



**Republic v Syombua & another (Criminal Case 21 of 2016)
[2024] KEHC 10349 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 21 OF 2016
EM MURIITHI, J
AUGUST 22, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MARY RAEL SYOMBUA 1ST ACCUSED

SAMUEL GATHOGO MIANO 2ND ACCUSED

RULING

Trial Within a Trial

1. Upon an objection to the production of a confession allegedly made by the Counsel for the 2nd accused before a qualified police officer within the meaning of section 25A of the *Evidence Act*, a trial within a trial on admissibility of the confession was ordered.
2. The Prosecution called one witness the police officer before whom the confession was made and the defence called the 2nd accused as witnesses. Their respective evidence is set out in full below.
3. PW10 Chief Inspector Mohamed Jillo, No. 231367 of DCI Mombasa, the person before accused's confession was allegedly recorded testified that:

“In 2020, I was at Nkubu DCI. I was called by Homicide officers to help with taking a confession. It was on 15/9/2020.

The confession was at 2.25pm. I was recording eh confession at DCI Office Meru.

Before taking the confession I followed the Judges' Rules which protect the rights of the accused. I read the Rules to the accused. It is the Out of Court Confession Rules.

He signed the Rules. I asked him whether he wanted to be represented by an advocate or relative. He said he did not wish to be represented. I asked him language he wished to use. He



said he wished to use Kiswahili. I asked him whether he wanted an interpreter and he said he did not wish to have an interpreter. I asked him whether he had been forced and induced to confess and he said no. I asked him whether he wished to have an advocate and he said No.

When we recorded the statement, we took two (2) hours and five (05) minutes. He had been given lunch. He said he had been arrested on 1/9/2020 at 1.00pm at Giakabi, Mathira East Sub-County. He had been brought to Meru and detained in cell by OB98/1/9/2020. At arrest he was OB 03/9/2020 at Giakaibi Police Post.

I asked him whether he had any ailment. He said he had an allergy that when bitten by bedbugs He would get rashes. He said he had not reported to any authority to be taken to hospital. I asked him whether he had been allowed to talk to his family and he said Yes.

After completing the Rules, I made a statement under Inquiry to the accused.

As I read the rule, the accused was signing against each. I explained to him who I was and that he and another on 4/12/2013 killed a person as charged. I cautioned him and asked him whether he wished to say anything. I told him that he did not require to say anything but if he said anything it could be used in evidence. He signed and I signed. I then took his particulars ID. 22860881 Samuel Gathogo Maino, Magutu Location, Gatheri sublocation, Chief Mumbi and Assistant Chief Muraguri.

I recorded the statement by Gathogo Miano - by him writing his own statement. He made the statement in Kiswahili language. He wrote the statement. [He took too much time]

I think it all too 2hours and 5 minutes. I read the statement. The accused confessed to killing. He wrote the statement and confirmed that he wrote in Kiswahili on his own volition.

I wish to adduce the out of court confession as an exhibit in the case.

[Court: Out of Court Confession dated 15/9/2020 to be marked PEX 14.]”

4. Counsel for the 1st accused, Mr. Ashaba, did not cross-examine the Prosecution witness.
5. On cross-examination by Mr. Karanja for 2nd accused, he said:

“[Statement in the Confession. Is there anywhere in the statement requiring the accused to add anything to the statement?]

It is not required there.

I am not the arresting officer.

[Can you tell whether the arresting officers beat him up?

I did not see any injuries. He was arrested on 1/9/2020. I cannot tell whether he was assaulted.

I did not come into contact with the 2nd accused at the detention. He did not complain of any duress. I had not seen him before the statement. I asked him and he said he was not subjected to any form of duress. It is in the Judges’ Rules. I asked him whether he was subjected to any coercion and duress. I did a certificate that I did the statement. I did not ask him about his stay in 14 days.

Medical allergy. I did not do anything to address the allergy.

Further statement by the 2nd accused. Further confession first line “Huyu mama anitwa Julia.” [Was the 2nd accused responding to a question?]



I cannot remember.

[You sought some information through questions?]

It is possible

[Who was present when taking the confession?]

I cannot remember who was present at the Confession.

[Under the Rules you are supposed to invite the accused to nominate third parties to be present.]

I asked him whether he preferred somebody to be present. He said he did not wish to be represented by a third party.

I informed him of his right to an advocate. At Paragraph 6 of the Statement. It is written by me and signed by the accused.

[Did he indicate so in the statement?]

I cannot remember. The statement was about his confession and not Judges' Rules. Judges' Rules are separate from the Confession.

