



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL CASE NO. 10 OF 2017

REPUBLIC..... PROSECUTOR

VERSUS

MAGDALENE MWENDE KIOKO.....ACCUSED

RULING

1. The accused herein **Magdalene Mwendé Kioko** has been charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 9th day of February, 2017 at Kitengei village, Kathiani Sub-Location in Kathiani Sub-County within Machakos County she murdered **Ndanu Musau**.

2. The prosecution had already called nine (9) witnesses in support of its case and was in the process of examining in chief its last witness Abdulqadir Lorot (PW.10) when Mr. Kyalo learned counsel for the defence raised an objection to the production by the witness of a confession that had allegedly been made by the accused herein. It was the view of the defence counsel that the confession was improperly made and sought for a trial within a trial which request was not opposed by counsel for the prosecution. Both learned counsels proceeded to tackle PW.10 in his testimony regarding the manner in which he had recorded the confession from the accused. From the defence objection, it was obvious that the defence concern was the manner in which the confession was obtained from the accused herein. The defence counsel having received instructions from the accused to oppose the production of the confession by cross examining the witness (PW.10) appeared to be contended with the trial within a trial to revolve only around the witness. The same view was taken by learned counsel for the prosecution.

3. The said witness (PW.10) presented his testimony regarding the manner in which he had recorded the confession from the accused herein. It was his evidence that at the time of recording the confession from the accused, the accused appeared very calm, alert and that the enormity of the matters she was stating did not seem to bother her at all and that he did not find anything unusual at all as she was not under any duress. The witness went on to add that he is a Judicial Officer well conversant with the procedures. He testified that the accused willingly made the confession and that he read back to her the statement in Kiswahili language and who confirmed the same to be a true reflection of what she had made and duly signed on every page. He stated that the signatures on the confession were made by the accused herself. He finally testified that he established from the police officers who had escorted the accused to his chambers that the accused had earlier made a confession to a chief Inspector of police and that the police opted to bring her to the law courts in order to ensure that she was making a genuine confession.

On cross-examination, he testified that he prepared the certificate after recording the statement and that he did explain to the accused on her rights which can be seen from the beginning of her statement. He further testified that he did warn the accused that whatever she was to state would be used in evidence against her. He also confirmed that his interview with the accused revealed that she wanted to suggest that some other evil forces were behind the incident in that the said evil spirits were directing her on what to do,. The witness further testified that he found the accused to be sober and in full control of the narrative she was making. He stated that he did not see the need to refer accused for mental assessment since he was merely recording her statement and that it was up to the investigating officer to decide on the way forward. According to the witness, it seemed that the accused wanted to pour out her heart about the matter regarding the death of the child. He finally confirmed that the accused spoke in Kiswahili language which he translated into English and then read back to her in Kiswahili before she signed it.

4. It was the submissions of Mr. Mwangera for the prosecution that the accused recorded her statement willingly in the presence of PW.10 and that she confirmed the contents thereof by signing every page of the statement. Learned counsel added that there was no coercion whatsoever and that the accused understood what she was doing. He urged the court to allow the witness produce the statement plus the certificate as exhibits.

5. Mr. Kyalo for the defence submitted that since the confession was made before plea was taken should be deemed as an out of court confession and which should be regulated by section 25 A of the Evidence Act and the confession (out of court) Rules 2009. It was the contention of counsel that the confession should not be used against the accused in violation of her rights under Articles 49 and 50 of the

Constitution. It was also submitted that the confession did not go through the provisions of the out of court confession Rules 2009 such as rule 4(1) thereof which deal with issues of coercion, duress, cruelty status etc. Learned counsel pointed out the fact that the allusion of evil spirits by accused warranted her to be mentally assessed before the statement was received. Finally counsel urged the court to reject the production of the statement and that the prosecution should be contended with the evidence so far adduced by the nine witnesses.

6. I have considered the evidence that has emerged from the trial within a trial involving prosecution's witness (PW.10) as well as the brief submissions of learned counsels. It is not in dispute that both defence and prosecution did not call other witnesses and both relied on the evidence of PW.10 during the trial within a trial to establish whether or not the statement recorded by the accused herein should be produced by PW.10. It is believed that the accused's opposition to the production of the statement in question has been properly articulated by her learned counsel and which explains as to why she did not present her views during the trial within a trial while the prosecution opted to rely on the evidence of PW.10. That being the position, I find the singular issue for determination is whether or not the statement recorded by PW.10 from the accused was properly made.

7. The law relating to confession is found in the Evidence Act as well as Evidence (out of court confessions) Rules 2009. Section 25 of the Evidence Act defines a confession as:-

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

Due to several pitfalls as a result of the application of the above provisions, an amendment was made to the Evidence Act which brought about section 25 A. The raison d'être of the amendment was to ensure that the rights of an accused while opting to make a confession over a crime are protected. Section 25A of the Evidence Act provides as follows:-

“25 A (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 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.”

It is noted that the rules envisaged above were made in 2009 and which are the Evidence (out of court confession) Rules 2009. Under Rule 4 thereof the rights of an accused making a confession must be observed and which include *inter alia*: that the recording officer should ensure that the accused person chooses his/her preferred language of communication; that he/she is provided with an interpreter free of charge where he/she does not speak Kiswahili or English; that he/she is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment; that he/she is informed of his/her right to have legal representation of his own choice; that the recording officer to ask the accused to nominate a third party to be present during the confession and that the particulars of the third party and relationship to the accused be recorded; that the accused should be informed of the option to record his/her own statement in his/her preferred language or have it recorded for him/her; that the accused should be cautioned before recording the statement etc.

8. Looking at the evidence adduced by Abdulqadir Lorot (PW.10) during the trial within a trial as well as the statement recorded by the accused and the certificate, it is quite clear that the said recording officer followed the Evidence (out of court confession) Rules 2009 to the letter. The recording officer clearly enquired from the accused on the language she preferred which is Kiswahili language and that he translated the same into English language and again read the same to the accused in Kiswahili language before she subsequently signed all the pages. The witness also ensured that the accused's choice of having a third party be present was actualized in that the accused agreed to have the lady police officer No. 104761 PC Rono Chepkemioi who had escorted her to Machakos law courts to be present and to stand next to her during the recording of the statement. The witness stated that the accused was then in perfect health and spoke freely and articulately. A portion of the statement is to the effect that the accused had been under the spell of evil spirits that were controlling her during the incident. The statement in question was made four days after the alleged incident and that a perusal of the same leaves no doubt that the accused at the time of recording was fully in charge of her faculties. Indeed the recording officer stated that he did not at all detect any unusual characteristic both physically and mentally on the part of the accused at the time. The mere fact that the accused raised a defence that she had been under the influence of evil spirits at the time of the incident did not warrant the recording officer to call for a mental assessment on the accused since he was satisfied that the accused was quite sober during the recording of the statement. In any case the issue of accused's mental assessment only became necessary for purposes of plea. Suffice to add that a mental assessment done prior to the accused taking plea found her fit to stand trial and hence it is highly unlikely that the accused's mental state was not up to date during the recording of the statement. I am satisfied by the explanation of the recording officer that the accused was then in a good mental state. I am also satisfied that the statement made by the accused on the 13/02/2017 was voluntary and hence admissible. I am also not persuaded by the defence counsel's submissions that the rights of accused under Articles 49 and 50 of the Constitution have been infringed and or violated. The certificate prepared by PW.10 and his testimony herein left no doubt that the accused was accorded her constitutional rights. The statement recorded by the accused was in itself some form of defence to the charge facing her in that she was expressing herself about the fact that she had been under the spell of evil spirits at the time of the commission of the offence herein. It is up to the accused and her learned counsel to decide whether or not they intend to raise such an issue either at this stage or at defence hearing if at all she is put on her defence. I find no prejudice will be suffered by the defence if the statement is admitted in evidence.

9. The upshot of the foregoing observations is that the trial within a trial has established that the statement recorded by the accused herein on 13/02/2017 was voluntarily made and hence the same is admissible in evidence. Consequently the prosecution's witness (PW.10) shall proceed to tender the statement and certificate in evidence.

It is so ordered.

Dated and delivered at **Machakos** this **29th** day of **October,2020**.

D. K. Kemei

Judge