



**Republic v Mwangangi (Criminal Case 22 of 2019)  
[2023] KEHC 19300 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19300 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE 22 OF 2019  
LM NJUGUNA, J  
JUNE 27, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**KAVIVYA MWANGANGI ..... RESPONDENT**

**RULING**

1. The accused person herein Kavivya Mwangangi faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. A brief history of this case is that Michael Muthini Mutunga, Kavivya Mwangangi and Solomon Mutava were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars being that on the night of 8<sup>th</sup> and 9<sup>th</sup> October 2019 at Makima Location within Mbeere Sub County murdered Father Michael Kyengo Maingi. The prosecution after a due consideration of the evidence at hand reached a decision to enter a nolle prosequi against the 3<sup>rd</sup> accused person and further made an application to make him a state witness.
2. On 11.11.2021, the 1<sup>st</sup> accused person admitted to the charge herein and after a consideration of the facts and law, the court sentenced him to serve thirty (30) years imprisonment.
3. The trial herein therefore is in relation to the 2<sup>nd</sup> accused person who pleaded not guilty to the charge. In the process of hearing, the prosecution sought to have an alleged confession as recorded by CI Bii produced as an exhibit which was objected to by counsel for the defence. The same therefore necessitated the court to conduct trial within a trial in order to determine whether the said confession could be admitted as evidence.
4. PW1, Phillip Bii stated that on 25.10.2019, a murder suspect was brought to him and the person had wished to confess to having committed murder. That he accompanied Sgt Hassan to the room where the suspect, the accused herein was, and thereafter introduced himself. It was his evidence that he asked



the suspect if he was ready to record his confession and the accused agreed and he informed him of his rights to have a representative around who either could be a family member, an advocate or a friend but the suspect said that he was comfortable being alone. That he enquired whether the suspect had any medical complaints from the time he was arrested until then but the suspect stated that he did not have any. He also asked him whether he was coerced into confessing but the suspect stated that the same was voluntary. He stated that the suspect narrated how he settled in the town of Gategi and thereafter became a cook at a hotel when he met Michael Muthini who was seemingly rich. That after several interactions with the said Michael Muthini he told him of alleged cult and he (accused) herein desired to join the alleged cult that people believed made Michael rich. It was his evidence that the said Michael told him that he must adhere to some requirements before he could join to the said cult. Michael Muthini informed him that he must pay a subscription amount of Kes.30, 000.00 and he therefore started paying the same albeit bit by bit. That Michael informed him that he had a guest and he was instructed to buy a 90 Kg sack and a polythene bag. On 08.10.2019, he received a call from Michael that the guest was coming to Gategi town and that he knew that the same was in relation to the sacrifice that was to be offered. It was his further evidence that Kavivya went to Michael Muthini's residence but did not enter the house as he was told to wait at the entrance. That the guest was later brought wearing only an underwear with his hands tied with a nylon rope. The guest was forced into the boot of a motor vehicle and they drove to an unfamiliar place where they crossed a bridge. While there, the guest was made to come out of the vehicle when Michael Muthini demanded from him his pin number and which he used to transfer Kes. 1500.00 to Kavivya's line. That they later walked to a river where he tied the legs and the hands of the guest together under the instructions of Michael Muthini; and having complied with the said directions, Michael further instructed Kavivya to slit the throat of the guest using a machete. That they thereafter placed the body of the guest in a polythene bag and buried it on a river bank. He further stated that he informed the suspect of the implications of his confession and he proceeded to make a certificate of the confession and thereafter read the same to the suspect who appended his thumb print on the confessional statement.

5. PW2 Mohammed Hassan stated that on 24.10.2019 while on duty, he received a call from Pascal Mbwana informing him that he should look for a senior police officer as he had a suspect in custody who was willing to record a statement. That the suspect was brought to the DCI headquarters to CI Bii. It was his evidence that he asked the suspect if he wished to be represented by a relative or any other 3<sup>rd</sup> party during the recording of the statement but the suspect declined stating that his family did not know that he was a member of illuminati. He stated that the suspect confessed that together with Michael, they murdered the deceased herein. That the suspect was informed of his rights about a confession but instead, declined citing reason already mentioned above. It was his evidence that he left the two in the general office and after the recording, and the session was finished, CI Bii handed over the suspect to him to escort him to Capitol Police Station.
6. PW3, Paul Oguta stated that while at Milimani Law Courts for the hearing of a miscellaneous application seeking more time for investigations in the matter herein, the suspect herein was given an opportunity to react to the same. That instead, he started narrating how together with another person who was not before the court tied the deceased from behind, pinned him down and thereafter slit his throat using a knife. It was his evidence that the trial magistrate stood down the suspect and ordered that if he was willing to confess, then the same should be done before a senior police officer. That together with Corporal Pascal Mbwana, they escorted the suspect to DCI Headquarters where they handed him over to PW2.
7. On his part, the accused herein testified that he did not commit the offence and that he did not make the alleged confession. It was his case that he was arrested and thereafter handcuffed with his hands at the back on their way to Nairobi where he was taken to Capitol Hill Police Station. He testified that all



