God, the creator of heaven and earth, the Savior of the world, *“in him my life is anchored and in him alone, there’s no failure!”*

Other special thanks are conveyed to my caring, loving, and supportive wife, *Hilda John* and our children; my deepest gratitude. It was a great comfort and relief to know that you were willing to provide management of our household activities while I was preparing this work. My apology to you and our children for taking away the time you should have benefited out of me. My heartfelt thanks.



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PART ONE

CONFESSION STATEMENT

1.1 Meaning of a confession

An ordinary meaning of a confession is a statement freely and voluntarily made by a suspect of an offence in the immediate presence of a police officer, a magistrate or justice of the peace or before ordinary persons.

Section 3(1) (c) of TEA defines a confession to mean;

A statement containing an admission of all the ingredients of the offence with which its maker is charged.

A confession voluntarily made is admissible in court as evidence to prove the guilty of the maker.¹

It is trite law that, the very best of witnesses in a criminal trial, is an accused person who freely confesses his guilty, provided that the confession is above and free from the remotest taint of suspicion.²

The principle behind confessions is the presumption that, no reasonable man in a free and voluntary environment would make a statement which is against his interest unless it be true. If he does so under such favourable environments, the inference is that he is speaking the truth about the matter hence becomes the best witness in a case against himself (emphasis mine).³

1 Read s.27(1) and 28 of TEA

2 Twaha Ali & 50 others vs Republic, Criminal Appeal No.78 of 2004 CAT (unreported), Frank Kinambo vs DPP, Criminal Appeal No.47 of 2019 CAT Mbeya (unreported) pg 17

3 Frank Kinambo vs DPP, Criminal Appeal No.47 of 2019 CAT Mbeya (unreported) pg 17



1.2 What constitutes a confession?

For a statement to qualify as a confession admissible in court, it must contain the admission of **all the ingredients of the alleged offence**. This is provided for under *section 3(1) (c) of the TEA* and several other referred case laws.⁴

1.3 Things to note when dealing with confessions

The following are summarized positions of law regarding confessions which may be considered when determining their admissibility in court.

- (i) A person who confesses to a crime is the best witness, meaning, if the court admits it as evidence, it makes one of the best evidences of the case.⁵
- (ii) It is not mandatory for a confession to be reduced into writing; even oral confession is admissible provided that it was made voluntarily.⁶
- (iii) The onus of proving that any confession made by an accused person was voluntarily made by him lies on the prosecution.⁷

⁴ Rhino Migere vs Republic, Criminal Appeal No.122 of 2002 CAT (unreported). Diamon Malekela@maunganya vs Republic, Criminal Appeal N O.205 of 2005 CAT (Unreported), Khalid Mohamed Kiwanga & another vs Republic, Criminal Appeal NO.223 of 2019 CAT (unreported) pg.32

⁵ DPP vs Nuru Gulamrasul [1988] T.L.R 82

⁶ Jacob Mayan V R, Criminal Appeal No.558 of 2016 CAT(unreported) pg.17

⁷ S.27 (2) TEA.



- (iv) Contrary to the other two types of confession (*cautioned and extra-judicial statements*), we do not test voluntariness of oral confessions through inquiry or trial within trial. Oral confession is tested by looking at the credibility and reliability of the witness testifying about it.⁸
- (v) It is acceptable if a confession is made before civilians as well as non-civilians so long as in both, the suspect was a free agent.⁹

1.4 Exculpatory statements in Confessions

Section 3(1) (c) of TEA provides that, a confession means;

A statement containing an admission of all the ingredients of the offence with which its maker is charged.

This literally excludes statements having a mixture of inculpatory and exculpatory statements if the latter negates the offence in question. Although, as a matter of practice that each case should to be determined according to its peculiar circumstances, the position of law is that, any confession statement which contains exculpatory matters does not amount to a confession in law “if the exculpatory statements negate the offence alleged to be confessed”.¹⁰

⁸ Anna Jamaniste Mboya Vs R, Criminal Appeal No.295 of 2018 CAT DSM (unreported)pg.29.

⁹ Posolo Wilson Mwalyego vs Republic, Criminal Appeal No.613 of 2015 CAT Mbeya (unreported) pg.7.

