

Legal and Practical Challenges in the Conduct of Video & Audio Recording of Interviews with Suspects in Tanzania

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Abstract

For quite long, there have been complaints towards the administration of criminal justice in Tanzania, particularly the mishandling of custodial interviews of criminal suspects by the Police Force in the course of criminal investigation. There have been allegations by the public about, among others, forced admissions and confessions through torture and other unacceptable means in the process of procuring cautioned statements from the suspects. In the move to provide control and openness of the process, on the 3rd of November 2023 the Chief Justice of Tanzania issued the Criminal Procedure (Video and Audio Recording of Interviews with Suspects) Rules of 2023, through Government Notice No. 792 of 2023. The Rules provide for the manner and procedure of holding interviews with suspects through video or audio recording. Despite the positive intention of issuing the Rules, there are legal and practical challenges in the application of the said Rules. This paper provides an analysis of the notable legal and practical challenges in the application of the Rules. It proceeds to make suggestions for necessary amendments for an effective and efficient control of interviews with suspects.

Keywords: Criminal Procedure, Interviews with Suspects, Video and Audio Recording Rules.

1. Introduction

Tanzania is among the commonwealth countries, having joined as a member after acceding to her independence in 1961. As such, the country follows the adversarial mode of criminal justice system which is common in countries that were, historically, British colonies. In essence, the adversarial mode of criminal justice system presumes an accused person innocent, until proven guilty beyond all reasonable doubt and through well-established legal procedures and processes.

In the aforesaid premises, the institutional framework of criminal proceedings in Tanzania is designed in a triangular structure, which is common to all commonwealth countries. With the said structure, the Police force has the investigative role, the office of the Director of Public Prosecutions (hereinafter and throughout to be referred to as “the DPP”) has the prosecutorial role, while the Judiciary has the adjudicative role.

Investigative powers of the Police are provided for under Part II of the Criminal Procedure Act (hereinafter and throughout to be referred to as “the CPA”).¹ This part provides generally for procedure relating to criminal investigations, with provisions governing arrests, interview with suspects and other

¹ Cap. 30 of the Laws of Tanzania [R.E. 2023].

matters related thereto. Although there are other laws providing for the duties, responsibilities and functions of the Police Force in Tanzania, the main law when it comes to the discharge of their duties relating to investigation of crimes and the handling of suspects, is the Criminal Procedure Act. Other laws as aforesaid include, inter alia, the Police Force and Auxiliary Services Act², the Police Force and Auxiliary Services (Police General Orders) Order, 2021³, the Auxiliary Police Force Regulations⁴, etc. Criminal proceedings in Tanzania start with the lodging of a complaint to the Police, who are mandated to investigate criminal allegations. A complaint is defined as an allegation that some person known or unknown, has committed an offence.⁵ Such information or complaint relating to the commission of an offence, may be given either in writing or orally.⁶ Pursuant to the information given, investigation of criminal proceedings may begin either before or after the arrest of a person suspected to have committed an offence.⁷ Arrest means the putting under restraint of a person who is suspected to have committed an offence, powers which are enjoyed by the Police, private persons and Magistrates.⁸ The CPA has provisions couched in mandatory terms, governing the investigative role of the Police particularly when interrogating arrested suspects who are under the custody of the Police. The said provisions provide as well for the rights of the suspects during interrogation. That notwithstanding, complaints are that the mishandling of the suspects by the Police begin from the moment a suspect is arrested. The reason is that the investigative role of the Police for the purpose of establishing whether or not the arrested person committed the offence the subject of arrest, starts right from arrest and the arrested person is under the custody of the police.

2.0 Prelude to the Introduction of the Rules

Prior to the issuance of the Criminal Procedure (Video and Audio Recording of Interviews with Suspects) Rules of 2023 (hereinafter and throughout to be referred to as “the Rules”), there was a provision in the CPA requiring, where necessary, interviews with suspects to be recorded through audio or video means.⁹ The provision, which still exists, remained redundant for all that time since its inception in the CPA in 2018, because the Rules had not been issued yet. As a result, the traditional way of taking statements of suspects continued to be used subject to the provisions of the CPA governing the exercise, as well as the rights of the suspects.