along, there was no relative present and further that, he could not communicate to any person for the reason that he did not have a phone. He stated that he was interrogated on the happenings surrounding the death of the deceased herein. It was his evidence that previously, Michael had borrowed some money from him in two different occasions but he paid him back. That the said Michael was supposed to send him some money and that on 07.10.2019, he did so at night but he did not realize the same till the following morning. After some time, he called Michael Muthini who confirmed to him that he had sent him the money although through a different number. He reiterated that he did not write anything but papers were brought to him to append his signature; he denied making a confession in reference to the death herein.

8. After the close of the defence case, directions, were given for both parties to file their submissions wherein only the defence complied with the said directions.
9. The accused person submitted that the prosecution did not shift the burden. That the conditions which the accused was subjected to by the arresting officer were brutal and intimidating. It was stated that he was not notified of his rights to have a third person present during the recording of the confession. As a consequence of the above, it was the defence's submission that the purported confession was involuntary and therefore inadmissible. Reliance was placed on the case of *Musili Tulo vs Republic* (2014) eKLR where the court noted that the onus of proving voluntariness of a retracted statement lies with the prosecution to prove all legal requirements in taking down a confession. That section 25 of the *Evidence Act* is in mandatory terms that during the confession, a third party of the person's choice must be present. Therefore, this court was implored to find that the purported confession is inadmissible.
10. In this case the accused person retracted the confession and therefore the court conducted a trial within trial and wherein the recording officer categorically stated that he gave the accused the option of the language of communication and invited him to call a relative or an advocate but he opted not to call anyone. I have also noted that C.I. Bii who is the recording officer told the court that he followed all the laid down procedures in recording the statement. It was his evidence that he sought to know whether the accused had been threatened, coerced or tortured before he was taken to his office. In my view, the allegations of brutality and intimidation and physical assault have not been substantiated and neither were medical documents presented before the court to support such allegations. I do not therefore find evidence to indict the police for torture.
11. On whether the accused person was informed of his right to have a third party present during the confession, Section 25A and Rule 4 of the *Evidence Act* states;
  - “(1) 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 Chief Inspector of Police, and a third party of the person's choice.
12. Rule 4 of the Confession Rules provides that the recording officer: -
  - Shall ask the Accused Person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.
13. The prosecution admitted that the confession was not made in the presence of a third party; but stated that the accused person did not want any third party to be present but rather insisted that he followed the law in recording the statement.



14. It is trite that the Confession Rules 2009 must be restrictively interpreted in order to safeguard the integrity and probity of confessions and eliminate or discourage extraction of confessions through torture or coercion or threat or inducement.
15. As earlier stated, the onus of proving voluntariness of a retracted statement lies with the prosecution. The prosecution has to tender evidence to show that all the legal requirements in taking down a statement of this nature have been met. The three prosecution witnesses in trial within trial told the court that they followed the law. This court has carefully analyzed their evidence alongside that of the accused person.
16. PW3 testified that while before the court at Milimani Law Courts the accused person stated narrating how he, together with another person who was not before the court they tied the deceased from behind, pinned him down and thereafter slit his throat using a knife. That the trial magistrate stood down the suspect and ordered that if he wanted to confess, then the same should be done before a senior police officer. In the same breadth, PW2 also stated how he received a phone call from Pascal Mbwana informing him that he should look for a senior police officer as the suspect under their custody was willing to record a statement; that he proceeded to look for PW1 who conducted the recording of the confession. That upon the accused being asked whether he wished to be represented by a relative or any other 3<sup>rd</sup> party during the recording of the statement, the suspect declined stating that his family did not know that he was a member of illuminati.
17. Ms. Migwi counsel for the accused person, submitted that the alleged confession herein is below par and therefore should not be admitted. She referred this court to section 25 of the Penal Code and contended that since there was no third party present during the conduct of the alleged confession, the same was rendered a nullity. To the contrary, this court finds consistency in the evidence adduced by the prosecution witnesses to wit that the accused person was offered a chance to have a third party during the recording of his statement but he turned down the offer.
18. This court is alive to the fact that the requirement of presence of a third party in such confession is essential in law, for it is intended to make the confession as free as possible from coercion, threats, inducement, torture and other ills thereto. It is trite that in as much as the accused person was informed of this right, he chose not to have a third party present stating that he did not want his family members to be present, because he did not want them to know that he was a member of a cult.
19. In conclusion, it is my finding the law governing taking of confessions was followed and that the prosecution discharged the burden of proof to show that the statement in issue was voluntarily made. Consequently, I make a finding that the statement recorded by the accused in respect of this trial is admissible in evidence.
20. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF JUNE, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Accused

.....for the State