¹⁰ Musa Bakari Ngolonji vs Republic, Criminal Appeal No.31 of 2007 CAT (unreported) pg.7, Daudi @ Senga Sadrick & Another vs Republic, Criminal Appeal No. 25 of 1998, CAT Mbeya (unreported) pg.9



In **Sharifu Mohamed@Athumani & 4 others vs Republic**,¹¹ it was held that, ***a statement in which a person exculpates himself from the offence is not a confession***. Quoting Sakar & V.R Manohar, Vol.1, Lexis Nexis pg.602, it adopted that;

“No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence.”

1.5 Confession leading to discovery

One of the reliable confessions is that which leads to discovery of the material objects connected with the crime. This is because such leading to discovery confirms or supplies a guarantee of truth of what is confessed in the statement. ***Chamuriho Kirenge @ Chamuriho Juias***¹² and many other case laws support this position. **Section 31 of TEA** provides that;

When any fact is deposited to as discovered in consequence of information received from a person accused of offence in the custody of police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant.

11 Sharifu Mohamed@Athumani & 4 others vs Republic, Criminal Appeal NO.251 of 2018 CAT (unreported) pg.53&54

12 Chamuriho Kirenge @ Chamuriho Juias vs Republic, Criminal Appeal No.597 of 2017 CAT (unreported) pg 24, John Shini vs Republic, Criminal Appeal No.573 of 2016 CAT (unreported) pg 16, Michael Mgowole & another v Republic, Criminal Appeal No.205 of 2017 CAT (unreported) pg.28



1.6 Confession implicating co-accused

As a general rule, for a confession to be used against the accused, it must have been made by the accused himself.¹³

However as an exception, where two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction and one of them makes a self-implicating confession which touches such other co-accused persons, the court may take consideration of that confession against those others provided that the said confession was made freely and voluntarily.¹⁴

Under s.33 (2) TEA, in order to convict the co-accused based on such confession, there must be independent evidence from a trustworthy source which when linked and supported by the confession of the co-accused, removes beyond reasonable doubt the question of innocence.¹⁵

This is because, as it has been held in several cases, co-accused confession is considered as one of the weakest of confessions. In **Simon v R**¹⁶ the court held;-

¹³ Section 27(1) of TEA

¹⁴ Section 33(1)(2) of TEA, Hassan Nondo v Republic, Criminal Appeal No.126 of 2002 CAT Mbeya (unreported),

¹⁵ Karanya s/o Njonji & others v R (1952) 20 E.A.C.A 324, Bushiri Amiri v. R [1992] TLR 65, Muthige Mwigai & others v Reginam (1954) 21 E.A.C.A 267& 268, Jamali Msombe & another v Republic, Criminal Appeal No.28 of 2020 CAT (Unreported) pg.25, Baven Hamis & 2 others v Republic, Criminal Appeal No.99 of 2014 CAT (unreported) pg.20, Shinje James vs Republic, Criminal Appeal No.408 of 2017 CAT (unreported) pg.14,

¹⁶ Simon v R (1974) E.A 74 , Anyanga v R (1968) E.A 239



“If it is a confession and implicates a co-accused it may, in a joint trial, be taken into consideration against that co-accused. It is, however, not only accomplice evidence but evidence of the weakest kind and can only be used as lending assurance to other evidences against the co-accused.”

The case of **Anyangu v R**¹⁷ repeated what was held in the East African Court that;

“If a statement amounts to a confession and it implicates the co-accused, it may in a joint trial be taken into consideration against the co-accused. It is however evidence of the weakest kind and can only be used as lending assurance of other evidence against the co-accused.”

1.7 Confession under s.29 of TEA

Generally, Confession statements are admissible if they were made voluntarily and free from promise, threat or torture. However, under some circumstances if torture was not employed, the law allows the trial court to admit a confession obtained through **a promise or threat** if it is of the opinion that no inducement was made and that the confession was not of such a nature as was likely to cause an untrue admission of guilty.¹⁸ Section 29 of TEA provides:-

No confession which is tendered in evidence shall be rejected on the ground that a promise or a threat has been held out to the person confessing unless the court is of the opinion that inducement

17 Anyangu v R [1968] EA 239, Anyuna s/o Omolo v R (1953) 20 E.A.C.A 218, Gopa s/o Gidamebanya v R (1953) 20 E.A.C.A 318

18 Yusuph Sylvester vs Republic, Criminal Appeal No.115 of 2021 CAT Bukoba (unreported)



was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilty to be made.