2.1 Custodial Interview and the Rights of Suspects under the CPA

The provisions of the CPA specifically section 12 that deals with arrest as well as section 49 through to 60, provide generally for the procedure and manner of dealing with, and the handling of arrested persons who are in the hands of the Police prior to their arraignment in Court. It means the rights of the accused which are expressly stated in the cited provisions of the CPA, are to be adhered to immediately after the arrested person is in the hands of the Police.

S. 49 (1) of the CPA provides that where a person is, or has been, under restraint in respect of an offence, a police officer may:

² Cap. 322 of the Laws of Tanzania.

³ Government Notice No. 315 of 2021.

⁴ 2009, Government Notice No. 90 of 2009, Made under S. 148(3) of the Police Force and Auxiliary Services Act, Cap. 322.

⁵ Section 2 of the CPA.

⁶ Section 10 of the CPA.

⁷ Sections 11 and 12 of the CPA.

⁸ Sections 15, 17 and 18 of the CPA.

⁹ Section 58(5) of the CPA.

- Ask the person questions, or
- Take other investigative action in connection with the investigation of the offence, during a period available for interviewing the person but not otherwise.

From the cited provision, investigation by the police involves the questioning and recording of answers given by an arrested person for the purpose of establishing connection between what the suspect is stating, and the offence alleged to have been committed by the suspect. Because the arrested person is in police custody, the exercise of questioning the suspect and recording the statement therefrom, is called custodial interview. The law further provides for procedure for conducting custodial interview including, inter alia, durations and/or periods within which to hold and interview the suspect.¹⁰

Despite the presence of clear provisions of the law governing the procedures and processes of conducting criminal investigation by the Police, there have been incidences of mishandling the suspects, either by forcing admissions or prolonging periods prescribed by law for custodial interviews.

Specifically, on periods for holding custodial interviews, Section 51 (1) of the CPA provides that the period available for interviewing a person who is in restraint in respect of an offence:

- Subject to paragraph
- the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;
- If the basic period available for interviewing the person is extended under Section 52, the basic period as so extended.

The law is very clear on the procedure to be followed where it is found impracticable to complete the custodial interview within the periods prescribed by law. Where it so happens, the Police Officer in charge of investigating the offence may extend the interview to not more than eight hours.¹¹ However, this is subject to existence of a reasonable cause for doing so, subject further to informing the accused of such extension and reasons.¹² Alternatively, the Police Officer in charge may make an application to a Magistrate within the local area in whose jurisdiction the suspect is held, for extension of time within which to continue holding and interviewing the suspect.¹³ The justification for having these procedural requirements clearly stipulated by the law is protection of the rights of suspects, during custodial interviews in the hands of the Police.

It is the requirement of the law for persons under restraint to be informed of their rights. Where a person is under restraint, a Police Officer is prohibited to ask him questions or anything connected to the offence alleged to have been committed by the person under restraint, unless he complies with conditions prescribed by the law.¹⁴ The conditions include the Police Officer to introduce himself by name and rank, and subject further to inform the person under restraint that he is not obliged to respond to any question except questions seeking to establish the particulars of the person under restraint.¹⁵

Further to the rights of a person under restraint, is the right to communicate with a relative or lawyer. Specifically, on this right, the law provides:

¹⁰ Section 51(1) (a) and (b) of the Criminal Procedure Act, Cap. 30 [R.E. 2023].

¹¹ S. 52(1) of the CPA.

¹² S. 52(1)(a).

¹³ S. 52(1)(b).

¹⁴ S. 54.

¹⁵ *Ibid.*

Subject to subsection (2), a Police Officer shall, upon request by a person who is under restraint, cause reasonable facilities to be provided to enable the person to communicate with a lawyer, a relative or friend of his choice.¹⁶

The right to communicate, however, is not absolute. A Police Officer may refuse to let the person under restraint exercise such right in the event the Police Officer, on reasonable grounds, believes that such refusal is necessary in order to prevent the escape of an accomplice of the person under restraint, the loss, destruction or fabrication of evidence relating to the offence.¹⁷

The law requires that a person under restraint be treated with humanity and with respect for human dignity.¹⁸ As such, it establishes in mandatory terms a prohibition of acts that go against humanity and human dignity, by using the word “shall”, in that, a person shall not, while under restraint, be subjected to cruel, inhuman or degrading treatment.¹⁹ The law clarifies on how a person under restraint should be treated by pointing out some incidences including, inter alia, that where a person, for instance, makes a request to a Police Officer to be provided with medical treatment, advice or assistance in respect of an illness or an injury or appears to the Police Officer to require medical treatment, advice or assistance in respect of illness or injury, the Police Officer shall forthwith take such reasonable action as is necessary to ensure that the person is provided with medical treatment, advice or injury.²⁰

2.1.1 Traditional Recording of Interviews under the CPA

The traditional procedure for the recording of custodial interview by the Police is provided for under S. 58 of the CPA, to the effect that a police officer who interviews a person for the purpose of ascertaining whether the person has committed an offence shall, unless it is in all circumstances impracticable to do so, cause the interview to be recorded.²¹ It provides further for the requirement that where a person who is being interviewed by a police officer for the purpose of ascertaining whether he has committed an offence makes a confession relating to the offence subject of the interview, then the police officer is to reduce into writing such a confession.²²

The recording of the confession is subject to the recording officer setting set out, inter alia, the questions asked to the suspect and answers given to such questions, the starting and completion time of the suspect's own written statement where the suspects voluntarily elects to write such statement, cautioning the suspect including specifying the time and terms in which the caution was made, indicating the time of commencing and completing the interview etc.²³ At the conclusion of the interview the law requires that the recording officer should write at the end of the record a form of certificate in prescribed form, then show the record to the suspect and ask him to read it and make any alterations or corrections if any.²⁴

Where the suspect is unable to read the record of the interview or refuses to read, or appears to the police officer not to read the record when it is shown to him, the law requires that the recording officer should read the record to him, or cause the record to be read to him, then ask him whether he would like to

¹⁶ S. 55(1).

¹⁷ S. 55(2)(a) and (b).

¹⁸ S. 56(1).

¹⁹ S. 56(2).

²⁰ S. 55(3) (a) and (b).

²¹ S. 58(1).

²² S. 58(2).

²³ S. 58(2)(a)-(f).

²⁴ S. 58(3).

correct or add anything to the record.²⁵ The certificate appearing in the record has to be signed to signify the completion of the interview.²⁶

It has already been explained that this traditional procedure has been the subject of abuse by the Police when carrying out their investigative responsibilities, particularly when conducting custodial interview. The result of it is incidences of faulted proceedings in courts when accused persons repudiate or retract their cautioned statements allegedly procured against the dictates of the law.

2.2 Incidences of Faulted Proceedings

Courts in Tanzania have not been hesitant to refuse to admit evidence procured in a manner that deviates from the dictates of provisions of the law directing the manner a suspect should be treated, or the manner evidence is to be procured. Further, the higher courts have not been hesitant to vitiate or fault criminal proceedings founded on procedures and processes that are against provisions of the law governing the handling and treatment of persons under restraint of the Police for the purpose of investigation. Incidences of accused persons repudiating or retracting their cautioned statements in courts stand as evidence of existence of maltreatment of suspects while under Police custody, or other investigative authorities.

Courts have been insisting that a cautioned statement must be properly admitted in court before it can be used to convict. If an accused person retracts or repudiates their confession, courts have been insisting for a thorough and careful consideration of the statement and other evidence to determine its truthfulness and reliability.

There is a myriad of precedents, old and recent, whereby accused persons successfully challenged the admission of cautioned statements in Court, on allegations that they (cautioned statements) were procured outside the dictates of the law. It is that the cautioned statements were procured either through torture or other unlawful means during custodial interviews, or procured through a custodial interview whose duration was beyond the statutory time.

The Court of Appeal of Tanzania in *Janta Joseph Komba & 3 Others Vs. Republic*²⁷, nullified the proceedings of the trial Court (the High Court of Tanzania) for a reason that the cautioned statements of the accused persons that were solely relied upon in convicting the accused persons, were procured outside the time prescribed by law.²⁸ It was well on record that the duration of custodial interview was extended without adhering to the procedure prescribed by the law, let alone the fact that the accused persons were held in custody for a period longer than that prescribed by the law.²⁹ The Court of Appeal in this case took an opportunity to expand the definition of torture from the common physical torture, to mental torture which resulted from the holding of the accused persons for a period longer than the statutory time.

There are so many cases that have adopted the approach taken by the Court of Appeal of Tanzania in *Janta Joseph Komba's* case. They include, for instance, *Mohamed Juma Mpakama Vs. The Republic*³⁰,

²⁵ S. 58(4).

²⁶ *Ibid.*

²⁷ Criminal Appeal No. 95 of 2006, Court of Appeal of Tanzania, Dar es Salaam.

²⁸ Section 51 of the Criminal Procedure Act, Cap. 30 [R.E. 2022] provides for the duration of custodial interview to be 4 hours. But also S. 52 of the same Act provides for procedure for extension of time where custodial interview is not completed within the statutory time.

²⁹ *Ibid.*

³⁰ Criminal Appeal No. 385 of 2017, Court of Appeal of Tanzania.

in which the Court of Appeal put emphasis on adherence to the mandatory provisions of Sections 50 and 51 of the CPA, in order for a cautioned statement to be admissible. The Court of Appeal further observed that Courts in Tanzania have an undeniable duty to ensure that cautioned statements which are taken beyond the times prescribed by the law, are first cleared before they are exhibited as evidence.

In its further observations in the said case, the Court of Appeal of Tanzania supported the rejection of a cautioned statement by the Counsel for the accused, on the ground of irregularities that did not warrant the admission of the cautioned statement. The Court emphasized that the statutory periods available for the police to interview persons suspected to have committed offences are closely regulated by the law under sections 51(1) and 52(1) of the CPA. Section 51(1) (a) of the CPA has prescribed the initial period of four hours for a police interview, counted from the time when the accused person is placed under restraint in respect of the offence.

In a criminal law class at the Law School of Tanzania, a student, a Police Officer working in the Department of Criminal Investigations in one of the Police Stations in Dar es Salaam, commended the means employed by the Police when interrogating suspects by using force or threats. The Officer was of the view that the means sometimes help in eliciting reliable evidence that supports allegations of criminality against suspects, further that the said evidence is admissible under the Evidence Act.

There have been misconceptions born out of misinterpretation of section 29 of the Tanzania Evidence Act (hereinafter and throughout to be referred to as “the TEA”)³¹, in that the section allows the admission of certain categories of forced confessions. The misconception, seemingly, has been justifying the continued mishandling of recording of statements of suspects by the Police, by using force (torture and other unacceptable means). Section 29 of the Tanzania Evidence Act provides:

Confession which is tendered in evidence shall not 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 the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilt to be made.

The Court of Appeal of Tanzania has, in a number of cases, provided a clear interpretation of the section. The Court has, in such cases, taken the view that where actual torture is involved in procuring a confession, the purported confession should not be admitted in evidence because section 29 of the Evidence Act was not meant to apply in such situations.

