



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 8 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

FEISAL IBRAHIM YUSSUF.....ACCUSED

RULING ON TRIAL WITHIN TRIAL

1. Where PW9 was testifying on behalf of the prosecution he intimated that he did record a statement made by the accused. Containing confession thereof. When he sought to produce the same, the production of the same an objection was raised and thus trial within trial ensued.

2. The prosecution witness was the only witness who recorded the statement in issue i.e. PW9 on trial within trial. On the defence side it was only the accused who testified on his side without calling witnesses.

3. The court thereafter made an extempore order that it admitted the statement and differed giving the reasons for the same later.

4. Trial within trial is conducted with regard to confessions on whether they were voluntarily recorded thus admissible or not.

a. The general rule is that statement whether written or oral by an accused person relating to the charge against him is admissible in evidence against him. The courts are however particularly careful about statements made to police officers as a result of English courts developed. What are known as Judge Rules to be followed by police officers whenever they wish to take statements from an accused.

5. The procedure is largely governed by law of evidence. section 25 A (1) of the Evidence Act. The provision specifies that;

“i) A confession or any admission of a fact tending to prove guilt of an accused person is generally inadmissible.

ii) Only confessions and admissions made in court before a judge or magistrate or made before a police officer (not the investigating office) of the rank higher than Chief Inspector and a third party of the accused person’s choice is admissible.”

6. In the recent case of **Republic vs Ahmad Abolfathi Mohammed & Another [2019] eKLR** the Supreme Court distinguished between confessions and admissions contemplated by section 25A thus;

“We agree with the appellant that it is a matter of general public importance that the Police are given the freedom to carry out investigations with a view to detecting crimes. We also agree with it that interviewing suspects is a standard operating procedure in criminal investigations. In such interviews, Police are entitled to confront suspects with any report they may have received about the suspects’ commission or involvement in the commission of a crime and demand an explanation. In response, a suspect may offer an explanation. If it happens that the explanation the suspect gives is an admission of a material, ideally the Police are required to invoke the provisions of Section 25A of the Evidence Act. If they do not, bearing in mind the distinction between an admission and a confession as stated above, such admission is admissible in evidence but, unlike a confession, it cannot on its own found a conviction. It will require corroboration to found a conviction. It would be absurd if admissions made in such circumstances were to be held inadmissible in evidence. It follows therefore that admissions, though not meeting the criteria set out in Section 25A (1) of the Evidence Act, are admissible. In the circumstances, we find that in its holding that “information from an accused person leading to 14 discovery of evidence is not admissible outside a confession....”, the Court of Appeal equated evidence proceeding from a suspect leading to discovery to a confession.”

7. This court heard the witness and the accused on the circumstances in which the statement of the accused was recorded. The PW9 says the accused was taken by the investigating officer to him to record same as he had intimated it that he was confessing to the commission of the act which led to the death of his wife.

8. The investigating officer in the circumstances realized that he was not mandated to record confessions of the suspect, thus he delivered him to PW9 who is a C.I.P who got accused's brother details to enable him call him to witness the recording of statement. He came and witnessed recording of accused statement and signed same.

9. The accused denies the statement was voluntarily recorded. He claimed he was intimidated and assaulted to record statement. However, he neither showed where he was assaulted nor complained to any authority or his brother who witnessed him record statement.

10. He never told the court during plea taking that he was assaulted. He signed statement and during the cross examination he agreed on some salient features of his statement such as ***“the wife throwing and hitting him with bucket full of utensils before he stabbed her...”***

11. He signed the same statement so is his brother. He never called his brother to support his defence yet he conceded he was present during signing of the statement and recording it.

12. Thus, the court finds that the statement was voluntarily recorded and thus admissible. Those are the orders of the court.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 24TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE