



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO 682 OF 2018**

**REPUBLIC.....APPLICANT**

**VERSUS**

**YASIN SAMBAI JUMA.....RESPONDENT**

**RULING**

The Respondent, Yasin Sambai Juma is facing two terrorism related charges brought against him under the **Prevention of Terrorism Act**. The Applicant pleaded not guilty to the charge. In the course of the trial, the prosecution sought to admit into evidence a confession allegedly recorded from the Respondent during his interrogation by the police. The Respondent objected to the production of the said evidence on the grounds that the same had been obtained after he had been subjected to torture, coercion and placed under undue duress. The trial court ordered a trial within trial to be conducted to determine the admissibility of the said confession. After conducting the trial within trial, the trial court ruled the confession inadmissible in evidence. The material part of its ruling, the trial court stated thus:

*“16. Going by the entire evidence tendered by PW2 as supported by the DVD video clip produced as exhibit “P-6(a)”, it is quite crystal clear that PW1 never complied strictly with Rules 4(1), (c), (d), (2) and (3) of the Confession Rules of 2009. In the foregoing premises, the statement allegedly recorded by the accused person and which the prosecution intends to tender in evidence herein cannot be construed to have been taken from him voluntarily. That statement having not been taken from the accused person voluntarily, the same is not admissible in evidence as against him. Furthermore, it is trite law that the owners (sic) of proving voluntariness of a retracted statement lies with the prosecution. The prosecution has to tender evidence to show that all legal requirements in recording a confession have been met.”*

The prosecution was aggrieved by the ruling. The prosecution applied to this court to have the decision revised under **Sections 362 and 364** of the **Criminal Procedure Code**. Prior to the hearing of the application, the parties agreed to file written submission in support of their respective opposing positions. The written submission were duly filed. During the hearing of the application, Ms. Sigei for the State submitted that the trial court had failed to consider the evidence adduced by the prosecution in support of its case that the confession had been taken voluntarily and therefore ought to have been admitted into evidence. She contended that the law on confessions was complied with by the officer who recorded the confession from the Respondent. She asserted that the chain of circumstances prevailing at the time proved that the confession was recorded voluntarily by the investigating officer.

Learned State Prosecutor relied on the case of **Republic –vs- Nicholas Ngugi Bagwa [2015] eKLR** in support of her submission. She submitted that the officer who took the confession complied with the law and infact electronically recorded the confession. The DVD was produced into evidence. A certificate of compliance as provided under **Section 106(a) and (b)** of the **Evidence Act** was produced. The Respondent did not adduce any evidence to rebut the prosecution’s case. Learned prosecutor urged the court to take into account the charges facing the Respondent was serious in that the Respondent was facing terrorism related charges. If the confession was not admitted into evidence, the end of justice may not be met.

Mr. Chacha for the Respondent opposed the application. While relying on his written submission, he stated that the trial court arrived at the proper decision after considering all the prevailing facts of the case. Learned counsel questioned whether it was within the jurisdiction of the court to consider the present application under **Sections 362 and 364** of the **Criminal Procedure Code**. He relied on the case of **Peter Gichungu Njoroge -vs- Republic [2018] eKLR**. He further submitted that the trial court considered all the facts of the case including the fact that the officer who took the confession had lied under oath when he testified before court. The oral evidence of the officer was contradicted by the video evidence that was produced before court. He urged the court to uphold the decision of the trial court.

This court has carefully considered the rival submission made by the parties to this application. The issue for determination by this court is whether the prosecution laid sufficient basis for this court to set aside the decision of the trial court when it declined to admit the confession allegedly made by the Respondent. The legal regime regarding the admissibility of confessions is contained in **Section 25A and 26** of the **Evidence Act** which 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 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.”***

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.”***

Pursuant to **Section 25A(2)** of the **Evidence Act**, The **Evidence (Out of Court Confessions) Rules 2009** were published on 27<sup>th</sup> March 2009. The **Rules** set out rigorous procedure that must be followed before a confession is recorded from a suspect. **Section 25A** of the **Evidence Act** and the **Rules** made thereunder were as a result of concern expressed by the citizens of Kenya in regard to the manner in which torture was being used to secure confessions from suspects. In the considered opinion of this court, the law on confession should be interpreted strictly with a view to ensuring that the confessions recorded give confidence to the court that the same was not induced by torture, intimidation, duress or by subterfuge. In **Republic -vs- Nicholas Ngugi Bagwa [2015] eKLR**, Lesiit J held thus:

***“45. In my view there are other confessions which are also extra judicial***

***confessions if made to any person other than a person in a position of authority and in the ordinary day life. Such confession will be admissible under Section 26 of the Evidence Act if made voluntarily without any inducement or force of any kind. ....***

***46. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra judicial confession, in the Indian case of State of Rajasthan v. Raja Ram [2003] 8 SCC 180], the court stated that such statements should:***

***i. It should be made voluntarily and should be truthful.***

***ii. It should inspire confidence.***

***iii. An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.***

***iv. For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.***

***v. Such statement essentially has to be proved like any other fact and in accordance with law.”***

In the present application, it was clear to this court that the decision reached by the trial magistrate cannot be faulted because the evidence that the officer who recorded the alleged confession gave in court contradicted with the video evidence which was produced into evidence. The video was viewed by the trial court. The officer recording the confession had categorically stated that the Respondent had made no complaint that he had been tortured. He further stated that the Respondent had not requested for a third party to be present during the recording of the alleged confession. This statement was contradicted by the video evidence and the other witnesses summoned by the prosecution who confirmed that indeed the Respondent had intimated to the officer recording the confession that he had been tortured.

The Respondent had also indicated that he desired his relative to be present as he was recording the confession. As stated earlier in this Ruling, the **Confession Rules 2009** must be restrictively interpreted to achieve the desired objective of discouraging the recording of out court confessions after a suspect has either been tortured or induced to make such confessions. If the officer recording the alleged confession had stated that indeed the Respondent had made an allegation that he had been tortured, and proceeded to have the allegation investigated before recording the confession, then this court would have been persuaded that there was a likelihood that the said confession was voluntarily obtained from the Respondent.

The upshot of the above reasons is that the prosecution’s application lacks merit and cannot be allowed. This court cannot fault the determination reached by the trial court. The application is dismissed. The trial court’s file is ordered returned to the trial court for hearing and conclusion of the case. It is so ordered.

**DATED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY 2019**

**L. KIMARU**

**JUDGE**