



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO. 39 OF 2017

(CORAM: F.M. GIKONYO J.)

REPUBLIC.....PROSECUTOR

-versus-

ISAACK KAGIRI WANJIKU.....ACCUSED

RULING

(TRIAL WITHIN A TRIAL)

Brief introduction

[1] Isaack Kagiri Wanjiru, the accused herein, is facing a charge of murder contrary to section 203 read with section 204 of the Penal Code. It is alleged that on 8th November 2017 he murdered one **Evaline Rehak** at Oloikirkirai Trading Centre in Narok North Sub-county. The prosecution in trial within trial was led by Ms. Torosi, prosecution counsel, while the defence is being conducted by Mr. Langat, advocate.

[2] In the course of the trial when taking down the evidence of Chief Inspector David Some (PW3) who had recorded a charge and caution statement of the accused, the defence opposed the production of the statement on ground that the manner in which it was extracted from the accused was objectionable. The court directed that a trial within a trial be conducted to determine the admissibility of the statement.

Trial within trial

[3] In a quest for admission in evidence of a charge and caution statement allegedly of the accused recorded by Chief Inspector David Some (PW3), the prosecution called three witnesses. In opposition thereof, the defence called one witness, the accused.

Evidence

[4] **PC Samuel Liu PW1** in trial within trial testified that IP Purity, Sgt Kiilu , PC Thuo , PC Kagege on 12/11/2017 went to Kericho to pick the accused herein following a signal received the previous day from Kericho police station. They picked the accused person from Kericho police station. The accused was looking okay. They entered the back seat of the land cruiser with him and he did not make complaints to them. While enroute to Narok they were interrogating him. He gave them certain information which made him escape to Kericho. The accused person stated that it was his own volition that he decided to surrender to Kericho police station. They were talking to the accused in Kiswahili and they explained to IP Purity and Sgt Kiilu what the accused had said to them. As a result of the disclosures made by the accused, they called deputy DCIO CI Some. The Accused expressed his wishes which made them visit the scene of the murder. He then escorted the accused to the office of CI Some and left him there. The accused person had taken meals. Before he was left at CI Some's office he did not make any complain.

[5] On cross examination by Mr. Langat, PW1 stated that he was armed when he went to Kericho. He did not take any relative of the accused person when they went to Kericho. He was not present in the office of CI Some when statement of the accused was being recorded. He denied assaulting the accused or witnessing PC Kagege, PC Thuo and Sgt. Kiilu assault the accused. He stated that the accused did not state whether he wanted to be accompanied by a relative to the office of CI Some. He did not see the gun on the table of CI Some. He did not tell the accused to confess before CI Some that he killed a person. He did not also ask the accused whether he had USA Dollars. The officers at Kericho police station searched the accused person before placing him in the cells and when they went to pick him up they were handed Kshs 4,500/= and a cell phone; the property of the accused herein. The accused had already taken breakfast at Kericho police station when they went to pick him up and on their way to Narok the accused did not have lunch. He ate supper at Narok along with other remandees. He took back the accused after 30 minutes at 4:30 p.m.

[6] The second witness for the prosecution was **PC Peter Thuo (PW2)**. He told the court that on 12/11/2017 he was in the company of IP Purity, CPL Kiilu, PC Liu and PC Kagege when they went to Kericho to escort Isaac Kagiri, where he had surrendered himself to Kericho

police station. They picked him and escorted him to Narok police station. Isaack Kagiri appeared normal. He did not raise any complaints to them. While *en route* to Narok the relationship between them and the accused was cordial. Upon arrival at Narok police station the accused was escorted to DCI offices. At around 4.00p.m. I.O. PC Liu escorted the accused from CID office to CI Some's office to record a confession. He stated that I.O. PC Liu had contact with the accused most of the time.