In *Yusuph Sylvester Vs. Republic*³², for instance, the appellant was convicted of the offence of murder contrary to section 196 of the Penal Code,³³ and sentenced to death by hanging by the High Court of Tanzania (Bukoba). On appeal to the Court of Appeal, it was evident from the record that conviction by the trial Court was grounded on a confession by the appellant during interrogation by the Police, which was indisputably procured through torture. The argument by the Republic during appeal was that the confession that was used to convict the appellant, though procured by force, was properly admitted by the trial Court in terms of section 29 of the Evidence Act. To clear the misdirection taken by the Republic in the appeal, the Court of Appeal observed that the said provision of the law, no doubt, allows the trial court to admit a confession obtained through a promise or threat, if the trial court is of the

³¹ Cap. 6 of the Laws of Tanzania [R.E. 2023].

³² Criminal Appeal No. 115 of 2021, Court of Appeal of Tanzania, Bukoba (Available on Tanzlii).

³³ Cap. 16 of the Laws of Tanzania [R.E. 2023].

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 guilt.³⁴

The Court of Appeal reiterated its position by making reference to the case of *Richard Lubilo & Another Vs. Republic*,³⁵ in which it stated that:

Section 29 [of the Evidence Act] is two-fold: It is whether the accused person was induced by such promise or threat to make the confession. If the answer to both limbs of the question is in the affirmative, the confession is inadmissible. But if, on the other hand, the Court is of the opinion that the promises and threats were not of such a nature and were not offered in such a nature and were not offered in such circumstances as to operate on the mind of the accused, the confession is admissible. Such a confession, not being the product of the threats and promises, is a species of voluntary confessions. The question whether or not the threats and promises have operated on the mind of the accused is a subjective one and the Court will have to decide each case on its peculiar facts.

A similar position was stated by the Court of Appeal of Tanzania way back in 1992 in the case of *Brasius Maona & Another Vs. Republic*,³⁶ in which the Court observed that once torture has been established, courts should be very cautious in admitting such statements in evidence even under the provisions of Section 29 of the Evidence Act, which in the considered view of the Court, was not meant to be invoked in a situation where the inducement involved is torture.

3.0 Introduction of the Rules

On the 3rd of November 2023 the Chief Justice of Tanzania issued the Criminal Procedure (Video and Audio Recording of Interviews with Suspects) Rules of 2023, through Government Notice No. 792 of 2023. The Rules provide for the manner and procedure of holding interviews with suspects through audio and video recording. The Chief Justice issued the said Rules in the exercise of his statutory powers in terms of Section 58(7) of the Criminal Procedure Act which. The said provision mandates the Chief Justice to make rules for the carrying out the provisions of Section 58(5) which provides for use of video and audio means when interviewing suspects. This provision directing the recording of interviews through audio and video means, had been there for quite sometimes; it is only that the Rules had not been made to take into effect the said provision.

3.1 Salient Features of the Rules

Part I of the Rules provides for preliminary provisions, including how the Rules are cited, as well as their “Application”, in that they do apply to all audio and video recording of interviews with suspects by the police officers. Rule 3 provides for interpretation of certain terms and phrases used in the Rules. Some of them are common in the Criminal Procedure Act but they are defined differently in the Rules to suit the context of the Rules. Some of the terms and phrases are new in view of the nature of the technology applicable in the course of recording interviews. Some of the technological terms are provided hereunder:

3.1.1 “Master Medium” - which means the recording media used in a twin or more recorders or the only medium used in a single recorder (there could be situations whereby the recording would involve either a single or more than one recorder in the process of recording);

³⁴ Criminal Appeal No. 115 of 2021, (Supra), p. 17.

³⁵ [2003] T.L.R. 159; referred in Criminal Appeal No. 115 of 2021, p. 17.

³⁶ Criminal Appeal No. 215 of 1992, referred in Criminal Appeal No. 115 of 2021, p. 17.

