



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL CASE NO.E016 OF 2021**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMWEL OMBIMA BURUK.....ACCUSED**

**RULING**

[1] The fifth prosecution witness, **CIP Jebason Okongo**, testified that the accused was brought to him from Adungosi police station for purposes of recording a confession. In that regard, a statement under inquiry (**P.MFI 2**) construed as a confession was obtained from the accused, but in the attempt by the witness (**PW 5**) to produce the statement in court as part of the evidence against the accused, the accused through the defence counsel, **Mr. Oketch** raised an objection on the basic ground that the statement was recorded contrary to the law and the appropriate rules.

[2] Whether or not the objection is valid is dependant, on the existing law and procedure pertaining to confessions taken out of court.

S.25 of the **Evidence Act** defines a confession in the following terms:-

**“A confession comprises words or conduct, or a combination of words and conduct from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”**

Under S.25A, it is provided that:-

**“(1) A confession or any admission of a fact leading 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.”**

**(2) The Attorney General shall in consultation with the law society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”**

[3] Pursuant to the aforementioned **sub-section (2)** of S.25A of the **Evidence Act**, the **Evidence (out of court confession) Rules, 2009**, were enacted. These are the rules the witness (**PW 5**) said he complied with when recording in writing the accused’s confession. Indeed, a proforma form made under the rules duly signed by the recording officer (**PW 5**) and thumbprinted by the accused was annexed to the confession. Its effect was to establish that the rules were indeed complied with by the witness when he recorded the confession from the accused. In theory, this may be correct but not necessarily in reality unless it is proved by necessary evidence that indeed the rules were strictly complied with so as to leave no doubt that the confession by the accused was voluntary. Such obligation lies with the prosecution in an enquiry into the manner in which a confession or a statement, under inquiry by the accused was recorded for determination of whether or not it is admissible in evidence against the accused.

Generally, a statement by an accused person is not admissible in evidence against him unless it is proved to have been voluntary. This would only be possible in a trial within a trial, a concept which is deeply entrenched in our criminal justice system.

[4] The court may determine the voluntariness of a retracted or repudiated confession only after hearing necessary evidence from both the prosecution and the defence.

The present objection by the accused provides adequate fodder for a trial within a trial inasmuch as it strongly indicates that the accused is retracting his confession. The objection is indeed valid and calls for an inquiry into the manner the confession was made and recorded to determine whether or not it may be admitted as evidence against the accused in this case.

In that regard, a trial within a trial will be held on 26/4/2022.

**J.R. KARANJAH**

**J U D G E**

30/3/2022

**[DATED & DELIVERED THIS 30<sup>TH</sup> DAY OF MARCH 2022.**