This means, if torture was not used, confession obtained through promise or threat may be admissible against the maker if it is in such a nature that it is true or if the inducement or threat was of such a nature as was likely to cause an untrue admission of guilt.¹⁹

See also the case of **Josephat Somisha Maziku v R**²⁰ where the court was of the view that;-

While it is trite law that the condition precedent for the admissibility of a confession is its voluntariness, a confession is not automatically inadmissible simply because it resulted from threats or promise, unless the inducement or threat was of such a nature as was likely to cause an untrue admission of guilt.

1.8 Guiding principles in confessions

In **Nyerere Nyague**, the court established important guiding principles to note when dealing with confession statements, which I think are useful for legal practitioners to observe. They include;²¹

- (i) A confession or statement will be presumed to have been obtained voluntarily until objection to it is made by the defence.

¹⁹ Thade Mlomo and others v Republic 1995 TLR 187 (CA),

²⁰ Josephat Somisha Maziku v Republic [1992] TLR 227

²¹ Tuwamoi v Uganda (1967)E.A 91, Nyerere Nyague v Republic, Criminal Appeal No.67 of 2010, Jumanne Issa & another vs Republic, Consolidated criminal Appeal Nos.54&55 of 2021 CAT (unreported) pg.4.



- (ii) Objection may be taken on the grounds that it was not made voluntarily contrary to s.27 TEA that it was not made at all or it was made in contravention with the law.
- (iii) If an accused intends to object to its admissibility, he must do so before it is admitted, not during cross-examination or defence.
- (iv) In the absence of any objection to the admissibility of the statement, the court cannot hold trial within trial or inquiry *suo motu*, to test its voluntariness.
- (v) If objection is made at the right time on issues of voluntariness or whether the statement was recorded or not (retraction or repudiation), the trial court must stop everything and proceed to conduct a trial within trial or inquiry to determine voluntariness or otherwise of the alleged confession.
- (vi) In trial within trial or inquiry, the court will determine only whether the accused made the statement at all or whether he made it voluntarily. Contravention with the law does not move the court into inquiry or trial within trial.
- (vii) Everything being equal, the best evidence in a criminal trial is a voluntary confession from the accused himself.



- (viii) If it contravenes section 169 of the CPA (or any other provision of law), its admissibility is in absolute discretion of the trial court, although before admitting or rejecting it, the parties must contest it and the trial court must show that it took into account all necessary matters into consideration and is satisfied that if it admits, it would be for the benefit of public interest and the accused's rights and freedom are not unduly prejudiced. Not every apparent contravention of the CPA would automatically lead to the exclusion of the evidence in question.

1.9 Retracted or Repudiated Confession

As stated in ***Tuwamoi v. Uganda***,²² a retracted confession is one which the accused person admits that he made the statements recorded but now seeks to take back what he said generally on the grounds that the statement was not voluntary as he had been forced or induced to make it. On the other hand, a repudiated statement is one which the accused avers that he never made it.

Generally, it is dangerous to enter a conviction based on a retracted or repudiated confession without corroboration. However, it is trite law that where a confession is retracted or repudiated, the court can convict on it even without corroboration provided that it warns itself of the danger of acting solely on such a confession and if it is fully satisfied that the confession cannot but be true.²³

22 *Tuwamoi v Uganda* (1967) EA 84

23 *Muganyizi Peter Michael & 3 others vs Republic*, Criminal Appeal



In ***Tuwamoi v Uganda***, the court stated that;

“.....a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.”

In ***Kashindye Meli v Republic [2002] TLR 374 CA***, the appellant retracted the confession made to the Justice of the peace but he was still convicted based on it. The Court of Appeal stated that:-

It is now settled law that although it is dangerous to act upon a repudiated or retracted confession unless such confession is corroborated, the court may still act upon such confession if it is satisfied that the confession could not but be true.

As the appellant clearly admitted killing the deceased in the extra-judicial statement which was accepted by the trial court as truthful, that was sufficient evidence for founding the conviction against the appellant.