3.1.2 “Recorder” – means an electronic device used to record audio or video with sound;

3.1.3 “Significant Statement” - means admission of the commission of an offence and any other statement likely to be used in evidence against the suspect; etc.

Part II of the Rules provides for the recording procedures and processes. This is where most of the challenges, both legal and practical, arise.

4.0 Legal and Practical Challenges

The Audio and Video Recording of Suspects Rules are considered as an essential safeguard designed to enhance transparency, ensure fairness and strengthen the integrity of investigative procedures. That notwithstanding, there are legal and practical challenges in the application of the same. The challenges are discussed hereunder.

4.1 The Rules are Optional and not Mandatory

As pointed out earlier, the primary purpose of the Rules is to put into effect the provisions of Section 58(5) of the Criminal Procedure Act. However, in reading Rule 4 of the Rules which provides for the mode of recording, the language used is “may”, instead of “shall”. Rule 4(1) of the Rules provides:

An interview of a suspect by the police officer **may** be recorded in form of video or audio.

The same case is with the provisions of Section 58(5) of the Criminal Procedure Act. The Section provides:

An interview of a person by a police officer under this section **may**, if available, and subject to sections 54, 55 and 56, be undertaken by using an audio or video recording device...

Sections 54, 55 and 56 to which the interview is subjected, provide for the rights of the suspect to be explained, presence of a lawyer or close relative and treatment of the suspect, respectively.

The word “**may**” has been used in Rule 4(1) of the Rules as well as Section 58(5) of the Act. The meaning of this is that the Rules, which were believed to have come to cure the long time public outcry on the mistreatment of suspects, do not set the requirement of audio and video recording in mandatory terms. It means further, that the recording of interviews through audio and video means, is optional. It is in the discretion of the Police.

The recording of interviews with suspects in the Police stations, was supposed to be put in mandatory terms, not necessarily for all offences, but at least for offences considered to be serious; offences that attract heavier punishments and which are very common in subjecting the suspects to forced admissions and confessions, when interrogated by the police or other investigative machineries.

4.2 Lack of Transparency

Rule 5(1) of the Rules provides for the requirement that when a suspect is being video-recorded, the camera is to be fixed in the interview room, in such a way that it ensures a wide coverage of the interview room, so that the full image of the suspect is displayed. Rule 5(2) requires the officer conducting the interview to ensure transparency.

The problem here, is that while sub-rule 2 requires the officer conducting the interview to ensure transparency, sub-rule 1 talks of the coverage of the room so that the full image of the suspect is captured. The question is, why only the full image of the suspect and not of the person conducting the interview as well? For the purpose of transparency, both the suspect and the interviewing or if the interview is by more than one officer, then all of them be captured by the recording device.

The Rules should not have provided for only the image of the interviewed person to be captured, leaving the interviewing officer(s). The demeanour, conduct and appearance of the person conducting the

interview must be seen. Some of the interviewing officers have intimidating appearances. There might be an interview room with a single interviewing person (according to the recorded voice), but behind this one interviewing person there is a group of other persons holding intimidating items, but their image is not captured! Say weapons? The exercise would end up capturing only the suspect in the interview room, then a confession procured.

4.3 Pre-Interview Events

Close to the challenge of transparency, is pre-interview events. These are events that may take place outside the interview room prior to the interview exercise, while the Rules require that recording devices be placed or fixed only in the interview room. A suspect could be intimidated, threatened before the interview, which may obviously go unrecorded. Under such circumstances, the process of recording in the interview room may become a mere rubber-stamping exercise.

Rule 7(1)(g) of the Rules, presupposes the possibility of there being pre-interview events. The Rule requires the officer conducting the recorded interview, to put to the suspect any significant statement made prior to the interview. A significant statement is defined under Rule 3 of the Rules to mean an admission of the commission of an offence, and any other statement likely to be used in evidence against the suspect. The meaning of this is that if such a statement is put before the suspect, it proves the existence of pre-interview events that go unrecorded prior to, or before the recording of the interview starts.

