

IN THE HIGH COURT OF ZANZIBAR

HELD AT TUNGUU

CRIMINAL CASE NO. 8 OF 2024

DIRECTOR OF PUBLIC PROSECUTIONS

v.

1. NASSOR SULEIMAN KHALFAN

2. ABUBAKAR ABDALLAH ALI

3. ALI SHIBU HASSAN

RULING

Dated: 25th March, 2025

S. HASSAN (J)

On the 13th March, 2025 after the prosecution has paraded 13 witnesses, filed a notice under section **34 (1) (2) of the Evidence Act No. 9 of 2016** and served a copy to the accused persons through their advocates.

The notice was filed with a view of requesting this court to admit as documentary evidence a witness statement of **Nassor Khamis Mohamed**.

As per the notice it appears that *Nassor Khamis Mohamed* is sick and the effort to procure him as a witness have proven failure and it is because of that reason the prosecution implore this court to admit his statement in lieu of his oral evidence.

Having been dully served with such notice, *Mr Rajab Abdalla* gave his intention to file notice of objection under the provision of **section 34 (2) (e) of the Act No. 9 of 2016**.

On the 17th March, 2025 the objection was heard and in principle it was based on the 3 issues, that the witness statement was recorded by *Bakari Y. Juma* and not the witness himself *Nassor Khamis Mohamed*, the summon which state the witness is sick was endorsed on the back by someone else and not the witness himself hence its creates doubt, he further submitted that the medical reports are from the private clinic and not

public hospital and they show that the witness visited clinic on **1st July, 2024** which is long time ago. Hence he prayed for the notice of prosecution to be dismissed because it will also deny them the right to cross examine the witness if the statement is admitted in court.

Responding to the above objection, *SSA Shamsi Saad* for the prosecution made reference to **section 34 (1) (2) of the Act No. 9 of 2016** and advice the advocate for the defence not to read the section in isolation. He submitted that the provision has among other reasons has put statement at the beginning which is clear that the reason of being bodily unfit, he further submitted that, in the process of procuring the witness, the process server has indorsed the summon at the back to show the condition of the witness on the 10th March, 2025 when he went to serve him with summon that the witness is sick hence it is sufficient evidence to prove that the said witness is bodily unfit. With regard to the issue raised that, the statement of the witness was recorded by someone else and not the witness himself, Mr Shamsi submitted that the requirement of **section 34 (2) (f)** was complied with fully, with respect to medical records not being of the public hospital he simple submitted that the witness has a choice to visit any clinic be private or public and he is not restricted by law. With respect to the right of the defence to cross examine the witness, he submitted that such right is waived under **section 34** if the state of the witness is admitted in court in lieu of his oral evidence.

In his brief rejoinder Mr Said maintained his position and prayed for the notice be rejected and dismissed.

After the submission of the parties, I gave a brief Order dismissing the objection raised by Mr Said and reserved my reasons on a later stage.

Today **25th March, 2025** I give my reasons, at first I wish to point out that, the law regarding admission of witness statement under **section 34 (1) (2) of the Evidence Act No. 9 of 2016** is very clear that for the same to be admitted in evidence all conditions stipulated therein must be complied with cumulatively as stated so by the Court of Appeal in the case of **Joseph Shaban v. Mohamed Bay & 3 Others v. R [1997] TLR 219** and in the case of **Adinardi Iddy Salimu & Another v. R, Criminal Appeal No. 298 of 2018** where in the latter case the Court of Appeal stated that:

“ The Court has on several occasions emphasized on the mandatory requirement of the law that, for a statement to be admitted in lieu of the oral evidence, the conditions stipulated under the cited provision must cumulatively be complied with ”

The said conditions as provided under **section 34 (2) (a) – (f) of the Evidence Act No. 9 of 2016**.

In the present case, it is obvious that, the notice to tender a witness statement of *Nassor Khamis Mohamed* was filed in conformity with the **section 34 (1)** which reads as follows:

“ 34 (1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence”

It is my understanding that, the above provision the words **“ shall subject to the following provisions”** means that all conditions stipulated under section **34(2)(a)–(f)** must be complied with cumulatively in order for the court to admit the witness statement and in the event the above requirements are not met or complied with, the statement of the witness cannot be admitted in court.

The consequence of omission to comply with such mandatory requirement was stated in the case of **Shilinde Bulaya v. R, Criminal Appeal No. 185 of 2013** in which the Upper Court stated that:

“ Where all conditions are not complied with the statement should be expunged or discounted”

See also the case of **Twaha Ali and 5 Others v. R, Criminal Appeal No. 78 of 2004**.

In the present case, there is no doubt that the witness whose statement is sought to be tendered is sick and unfit as per the attached medical report and cannot attend in court as a witness, the prosecution has taken all reasonable steps to summon him to appear as a witness but as stated by court sever that, he found the witness sick when he went to serve him with summons to attend the court.

With all in mind, it is the view of this court that, the prosecution has met all the conditions set out under **section 34 (2) (a) – (f) of the Act No. 9 of 2016** as stated so by the Court of Appeal in the cases of **Joseph Shaban v. Mohamed Bay & 3 Others v. R [1997] TLR 219** and in the case of **Adinardi Iddy Salimu & Another v. R, Criminal Appeal No. 298 of 2018**.

Therefore, I see no justifiable reasons not to allow the prosecution to admit as documentary evidence a witness statement of **Nassor Khamis Mohamed** in lieu of his oral evidence. The objection raised by the defence side lack merits and it is hereby dismissed by the court.


S. HASSAN (J)



It is so Ordered.

Dated: 25th March, 2025.