No.144 of 2020 CAT (unreported) pg.43, *Tuwamoi v Uganda* (1967) EA 84. *Toyi v R* [1960] EA 760, *Swai and Others v Republic* [1974] EA 37



PART TWO

TYPES OF CONFESSIONS

2.1 Introduction

This part will discuss three types of confessions, namely:-

- (1) Oral confessions
- (2) Cautioned statements
- (3) Extra-judicial statements

2.2 Oral confession

Oral confession refers to a voluntary verbal statement confessing to having committed a crime.²⁴ As long as the accused person was a free agent at the time when he made it, oral confession is sufficient by itself to ground a conviction against him.²⁵

However, a point to note is that, it is not enough that the accused made the oral confession, the trial court should go further to determine whether it was voluntary or not.²⁶

It is settled that an oral confession made by a suspect before or in the presence of reliable witnesses, whether they be civilians or not, carries equal weight to the

24 Academic Dictionaries and Encyclopedias, 2000 - 2022

25 Joseph Thobias & 2 others vs Republic, criminal Appeal NO.296 of 2019 CAT (unreported) pg.35, The **Director of Public Prosecution v. Nuru Mohamed Gulamrasul** [1988] T.L.R. 82,

26 Chamuriho Kirenge@chamuriho Julias vs Republic, criminal Appeal No.597 of 2017 CAT (Unreported) pg.20



written one and a valid conviction can be founded on it.²⁷

Section 27(3) of TEA provides what amounts to an involuntary confession. There are certain circumstances where the surrounding environment may suggest that the accused was not a free agent despite the fact that he orally confessed to commit a crime.

In **Inota Gishi&3 others vs Republic**²⁸ for instance, the appellant confessed before a group of 50 sungusungu militias, such a large group of vigilantes was not said to have been conducive to the making of a voluntary oral confession.

A different scenario happened in **Gozbert Henerico v Republic**,²⁹ where the accused person submitted himself to the village chairman after he had committed the crime, and confessed to him. The village chairman tied and locked him in a room, put someone to guard as he went to fetch other people for further actions. The Court of Appeal found such oral confession to be valuable since at the moment when he made it, he was a very free agent and in a reasonable number of people.

27 DPP vs Nuru Mohamed Gulamrasul [1988] TLR 82, Peter Didia@ Rumala vs Republic, Criminal Appeal No.421 of 2019 CAT (unreported) pg.17, Mawazo Anyandwile Mwaikwaja vs DPP, Criminal Appeal No.455 of 2017 CAT (Unreported), Poloso Wilson Mwalyego v R Criminal Appeal No.613 of 2015 CAT (unreported) pg.7

28 Inota Gishi&3 Others vs Republic, Criminal Appeal NO.05 of 2008 CAT (Unreported),

29 Gozbert Henerico v R, Cr. Ap. No. 114 of 2015, CAT (unreported).at pg. 17



2.3 Cautioned statement

For the purpose of this part, a cautioned statement refers to the statement made by a suspect of a crime during interrogation by the police after being warned that the same may be used as evidence against him in a court of law (*emphasis mine*).

As it is to any other confession statement, a cautioned statement is admissible in evidence against the maker if at the time of making it, the accused person was a free agent and he made it voluntarily.

The following are guiding principles applicable in cautioned statements at the time of recording and during admissibility in court. The principles have been written in brief as a checklist for ease of understanding and use during trial or appeal.

(i) Recording before several officers

During recording, the suspect must be a free agent, free from anything capable of interfering his voluntariness. Ordinary people for example, get intimidated by the police even when they have not committed a crime, so it is expected of the recording officer to be alone with the suspect at the place of recording it. It is trite law that, a cautioned statement recorded in the presence of another police officer or other officers is not admissible in evidence.³⁰

30 Leonard Mathias Makani & another vs Republic, Criminal Appeal NO.579 of 2017 CAT (unreported) pg.21, Friday Mbwiga@Kameta vs Republic, Criminal Appeal No.514 of 2017 CAT (unreported)pg 10&11, Charles Issa @Chile vs Republic, criminal Appeal No.97 of 2019 CAT (unreported) pg 15&16



(ii) **Four hours rule**

Generally, as per s. **50(1) (a)** of the CPA, the basic period available for interviewing the suspect is four hours commencing at the time when he was taken under restraint in respect of the offence or such period as may be extended under s.51 of the CPA. The law is clear that, recording cautioned statement outside such period renders it incompetent and liable to be expunged from the evidence.³¹

In calculating the said four hours period, there shall not be reckoned as part of it any time while the police officer investigating the offence refrained to interview him or causing the suspect to do any act connected with the investigation of the offence;³²

- (a) While the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;
- (b) For the purpose of;–
 - (i) Enabling the person to arrange or attempt to arrange for the attendance of a lawyer;
 - (ii) Enabling the police officer to communicate or attempt to communicate with any person whom

31 Ibrahim Mohamed vs Republic, Criminal Appeal NO.176 of 2021 CAT (unreported), Alex Kalilo vs Republic, Criminal Appeal No.305 of 2019 CAT (unreported) pg 14.