[Counter-signed questions by accused. Accused was in custody for 14 days.]

The accused wrote a statement based on the charges I read to him.

[You asked him questions and he would give his answers?]

I read the charge and gave him paper to record his confession.

[What formed the basis of his statement is he questions you put to him?]

I cannot remember.

Some fear the police. [Statement was done under duress.]

If accused was in the category of those who fear, I cannot tell. He was not told police would pursue the 1st accused."

6. On re-examination by Ms. Mukangu for the Prosecution, he said:

"I asked the person whether he had been subjected to torture, duress or harassment. He said he was not under duress or torture.

I asked the questions on Judges' Rules. As an Investigator, I had an obligation to ask him what happened but he was the one who was writing.

[Did you make any promises to him]

No.

[Are there circumstances where promises are made?]

No.

[Statement – Further Statement (Taarifa Zaidi)]

I went through what he recorded and when I found a gap, I put questions to him."



7. DW1 Samuel Gathogo Miano, the 2nd accused herein, in examination-in-chief testified in Kiswahili as follows:

“[Confession dated 15/9/2020 by Officer Mohamed Jillo Gullow. What do you tell the court?]

I was taken from the station Meru Police station by DCI officers – Kamau Inspector, a female and male officer. They took me o a separate room in the same police station.

Inspector Kamu removed a pistol, a lanyard from his shoulder and he tied me up on the neck and arms. He told me that I had to agree with whatever they said. Inspector Kamau told me that they were taking me to another senior officer and that I should write what they told me. They took me to the senior officer in another room. He was called Mohamed. Mohamed had written something on a piece of paper. He told me copy as he read it to me.

After writing, he asked me to sign. I was with the said Mohamed and the 3 DCI officers. There was no one else.

I did not get an opportunity to have an advocate with me or a family member. After writing the statement he did not give me an opportunity to read it before I signed.

Confession was not voluntary. The police officers forced me. I did not even know what I recorded. The Confession is false. The confession is false as I only recorded what they told me. I told them I was unwell that day and I asked that I record the confession on another date and they declined. I ask that the confession be rejected.”

[Emphasis added]

8. On cross-examination by Mr. Ashaba, Counsel for the 1st Accused, he said:

“I worked at the deceased’s house for one (1) day. I had arrived and got sick because of the climate. I am asthmatic. Mary gave me food. I did not plan anything with the 1st accused. I did not give money to Mary. I have never given any money to Mary.”

9. On cross-examination by Mr. Masila counsel for the DPP, he said:

“I have studied up to Form Four (4) in 2002. I know Inspector Kamau did not work in Meru. I did not report the issue of the pistol because I told the O.B. officers. They did not record.

I was brought to court in 2020. I did not tell the court that I had been threatened with a pistol. The confession is in English language in the first pages. The confession is in Kiswahili. It is in my handwriting. The police officer was reading in Kiswahili and I was writing down. It did not come from my mind. I signed the document. We are two accused persons. The 1st accused did not record a statement.

Inspector Kamau did not know me before my arrest.

[How and why [then] did he force you to record a confession?]

We got copies of the confession.”

10. On re-examination by Mr. Karanja for the 2nd Accused, he said:

“I have been in custody since I recorded the statement.”



Submissions

11. Counsel for the DPP did not file submissions.
12. For the Defence, it was contended that the confession was involuntary as follows:

“2nd Accused’s Submissions On Trial Within A Trial

May it please Your Lordship,

1. These submissions are pursuant to the court’s directions issued on 30/04/24 directing that the accused file their written submissions on admissibility of the confession dated 15/9/2020 upon closure within a trial.
2. My Lord the accused person denied ever making the confession dated 15/09/2020 voluntarily. He stated that he was only given papers to write what the recording officer was telling him to write and thereafter forced to sign. Be that as it may, the question that arises is whether the purported confession met the threshold of admissibility in evidence.
3. Your Ladyship, section 25A of the Evidence Act Cap 80 provides for confessions and it reads as follows:

25A A confession or any admission of a fact tending to the proof
(1) of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than investigating officer), being an officer not below the rank of inspector of police, and a third party of the person’s choice.
4. The evidence (out of court confessions) rules, 2009 also provide for the recording of confessions from accused persons. Rule 4 thereof provides for the rights of the accused person and reads as follows:

“Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person-

 - a. Has stated his preferred language of communication.
 - b. is provided with all interpreter free of charge where he does not speak either Kiswahili or English
 - c. He is not subjected (to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment.
 - d. Is informed of his right to have legal representation of his own choice;
 - e. Is not deprived of food, water or sleep
 - f. Has his duration, including date and time of arrest and detention in police custody established and recorded



- g. Has his medical complaint if any adequately addressed
- h. Is availed appropriate communication facilities; and
- i. Communicates with the third party nominated by him under paragraph 3 prior to the caution to be recorded under rule 5.

The recording officer shall ask the accused person to nominate a third party who shall be present during the duration of the confession session, and upon the appearance of the third party, the recording officer shall record the third party's particulars and relationship to the accused person.

5. Your Lordship the Recording officer Mr Mohamed solely testified on behalf of the state matter of the admissibility of the confession. He indicated that he recorded the confession whereof the accused admitted and or confessed to have killed the deceased. He indicated that there was no third party of the accused person's choice who witnessed to the statement. He indicated that he could not tell whether the accused was tortured and coerced by the I.O Corporal Kamau to record the statement. He confirmed that accused complained he was unwell and was not attended to. He lastly confirmed that he [Could Not] confirm whether the statement by accused was actuated by duress and threats by I.O. and therefore simply put he could not confirm it was voluntary.
6. Your Lordship in defence the accused gave sworn testimony where he sought repudiation of the confession as the same was choreographed by the police officers on behalf of state against him. He indicated he was not given an opportunity to have an advocate of family member present during the recording of the confession. In brevity, his duty was singular which is to sign what the Police officers wanted him to write. This testimony was not controverted by the prosecution.
7. From the admission of the Recording officer, the purported confession fails to meet the threshold of admissibility laid down in section 25A of the Evidence Act as quoted above. There is no evidence that the accused person clarified the statement and or confession as required by Rule 8 neither is there contrary evidence that accused was afforded to have a family member or Lawyer present during the Trial. The accused was subdued and under authority of the Police to date. Any effort to report elsewhere of the injustices at Meru Police station has never been availed. Consequently, the confession should be held inadmissible.
8. Your Lordship in the foregoing premises, the confession allegedly recorded by the accused person and which the prosecution intends to tender in evidence herein cannot be construed to have been taken from him voluntarily. That statement having not been taken from the accused person voluntarily, the same is not admissible in evidence as against him. Furthermore, it is a trite law that the onus (sic) of proving voluntariness of a retracted statement lies with the prosecution. The prosecution has to tender evidence to show that all legal requirements in recording a confession have been met.



9. We rely on the case of *Republic v Yasin Sambai Juma* [2019] eKLR, where the court while declining an appeal to allow admission of a confession held as follows:

"In the considered opinion of this court, the law on confession should be interpreted strictly with a view to ensure that the confessions recorded give confidence to the court that the same was not induced by torture intimidation, duress or by subterfuge. In *Republic -vs- Nicholas Ngugi Bangwa* [2015] eKLR. Lesiit J. held thus:

- "45. In my view there are other confessions which are also extra judicial confessions if made to any person other than a person in a position of authority and in the ordinary day life. Such confession will be admissible under Section 26 of the *Evidence Act* if made voluntarily without any inducement or force of any kind.
46. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra judicial confession, in the Indian case of *State of Rajasthan v. Raja Ram* [2003] 8 SCC 180], the court stated that such statements should:
- i. It should be made voluntarily and should be truthful.
 - ii. It should inspire confidence.
 - iii. An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.
 - iv. For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.
 - v. Such statement essentially has to be proved like any other fact and in accordance with law."
10. Your Lordship as we submit, we urge you to be bound by the decision of the Court in *R v Muthiwa* (1935) 2 EACA 66 in which this Court held that it would be unsafe to convict on the retracted confession in that case and it adopted as a correct statement of the law the rule of practice referred to by Sir Grimwood Mears CJ. in *Emperor v Shambhu* and the judgment quotes this rule as follows (1932) All ILR 54 at page 358):
- "The evidentiary value of a retracted confession is very little and it is a rule of practice, as also a rule of prudence, that it is not safe to act on a retracted confession of an accused person unless it is corroborated in material particulars".
11. In conclusion, we urge the Court to protect the accused from the powerful whims of the prosecution and especially the investigative authorities by declining to use the involuntarily procured confession and have the same expunged as the same has been retracted by the Accused.



We Humbly Submit.”

13. Ruling was reserved.

Issue for determination

14. The point urged by the defence is that the confession in this case was involuntarily given. The Prosecution asserts that it was voluntary and taken in accordance with the Judges’ Rules and the Evidence (Out of Court Confession) Rules 2009. The issue for determination is therefore whether the confession is voluntary and admissible.