[7] On cross examination by Mr. Langat, he stated that he would not know whether the accused was served with any meals at Kericho. The accused was seated at the back cabin of the police vehicle with PC Liu and PC Kagege. On their way back they had periodic conversations with the accused and amongst themselves. They had a conversation on murder and the accused told them that he had committed murder. All the occupants had guns. All of them knew that the accused was coming to make a confession to CI Some. The accused did not complain that he was hungry or tired. The accused was handcuffed on their way to Narok from Kericho. They arrived at Narok between 3.00 and 3:30 p.m. The accused was escorted to CID general office where he was left with PC Liu as the rest went for lunch. He could not tell whether the accused was assaulted in his absence. He stated that they did not assault the accused on their way to Narok

[8] The Third witness for the prosecution was **CI David Some (PW3)**. He told the court that on 12/11/2017 he was investigating a case of murder against the accused with PC Liu. PC Liu brought the accused to record a confession statement. He informed him that the accused was willing to record a confession statement. The reason PC Liu could not take the confession himself was because he was of a lower rank. He stated that murder had occurred at Olkirikirai area which he was investigating. He was not part of the team that was conducting investigation. When the suspect was brought to his office he took charge of him and ensured the following;

- i. He inquired the language in which the accused wished to use for the confession of which he chose Kiswahili.
- ii. He asked whether he needed an interpreter which he indicated no.
- iii. He asked whether he was subjected to coercion, duress, threats, torture or any other form of cruel, inhuman or degrading treatment or punishment. He said no.
- iv. He informed him of his right to legal representation of choice. He told him he had been informed of those rights.
- v. He also asked him whether he had been deprived water, food or sleep. He said no.

[9] The accused had been in custody since 11/11/2017 when he was arrested at Kericho. Officers from Narok travelled to Kericho and brought the accused. He did the statement a day after the arrest. He said he was ok and did not need medical attention. He ensured that he communicated with his relatives. He stated that he was in constant communication with his relatives. He informed him of his right to have a relative or lawyer when recording a statement. He stated that he will do the confession alone. He then cautioned him and informed him that anything he will say will be put down in writing and will be used in a court of law against him. He gave him the statement to read. He elected to give him the confession statement. The confession was taken when only the accused and CI Some were in the room. PC Liu had left. He left immediately after handing over to him the suspect. He recorded the confession statement and a certificate of confession was given. The accused stated that he had read the statement and was told that he could alter or add anything he wished. He did it in his own will. He went through the statement and certificate and signed it. He gave the recording officers certificate. He certified that the statement was given to him by the accused voluntarily. He signed the certificate at around 1600hrs and the time is indicated at the margins of every page of the certificate. He produced the copy of the confession and certificates thereof as **Pexh. 1** for purposes of trial within trial only.

[10] On cross examination CI Some stated that the accused confirmed that he was not denied food or water or tired from the journey. Also the accused confirmed that he was not coerced or tortured or threatened or punished by anybody. He could not remember how long it took to record the confession but he estimated to be less than 1 hour. The accused was asked whether he needed breaks but he said he should continue. The accused understood Kiswahili and English and he was able to go through the statement and understood it. He recorded the statement in his own handwriting. The accused read the cautionary statement and having understood he gave the confession statement. He looked okay and he stated he did not need any medical attention. The accused was in communication with relatives though he did not ask him about the relatives he had talked to during that period. The confession was not done in the presence of another person because the accused did not want any other person to be present. He stated that PC Liu had not placed the gun at the table at the time of recording the confession statement. He stated that the accused signed the confession statement as evident in the statement

[11] The accused on his part told the court that on 10/11/2017 at 10:30 a.m. CID officers, Liu, PC Kagege, PC Thuo, inspector Wanjiru and another came for him at Kericho. They took photos of him. He said that they hand cuffed him and boarded a land cruiser with him to Narok. Kagege, Thuo and Lous came to the land cruiser and asked him to sit on the floor of the vehicle. They kept asking him to give them money he stole from a muzungu. They stepped on his head asking for the status from him. That PC Thuo pointed a pistol at him and threatened to kill him and throw him to the bush. They kept beating him. They arrived at 3:30 p.m at Narok and was taken to CID offices by Thuo, Louis, Kagege and Inspector Wanjiru. That the CID officers tied his legs and hands to a big rod. That PC Kagege pressed his private parts with pliers. He was in great pain until he admitted that he stole the money in order to end the beating and torture. That all officers stayed in the room threatening and beating him. They drew pistols at him and forced him to sign the confession. The signature on the certificate of confession is not his. That inspector did not inform him of his legal rights as he alleged. The journey from Kericho to Narok was 5-6 hours. They had beaten him thoroughly and he was hungry too. The confession took about 4 hours to write. He was not allowed time to rest. He was even beaten at the office by the officers. The confession was recorded in English. That he is now ailing in his private parts as a result of the torture. He took an x-ray of the injured parts.