Another situation of pre-interview events is where a suspect is held in custody for a long time. The suspect may volunteer to speak believing that he would be released, especially where there is such a promise, or that he may soon be taken to Court. In so doing, he may admit a fact unrecorded because the recording starts when the interview begins in the interview room and not outside the interview room.

4.4 The Effect of Refusal to Sign the Record of Interview

Rule 14 of the Rules provides generally for the conclusion of interview and procedures for the handling of the electronic record of interview (the master medium). Of interest is Rule 14(2) and (3), which requires the master medium (the digital record of interview) to be sealed with a master medium label and to be signed by the interviewing police officer, suspect and any independent witness if any. According to Rule 14(2), the master medium is treated as any other object intended to be used in court proceedings.

The challenge is where the suspect refuses to sign the label, or where an independent witness refuses to sign the label. The Rules provide that in the event the suspect or independent witness refuses to sign the label, then an officer of at least the rank of inspector, or if not available, an officer of a commanding station (OCS) not directly involved with the case, to be called into the interview room and be asked to sign the label.

The problem is that; the Rules are not precautionous of the danger of having a police officer signing the label in case of refusal. The recording is handled by the police; why then in case of refusal to sign by the suspect, a police officer is called to sign? Although the Rules require that the police officer who is to sign the label in case of refusal should be one who is not involved in the case, still he remains to be a police officer of the station that conducted the interview.

It has to be noted further that, the independent witness who Rule 14(4) is referring to, is a person who is not directly involved with the matter under investigation and therefore not related to the suspect. Therefore, why should a police officer sign the label in case of refusal of either of the two (the suspect or independent witness), and not a close relative of the suspect?

4.5 Uncertainty of Procedure for the Procurement of Independent Witnesses

The Rules, in particular Rule 14, provides for the involvement of independent witnesses in the process of recording interviews. Despite providing for the definition of an independent witness in Rule 3, the Rules are silent on how independent witnesses are procured, including their qualification/eligibility to act as such, let alone their relations with either the investigative machinery or the suspect. It is important to note that the independent witness is not only witnessing the suspect being interviewed, but also that the interview itself is by the digital means. The independent witness has to witness technology being applied in a manner that is correct, proper and transparent so as to instil confidence and integrity of the process and in the process.

The Rules, therefore, ought to have set the means of procurement of independent witnesses, as well as standards and qualifications. Otherwise, this gap poses itself as a practical and legal challenge towards the enforcement of the Rules.

4.6 Uncertainty of Required Recording Devices

Rule 3 defines a “recorder” to mean an electronic device used to record audio or video with sound. There is no any mention or suggestion of even a single device as an example. Under Rule 5 (1) of the Rules, the marginal notes talk of “positioning of a camera”, this, obviously is for video recording. So there is, at least, a mention of cameras. The Rules do not specify, however, the type of cameras to be used. Recently, mobile phone cameras have been commonly used in recording events. Failure of the Rules to specify the type of cameras may lead to use of any type of cameras, thereby affecting the integrity of the recording exercise as well the quality of the image and sound.

What about audio recording? What are the specified devices? Or, is it that audio cannot be recorded separately except with a video?

A proper construction of Rule 11 of the Rules, removes the possibility of mobile phones being used as recording devices. Rule 11(1) (b) for instance talks of the “insertion” and “removal” of a recording medium from the recorder. So if the recorder is a mobile phone, what is the recording medium that is to be inserted in and removed from a mobile phone? The same language is in Rule 13. So by removing the possibility of mobile phones being used, why are the recording devices not specified to maintain uniformity, and therefore quality of the images and sound, confidence and integrity as provided in Rule 5(2)?

4.7 Availability of Recording Devices

Regardless of the fact that the recording devices are not specified in the Rules, they are not available in all the police stations in the country (Main and Outposts). Non-availability of the devices creates room for continuing with the traditional way of interviewing suspects, rendering the introduction of the Rules meaningless.