Determination

15. The 2nd Accused was charged in court on 16/9/2020 in Meru HCCRC No. 51 of 2020 which was subsequently consolidated with the present case. If there was any truth in the accused story as to the circumstances of his confession, he could have (with assistance of counsel Mr. Karanja who has been on record since appointment by Deputy Registrar by letter of 18/9/2020) taken up this complaint with relevant authorities including both in the Court, where 10 witnesses had testified before the Inspector Peter Kamau the Investigating Officer (I.O.) was called as PW11 on 5/10/2022, a whole two years, and the Independent Police Oversight Authority (IPOA).
16. The allegation, if true, that a suspect could be tied on the neck and forced to write a confession at gun-point is a grave indictment on the process of investigation and prosecution of Kenya. And how was the accused able to write when his arms were tied up with the lanyard from Inspector Kamau’s shoulder. Is the police shoulder lanyard long enough to tie the accused both at his neck and arms as alleged?
17. Even on a balance of probabilities standard of proof which should apply to the accused raising an issue in a criminal trial, the rebuttal of which the Prosecution must prove to the standard of beyond reasonable doubt, there is need for cogent evidence of such grave breach of procedures of confession taking.
18. The Prosecution has, however, by the testimony of PW1 in the trial within a trial demonstrated compliance with the rules on taking of confessions out of court. The statement under inquiry indicates scrupulous compliance with the Judges’ Rules on the taking of confessions as well as out Evidence (Out of Court Confession) Rules 2009 based thereon. Indeed, the statement under inquiry, properly entitled “Out of Court Confession” demonstrates compliance with the Rules by way of accused’s responses to questions put to him in chronological order of the Rules leading to the Caution before taking the confession, as follows:

““Out Of Court Confessions.

Confession statement by Samuel Gathogo Miano of ID No. 22860881.

Date: 15th September, 2020

Time: 1220 Hours

Place: Imenti North DCI Office (Meru County)

Rules

1. I Samuel Gathogo Miano certify that the evidence out of court confession rules have been read to me in English language that I understand.

[Signed]



2. I do not wish to be represented by a third-party during confession.
[Signed]
3. My preferred language is Kiswahili.
[Signed]
4. Do you wish to have an interpreter? – Yes/No.
[No]
5. I have not been subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment of punishment.
[Signed]
6. I have been informed of my right to legal representation and I do not wish to appoint any legal representative.
[Signed]
7. This statement took 2 hours 5 minutes during which period I was given food for rest and I was not deprived of food, water or sleep.
[Signed]
8. I was arrested on 1st of September 2020 at 1300 hours at Giakaibii in Mathira East Sub-County and placed in cell at Meru Police Station vide OB No. 98/1/9/2020 and my arrest was reported at Giakabii Police Station vide O.B. No. 3.1.9.2020.
[Signed]
9. Do you have any medical complaint? Yes/No.
[Yes]
Nature of medical complaint –
I am allergic to bedbug bites –I have developed rushes all over my body but I have not reported for action to be taken.
[Signed]
10. Have you been allowed to contact a third party: Yes/No.
[Yes]
Recording Officer
I Mohamed Jillo (Recording Officer) a Chief Inspector of Police inquiring into the alleged offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 4th of December, 2013 at around 0.00a.m. at Itumi Sub-location, Nathari Location in Igembe South Sub-County, jointly with another before court you murdered Julia Ntheru Kaburu a female aged 85 years old.
Caution



Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.

Signature [Signed] Signature [Signed]

Recording Officer Accused”

19. The accused confirms by a certificate in the confession that the statement is recorded by him voluntarily and in Kiswahili language. That he had been bitten by bedbugs in the cell cannot have affected the voluntariness of his plea. It may have called for medical attention by the Prison authorities who were holding the accused but not voluntariness of the statement and, in any event, he did not tell the person recording the statement that he had been influenced by the bedbug bites all over his body to make the statement and escape any further bites.
20. Most importantly, he did not tell the recording officer, or any other authority since his arraignment, that he had been assaulted during his incarceration or threatened at gun-point to record the statement, by investigating officer Insp. Kamau (PW11) and two DCI collaborators, one female and one male, or that he would be released if he made the confession, as suggest in the cross-examination of PW1 the recording officer in the trial within a trial. The recording officer acted bona fide in relying on the responses by the accused had voluntarily chosen to make his confession. The story by the accused is simply unbelievable. It strikes the Court as an effort to fit the accused’s confession in he circumstances proscribed under the provisions of section 26 of the *Evidence Act* and Rule 4 of the *Evidence (Out of Court Confession) Rules, 2009*.
21. With respect Counsel for the 2nd accused in calling for a trial within a trial of the admissibility of the confession of the 2nd accused made to the PW10 was mistaken and it would appear to been caused by a confusion of question of admissibility and weight to be given to a confession.
22. Admissibility of a Confession made out of Court to a police officer is governed by section 25A (1) of the *Evidence Act*, which provides as follows:

“ A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.”
23. Such a confession made before a qualified police officer may only be rendered inadmissible if under section 26 of the *Evidence Act* it is caused as follows:

“ 26. Confessions and admissions caused by inducement, threat or promise.