[12] On cross examination the accused said he went to report some incident at Kericho police station. That the officer did beat him up. He was treated and he has a clinic attendance on 15/3/2021. The treatment record is in the hospital. He was being treated of the injuries he sustained as a result of the beatings by the CID officers. He did not sign the confession. He was beaten to admit the theft. He was not informed of his rights. He was not given food until on Wednesday at 7:00p.m. He was not given an opportunity to call his relatives to come and be present during the confession.

ANALYSIS AND DETERMINATION

Confession: burden of proof and admissibility

[13] The statement subject of objection in these proceedings is in law a confession, for it is alleged to be an expression of full admission of guilt for the offence herein and to contain self-incriminating statement. And, it was purportedly made to a person in authority- a police officer. Such confession is different from what is commonly known as extra judicial or informal admission which at common law refers to an out-of-court statement made by an accused against his interest in ordinary course of business, and which is admissible by way of exception to the hearsay rule, as evidence of the truth of its contents, on the basis that what a person says against himself is likely to be true.

[14] In law, a confession cannot be given in evidence, unless the prosecution shows it to be a voluntary statement in the sense that it was not obtained from the accused by fear of prejudice or hope or promise of advantage exercised or held out by a person in authority or by coercion or threat or torture. And, if the admissibility of the confession is in dispute, the issue fell to be determined by the trial judge in a trial within a trial on evidence. Accordingly, the prosecution bears the legal burden of proving beyond reasonable doubt that the confession was voluntary. If the prosecution failed to discharge this burden, the confession was inadmissible. However, I am of the view that, even if the court is satisfied beyond reasonable doubt that it was made voluntarily, in light of the Constitution, the Evidence Act and rules made thereunder, the trial court could exclude it, in the exercise of discretion, on the grounds that:

- (i) its admission makes the trial unfair; or
- (ii) its prejudicial effect on the administration of justice outweighed its probative value;
- (ii) it was obtained in a manner that violates any right or fundamental freedom in the Bill of Rights; or
- (iii) it was obtained in breach of the law and rules relating to confessions.

Issue

[15] This trial within a trial is, therefore, an enquiry into the manner in which the statement purportedly to be made by the accused person in respect to the case before the court was recorded. It seeks to determine the voluntariness and probity of that statement, and its admissibility or otherwise.

The law

[16] In Kenya, confessions are governed by the Constitution of Kenya 2010; the Evidence Act (Cap.80); the Evidence (Out of Court Confessions) Rules, 2009 and decisional law.

[17] Article 49 of the Constitution guarantees rights of arrested person certain rights including the right to be informed promptly, in language that the person understands, of the reason for the arrest; the right to remain silent and the consequences of not remaining silent; to communicate with an advocate, and other persons whose assistance is necessary and not to be compelled to make any confession or admission that could be used in evidence against the person.

[18] Article 50(4) of the Constitution also excludes any evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

[19] Similarly, Article 50 (2) (l) guarantees each Accused Person a right to refuse to give self-incriminating evidence.

General rule

[20] It bears repeating that, as a general rule, confessions in Kenya are inadmissible in a criminal trial unless the confession is made in accordance with rigid rules provided in the Evidence Act and Rules promulgated thereunder. These provisions are to be interpreted restrictively in order to avert the return of the dark days when confessions were extracted through torture to obtain conviction for political or other extraneous purposes, and worse still, in politically-motivated criminal trials. The days of Mwakenya, Pambana and Nyayo torture chambers incidents have not receded to the background in our memories even with passage of considerable time.

[21] Admissibility of confessions is provided in Section 25A and 26 of the Evidence Act. Section 25A provides as follows:

“(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.

(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.”

[22] Section 26 provides thus:

“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.”