32 Ally Hasan Abdallah vs Republic, Criminal Appeal No.383 of 2021 CAT (unreported)pg 21



he is required by section 54 of the CPA to communicate in connection with the investigation of the offence;

- (iii) Enabling the person to communicate or attempt to communicate, with any person with whom he is, under the CPA, entitled to communicate; or
- (iv) Arrange or attempting to arrange, for the attendance of a person who, under the provision of the CPA is required to be present during an interview with the person under restraint or while the person under restraint is doing an act in connection with the investigation.
- (c) While awaiting the arrival of a person referred to in subparagraph (iv) of paragraph (b) above; or
- (d) While the person under restraint is consulting with a lawyer.

(iii) Suspect's rights during interrogation

During interrogation and when a cautioned statement is about to be recorded, the suspect has rights to be given by the recording officer (the Police). The police officer is required to introduce himself by name and rank and inform the suspect of the alleged offence he is about to record the statement about and that the same may be used as evidence against him in a court of law. This is what makes it a “*cautioned statement*” when the suspect is warned/cautioned that it might be used against him as evidence.



Also, the suspect has the right to be informed that he is at liberty to answer any question other than those seeking to his particulars and address, and subject to *section 54(2) of the CPA*, that he has the right to communicate a lawyer, relative or friend prior to the recording.³³

(iv) Certification by recording officer

At the end of every cautioned statement, the recording officer is required to endorse a certification as a way to authenticate the truth of what has been recorded. Failure to do so or doing so under non-existing law renders the statement unauthentic liable to be expunged from the record.³⁴

(v) Right to comment statements

This sometimes is said to be clearing an exhibit for admission. Before a cautioned statement is admitted in court as exhibit, the accused person must be given opportunity to comment or challenge it and the records of proceeding must indicate so. Failure to afford him such chance results to unfair trial and makes the statement valueless, liable to be expunged.³⁵

33 Section 53 of the CPA

34 Section 57(3) of the CPA, *Juma Omary vs Republic*, Criminal Appeal No.568 of 2020 CAT (unreported) pg.15, *Paschal Maganga & another vs R* Criminal Appeal No.268 of 2016 CAT Tabora (unreported) pg.15

35 *Jumapili Msyete vs Republic*, Criminal Appeal NO.110 of 2014 CAT 2014 Mbeya (unreported), *Twaha Ally & 5 Others vs Republic*, and Criminal Appeal NO. 78 of 2004 CAT (unreported) and *Bundala Mahona & Another vs Republic*, Criminal Appeal NO. 224 of 2013 CAT (unreported), *Fraterin Constantin Shayo vs Republic*, Criminal Appeal NO. 73 of 2011 CAT Arusha (unreported) pg.7



It has been a long adopted principle that an exhibit must first be cleared for admission before it is admitted as exhibit and as for a confession statement, before reading it out in court.³⁶ Clearing for admission means removing all possible chances of complains about its validity. As it has been noted above, it is done by giving opportunity to the adverse party to comment or challenge it as a way of ensuring that it is admitted without complains. This is as good as giving the adverse party the right to be heard on it failure of which renders unfair trial.³⁷

(vi) Reading statements after admission

After the statement has been cleared for admission and thereafter being admitted as exhibit, it must be read out before the court for the accused to be informed of its contents to enable him prepare for cross-examination of the witnesses and his defence. Reading out the statement before admitting it is fatal for want of impartiality on the part of the court (*might be influenced by its contents before the accused is heard about it hence be biased*) and renders the statement to be expunged.³⁸

2.4 Extra-judicial statement

These are statements voluntarily and freely made by a suspect in the immediate presence of a magistrate or a justice of the peace.³⁹

36 Robison Mwanjisi & 3 Others V R [2003] TLR 218

37 Robison Mwanjisi (supra)

38 Samwel Henry Juma vs Republic, Criminal Appeal No. 211 of 2011 CAT DSM (unreported) pg.10

39 Section 28 of TEA



As per section 28 of TEA, confession statements in the form of extrajudicial are admissible as against the person who made it.