4.8 Conflict between Digital Interview Record and Written Record of Interview

Rule 14(2) presupposes that the digital interview record, is going to be used in court proceedings. It requires the master medium to be sealed with a master medium label, and treated as any other object which is subject to be used in court proceedings. A quick interpretation poses a challenge in that, what would take precedence in the event the audio and video record conflicts with the written record of interview? The Rules do not expressly prohibit the existence and use of written record of interview, where there is an audio and video record of interview. As such, there is the possibility of a suspect denying one record of interview, and recognizing the other.

4.9 Discretionary Powers of the Police

Given that the Rules are not couched in mandatory terms because of use of the word “may”, it is obvious that whether or not to record interviews with suspects through audio and video means is in the discretion of the Police. Such discretionary powers may be subject to abuse by the Police because they are not obliged to record as such. The use of the word “shall” instead, would have made it mandatory that whenever a suspect is being interviewed, then the interview should be recorded through audio and video means.

5.0 Recommendations

The identified challenges cannot outweigh the importance and primary purpose of the Rules. Therefore, it is proposed as follows:

- The Rules needed to be revised so that the recording of interviews with suspects through audio or video means becomes mandatory and not optional as it is. The mandatory use of audio and video means will give no room for the employment of torture and other unacceptable means of procuring cautioned statements from suspects.
- Rules 5(1) and (2) of the Rules provide for the requirement of the interview room to be widely covered when recording the interview as well as for the recording officer to observe transparency respectively. For the purpose of observing transparency, the Rules should provide for the capturing of the image of both the suspect and the recording officer.
- The Rules are to be refined in such a way that they provide for the mechanism of taking care of pre-interview events, that take place outside the interview/recording room.
- According to the Rules, in case of refusal to sign a record of interview by the suspect, then a Police Officer not involved in the case should sign the record. This requirement ruins the integrity of the record given that even if the signing Police Officer may not be involved in the case, the officer comes from the same Police Station handling the case. It is recommended instead that in case of refusal, the record should be signed by an independent witness or a near relative.
- As the Rules are silent on the mechanism for procuring independent witnesses, it is recommended that the Rules be amended to provide for the mechanism of procuring the said witnesses, including their qualification, given the technical nature of the process of recording and the handling of evidence obtained therefrom.
- Failure to specify the required devices for the purpose of recording, has the effect of giving the Police and other investigative machineries the discretion to use any devices that can record. It is recommended that recording devices should be specified by the Rules in order to avoid the possibility of using poor, sub-standard devices or devices that do not produce quality results for use as evidence.
- Specifying the required recording devices is one thing, but making such devices available in all Police Stations all over the country is another challenge. Recording devices should be made available in all Police Stations, otherwise, non-availability of the same will justify the continued use of traditional ways of interviewing suspects, rendering the introduction of the Rules meaningless.
- As the Rules do not expressly prohibit the existence and use of written record of interview where there is an audio and video record of interview, and vice versa, there is a possibility of occurrence of a scenario calling for the determination of which record between the two takes precedence. This is likely to happen when the two records conflict or when one of them is denied by the suspect. It is

recommended, therefore, that the Rules should be clear on which record would take precedent in such a situation.

6.0 Conclusion

It is worth noting that the issuance of the Rules by the Chief Justice came as an answer to the long time concerns by the stakeholders in the criminal justice system, about complaints by the general public of existence of acts of torture and other unacceptable means employed by the Police Force and other investigative machineries, when undertaking custodial interviews. While commending the move taken by the Chief Justice to issue the Rules, it is important to note the legal and practical challenges associated with the application of the Rules. The challenges that have been pointed out, have their corresponding solutions or recommendations which, if used, may improve the Rules which have been issued with a positive intention of improving the administration of criminal justice in Tanzania.