[23] The rules envisaged under Section 25A (2) above are known as the Evidence (Out of Court Confessions) Rules, 2009 (hereinafter the “Confessions Rules”). The Confession Rules set out rigorous procedure that must be followed before a confession is recorded from a suspect. Rule 4 provides that, among other things, the Recording Officer:

- a. Shall ask and record the Accused Person’s preferred language of communication;***
- b. Shall provide the Accused Person with an interpreter free of charge where he does not speak Kiswahili or English;***
- c. Shall ensure that the Accused Person is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;***
- d. Shall ensure that the Accused Person is informed of his right to have legal representation of his own choice among others;***
- e. 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.***

[24] Further, the Confessions Rules require the Accused Person to be informed of the option to record his own statement in his preferred language or to have it recorded for him (Rule 7); the option to clarify or add anything in the statement after the same has been recorded (Rule 8) and the requirement to administer a caution before recording the statement (Rule 5). To these legal provisions add the numerous judicial pronouncements on extra-judicial confessions.

[25] In light therefore, voluntariness of a confession entails: -

- a) Absence of threat or coercion or torture or inducement of any form; and
- b) That the statement was made and taken in accordance with the law- the Constitution, the Evidence Act, the Confession Rules and decisional law.

Applying the test

[26] I note that 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 noted also that C.I. Some 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. The accused did not indicate to the court whether he complained to CI Some or tell him that he had been threatened before he went to his office because of fear of threats by PC Liu or any of the officers who had accompanied him from Kericho to Narok. Allegations of torture have not been substantiated and I noted that the accused had been treated for injuries he sustained from the torture. Yet, he did not see the need to produce the medical evidence. I do not therefore find evidence to indict the police for torture.

[27] Nonetheless, was the statement recorded in accordance with the law? Mr. Langat for the accused took CI Some to task on the requirement to have a third party present when recording the statement. Notably, according to section 25A of the Evidence Act

“(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.

[28] 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.

[29] The witness admitted that the confession was not made in the presence of a third party; the reason he gave was that the accused person did not want any third party to be present. He stated that the accused was in communication with relatives. He did not ask him of the details of the relatives he had talked to during that period or their relationship. Despite this lapse, the witness insisted that he followed the law in recording the statement.

[30] I must repeat 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.

[31] 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. Whereas the three prosecution witnesses in trial

within trial told the court that they followed the law, the lapses I have noted in some of the necessary requirements under the rules casts doubt that due process was followed. The recording officer, CI Some followed the law to some extent in taking down the statement but failed to take some necessary steps for instance, presence of a third party, particulars of relatives the accused allegedly contacted or was in communication with. 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. CI Some seems to have attached not appropriate proportion of weight and significance to this requirement and failed to record important details such as the identity of the relatives as well as the relationship they have with the accused. This was a substantial omission that taints the confession.

[32] Again, the accused claims that the officers who went for him from Kericho tortured him. Although he offers no evidence to prove this allegation, I note with concern there is evidence that the accused was handcuffed the whole way and was lying on the floor of the police vehicle's rear cabin. These officers were also armed. C.I. The officers alleged that on the way, they had a conversation with the accused who made certain confessions. A conversation between the police and the accused in such circumstances and conditions cannot be said to be voluntary in the sense of the law. Such were matters that CI. Some ought to have established before recording the confession. Nothing shows he ensured before recording the confession that the accused was not threatened before he was brought to his office.

[33] The evidence of non-compliance with the Act and Confessions Rules together with other evidence of circumstances which tend towards possibility of indirect threats, show that the confession was obtained by such failing that should result in the confession being excluded by the court. Accordingly, due to the procedural lapses herein, and the treatment of the accused on his journey from Kericho to Narok, the statement was recorded in contravention of the law. The statement therefore rattles the staple safeguards provided in the Constitution and the law to guarantee the rights of the accused to fair trial.

[34] In conclusion, it is my finding after carefully considering the evidence in the trial within trial and the law governing confessions that the prosecution has failed to discharge the burden of proof and show that the statement in issue was voluntarily made. The accused has succeeded to raise doubts in the court's mind about the voluntariness of the statement in this case. Consequently, I make a finding that the statement recorded by the accused on 12th November 2017 in respect of this trial is inadmissible in evidence. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 20TH DAY OF MAY, 2021

F. M. GIKONYO

JUDGE

In the presence of:

- 1. The accused**
- 2. Ms. Torosi for the Republic**
- 3. Mr. Kasaso CA**
- 4. Langat for accused**

F. M. GIKONYO

JUDGE