(i) Guiding procedure in extra-judicial statements

The guiding procedure to follow when Justices of the Peace record extra-judicial statements is the *Chief Justice's Instructions* (guides) made under sections 52 and 62 of the MCA. Generally, what is required of them is for the suspect to commit himself over his readiness to voluntarily make the statement, thereafter sign it and for the JP to sign after the recording as authentication of what he has recorded.⁴⁰

The validity of the Chief Justice's guide is that, since they are born from the *Magistrates' Court Act*, they are not merely administrative procedures but a law.⁴¹ And this means, it is mandatory to Justices of the Peace to abide by them when recording extra-judicial statements.⁴²

(ii) Voluntariness during recording

As it is to any other confession statements, the suspect must be a free agent at the time of recording an extra-judicial statement. The suspect must not be forced to record it, in the contrary it must be shown that, he wished in his own will, to record it.

40 Peter Charles Makupila @ Askofu vs Republic, Criminal Appeal No.21 of 2019 CAT (unreported) pg.24

41 Khalid Mohamed Kiwanga & another vs Republic, Criminal Appeal NO.223 of 2019 CAT (unreported) pg.32

42 Japhet Thadei Msigwa v R Cr. Appeal No.367 of 2008, CAT (unreported),



In the case of ***Mpemba Mashenene v R***,⁴³ for example, the suspect recorded an extra-judicial statement in the presence of a police officer and featured nowhere to show whether he signed to consent or not to the recording. The Court of Appeal stated that he would not be a free agent to record such statement in the presence of a Police Officer.

(iii) Essential aspects when recording

In the case of ***Japhet Thadei Msigwa vs Republic***,⁴⁴ and ***Peter Charles Makupila @ Askofu v. Republic***,⁴⁵ stated that, when JPs are recording confessions of persons in custody of the police, they must follow the Chief Justice's instructions to the letter.

Furthermore, the court listed down important conditions precedent to observe when recording extra-judicial statements that it must indicate;

- (i) The time and date of his arrest
- (ii) The place he was arrested
- (iii) The place he slept before the date he was brought to him

43 *Mpemba Mashenene v Republic* Criminal Appeal No.557 of 2015 CAT Mwanza (unreported) pg.21

44 *Japhet Thadei Msigwa vs Republic*, Criminal Appeal No.367 of 2008 CAT Iringa (unreported)

45 *Peter Charles Makupila @Askofu v. Republic*, Criminal Appeal No. 21 of 2019



- (iv) Whether any person by threat or promise or violence has persuaded him to give the statement.⁴⁶
- (v) Whether he really wishes to make the statement on his own free will.
- (vi) That if he makes the statement, the same may be used as evidence against him.

The court emphasized further that the need to observe the Chief Justice's Instructions are twofold; **One**, if the suspect decided to give such statement he should be aware of the implications involved and **Two**, it will enable the trial Court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntary. Non-compliance will fatally render the statement inadmissible.

(iv) Persons who sent suspects to JP

Especially where the statement has been objected, the person who sent the accused person to the Justice of the Peace (JP) is necessary to be called to testify about the role he played. In ***Joseph Mwita @ Cahcha vs Republic***,⁴⁷ the court pointed out the requirement that the Justice of the peace must explain in the statement the person who handled the suspect to him and to whom the statement was handled after it had been recorded.

⁴⁶ Joseph Kafuka & Antony Mwitula vs Republic, Criminal Appeal No. 87 of 2014 CAT Iringa (unreported)

⁴⁷ Joseph Mwita @ Cahcha vs Republic, Criminal Appeal No. 294 CAT Mwanza (Unreported) pg.4



(v) Time to record extrajudicial statements

Contrary to what is required in cautioned statements, there is no prescribed time limit to record extrajudicial statements from the time when the suspect was put under restraint.⁴⁸

In ***Andius George Songoloka & 2 others vs Republic***,⁴⁹ the court stated that, what is required to be observed is the reasonableness of time with which the suspect elects to make his extrajudicial statement the bottom line being when he is ready to do so.

This is because; recording such statements depends on the suspect's willingness to do so. In ***Vicent Ilomo & another vs Republic***,⁵⁰ the court held that;

We take voluntariness to be the key factor even when it comes to the decision whether and when a suspect should be taken to a JP. We say so because not in every case do suspects record extra-judicial statements, and this, in our view, is a healthy situation tending to confirm that only when the suspects freely make up their minds to have confessions recorded, are they taken before the JPs to record such statement.