A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage



or avoid any evil of a temporal nature in reference to the proceedings against him.”

24. A confession may also be made before a third party in accordance with section 25A of the *Evidence Act* as happened in *Republic v Nicholas Ngugi Bangwa* [2015] eKLR, Nairobi HC Criminal case no. 49 of 2011, cited by the counsel, where the Court (Lessit, J. as she then was) considered both principles on admissibility and weight of a confession. The Court found a confession made to a neighbour to be admissible confession within the meaning of section 26 of the *Evidence Act*, and the weight to be given to the confession to be governed by case law on the matter which she cited as follows:

“ 56. In regard to the weight to be given to the confession I am guided by the court of appeal in the of *Kanini Muli Vs Republic Criminal Appeal No. 238 Of 2007 (2)* the court held:

“That certainly is not a correct statement of the law, but we take it that the learned judge had in mind the rule of prudence or practice that a court should be cautious to act on a retracted or repudiated confession unless it is corroborated in material particulars (See *Tuwamoi Vs Uganda (1967) Ea 84* And *Thiongo Vs Republic (2004) 2 KLR 38*). The correct position is that the court can still act on a retracted or repudiated confession if it came to the conclusion in the light of all the circumstances that the confession could not but be true.”

[emphasis added]

25. In *Republic v Kibon Kibelian* [2018] eKLR the Court (Prof. Ngugi, J. as he then was) specifically found breach of the *Evidence (Out of Court Confession) Rules 2009* in that:

“ 19. Looking at the Confession Rules and applying them directly to the case at hand, I note the following:

- a. The Recording Officer did not invite the Accused Person to select a third party of his choice whom he wanted to be present during the recording of the statement. By his own admission, the Recording Officer “chanced” on two brothers of the Accused Person who had come to visit the Accused Person in the Police Cells, and requested them to be present.
- b. The Recording Officer did not inform the Accused Person of his right to have an advocate of his choice present during the recording of the confession.”

See also *R v Yasin Sambai Juma (2019) eKLR*, cited by Counsel for the Defence.

26. With respect, the situation in this case is different. There was evidence that the Chief Inspector before who the confession was made duly complied with the Rules.
27. The question of the weight to be given to confession of an accused, where retracted or repudiated, will be determined at the final determination of the issue whether the prosecution has established the charge against the accused on the basis of all the evidence adduced, with the necessary caution as shown



in *Kanini Muli Vs Republic, supra*. See also statement of the Court in *R. v. Mutbiwa* cited by the Defence in submissions that “it is not safe to act on a retracted confession of an accused person unless it corroborated in material particulars.”

28. On the issue of admissibility, it is this court’s finding that the prosecution witness PW10 demonstrated the taking of the confession before him in strict compliance with the *Evidence (Out of Court Confessions) Rules* 2009 with no reasonable doubt being raised by the evidence of the 2nd Accused thereon.
29. Having considered the evidence of the Chief Inspector of Police who took the 2nd accused confession (PW1 in the trial within a trial) and that of the accused DW1 together with the Statement under Inquiry and the Confession subject of the trial within a trial, together with submissions of Counsel for the Defence, this court finds without doubt that the accused’s confession was given voluntarily and it is admissible.

Orders

30. Accordingly, for the reasons set out above, the Court finds that the objection as to admissibility taken by the 2nd accused against the admission of his Confession dated 15/9/2020 is without merit and it is declined.
31. The Out of Court Confession made by the 2nd accused and dated 15/9/2020 and presented as Pex.14 is admitted in evidence.
32. The trial will proceed to conclusion with the other prosecution witnesses from the stage where it had reached with the Investigating Officer (PW11) on a date to be fixed in consultation with the Counsel for the Accused and the DPP.

Order accordingly.

DATED AND DELIVERED ON THIS 22ND DAY OF AUGUST 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Masila with Ms. Nandwa, Komu & Mukangu for DPP.

Mr. Ashaba for 1st Accused.

Mr. Karanja for 2nd Accused.

