



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO. 27 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RANDU KATANA KARISA ALIAS RAMA.....ACCUSED PERSON**

**RULING**

1. The accused person was on 4<sup>th</sup> June, 2018 arraigned in court charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars of the charge were that on the 19<sup>th</sup> day of May, 2018 at Dargube village Ramisi location, Msambweni Sub-County within Kwale County murdered Mbaché Mwadzombo. He denied the charge.
2. The hearing of the case commenced on 21<sup>st</sup> November, 2018 and proceeded smoothly. When it came to the turn of PW8, the Investigating Officer to testify, he sought to rely on a charge and cautionary statement that he had recorded from the accused person.
3. Mr. Muthuri, the defence Counsel objected to the said statement being produced on the basis that it violated the provisions of Section 25A(1) of the Evidence Act as it was not recorded before a Chief Inspector. It was also contended that the accused person's brother was not present when the statement was recorded. Further, that the accused person was not told in express terms that the charge and cautionary statement would be used against him in a trial.
4. It was contended by the defence that the accused person was tortured and ordered to make the said statement. It was also claimed that it had been recorded on a different date by the late PC Mutunga and then taken to Inspector Hamisi (PW8) for rubber stamping. Mr. Muthuri indicated that the person who signed the said statement as a witness, by the name Chengo, was present at the Police Station because the statement had been recorded by the late Investigating Officer, PC Mutunga and the witness was called to sign it.
5. Mr. Muthomi, Prosecution Counsel, responded to the objection raised by the defence Counsel by submitting that the charge and cautionary statement was made voluntarily by the suspect who is now the accused person. The Prosecution Counsel said that the accused person was not tortured in any way by PW8 as to obtain the statement from him. He further submitted that the said statement was recorded in the presence of the accused person's brother, after the accused person was informed of his right to have witnesses. Mr. Muthomi stated that before the accused person recorded the statement, a caution was administered to him to the effect that whatever he would say could be used against him in a court of law.
6. It was argued that the accused person understood the caution and that he signed it, and so did his witness. Mr. Muthomi submitted that the signatures on the statement were by Inspector Hamisi. He relied on the provisions of Article 159(2)(d) of the Constitution which provides that in exercising judicial authority, the court should administer substantive justice without undue regard to technicalities. He stated that since this is a serious case of murder, where the court should arrive at the truth, it should find the objection raised devoid of merit. He urged the court to overrule the objection raised by the defence.
7. In response to Mr. Muthomi's submissions, the defence Counsel submitted that Article 159(2)(d) of the Constitution cannot cure the anomaly of the charge and cautionary statement having not been recorded in accordance with the provisions of the Evidence Act and the rules laid out in furtherance of the provisions of Section 25A(1) of the Evidence Act.
8. Section 25A(1) of the Evidence Act provides that –

***“(1) A confession or any admission of 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 a Chief Inspector of police, and a third party of the person's choice.”***

9. I agree with Mr. Muthuri that the charge and cautionary statement was recorded by a police officer below the rank of a Chief Inspector of police. When PW8 introduced himself in court, he said that he was No. 233503, an Inspector of Police.

10. Mr. Muthomi in his submissions did not controvert the fact that the said witness was an Inspector of Police. That being so, it is the finding of this court that the charge and cautionary statement was recorded by a police officer below the rank of a Chief Inspector, which was contrary to the provisions of Section 25A(1) of the Evidence Act. The said statement was therefore not admissible in evidence.

11. The other issues raised by Mr. Muthuri can only be resolved by way of a trial-within-a-trial. Having found that PW8 should not have recorded the charge and cautionary statement from the accused person, it would be superfluous to delve into the other issues which were raised.

**DELIVERED, DATED and SIGNED at MOMBASA on this 30<sup>th</sup> day of October, 2020. Ruling delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

**The accused person**

**Mr. Muthuri for the accused person**

**Mr. Muthomi, Prosecution Counsel - for the DPP**

**Mr. Oliver Musundi - Court Assistant.**