48 Maige Nkuba vs Republic, Criminal Appeal NO.551 of 2016 CAT (unreported) pg.13

49 Andius George Songoloka and 2 Others v. The Republic, Criminal Appeal No. 373 of 2017 (unreported),

50 Vicent Homo and Another v. The Republic, Criminal Appeal No. 337 of 2017 (unreported)



PART THREE

INQUIRY OR TRIAL WITHIN TRIAL

3.1 Meaning of inquiry

An inquiry is a mini-trial conducted in subordinate courts when determining admissibility of objected confession statements, whereby the main trial is paused to allow a mini-trial which would determine admissibility of the said statement.⁵¹ In subordinate courts it is called an *inquiry* but in the High Court the same is called *trial within trial*.

During admissibility stage of the confession statement and before it is so admitted in court as exhibit, the accused must be given opportunity to comment or object on it as a matter of fair trial. If he objects on the ground of voluntariness or where he repudiates it, the main trial must stop to allow a mini-trial to determine the validity of the objection. After the inquiry has been conducted and a ruling delivered, the main trial resumes therefrom where it had been paused.⁵²

Failure to conduct *inquiry/trial within trial* where the objection touches matters of voluntariness or where the accused repudiated the statement is fatal and renders the statement liable to be expunged from the record by an appellate court.⁵³

51 Seleman abdallah & 2 others vs Republic, Criminal Appeal No.384 of 2008 CAT (unreported) pg.14

52 Twaha Ali and 5 others v R Cr.Appeal No. 78 of 2004 CAT (unreported)

53 Nyeura Patrick v R Cr.Appeal nO. 73 of 2013 CAT Mwanza (unreported)



A number of case laws have settled the principle that, an inquiry or trial within trial is not to be conducted on every objection raised by the accused, but only on those which touch voluntariness or repudiation of the statement. In **Annes Allen vs DPP**,⁵⁴ quoting with approval the East African cases of **Mohamedi Ali & Another v. R [1956] 29 EACA 166** and **Mwangi Njoroge v R [1954] E.A.C.A 377** it was stated that;

A trial within trial (or inquiry) should be held to determine not only the voluntariness or otherwise of an alleged confessional statement, but also whether or not the statement was made at all.

3.2 Procedure for conducting inquiry

In the case of **Seleman abdallah and 2 others vs Republic**,⁵⁵ quoting with approval the case of **Rashid & another v Republic**⁵⁶, underlined the procedure of conducting inquiry as follows;

- (i) When an objection is raised as to the voluntariness of the statement intended to be tendered as an exhibit, the trial court must stay the proceedings.
- (ii) The trial court should commence a new trial from where the main proceedings were stayed and call upon the prosecutor to adduce evidence in respect of that aspect of voluntariness.

54 *Annes Allen vs DPP*, Criminal Appeal N.173 of 2007 CAT (unreported) pg19

55 *Seleman abdallah & 2 others vs Republic*, Criminal Appeal No.384 of 2008 CAT (unreported) pg.14

56 *Rashid & another v Republic* (1969) EA 138



The witnesses must be sworn or affirmed as mandated by section 198 of the CPA.

- (iii) Whenever a prosecution witness finishes his evidence the accused or his advocate should be given opportunity to ask questions.
- (iv) Then the prosecution to re-examine its witness.
- (v) When all witnesses had testified, the prosecution shall close its case.
- (vi) Then the court is to call upon the accused to give his evidence and call witnesses, if any. They should be sworn or affirmed as in the prosecution side.
- (vii) Whenever a witness finishes the prosecution to be given opportunity to ask questions.
- (viii) The accused or his advocate to be given opportunity to re-examine his witnesses.
- (ix) After all witnesses have testified, the accused or his advocate should close his case.
- (x) Then a ruling to follow.



- (xi) In case the court finds out that the statement was voluntarily made (after reading the ruling) then the court should resume the proceedings by reminding the witness who was testifying before the proceedings were stayed that he is still on oath and should allow him to tender the statement as an exhibit. The court should accept and mark it as an exhibit. The contents should then be read in court.
- (xii) In case the court finds out that the statement was not made voluntarily, it should reject it.



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