



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MURDER NO. 7 OF 2012

REPUBLIC.....PROSECUTOR

V E R S U S

HILLARY MUGO MWENDI.....1ST ACCUSED

EVANS MBAI NJERU.....2ND ACCUSED

JAMES MBOGO NYAGA.....3RD ACCUSED

RULING

1. The matter proceeded for defence hearing on 01/11/2018 where the prosecutor on cross examination sought to rely on the accused’s statement recorded at the police station.
2. The accused’s Advocate objected to the reliance on the statement on the basis that the Investigating Officer was not cross examined on the atmosphere in which it was recorded. In addition, the statement cannot be used to incriminate him when it was not produced. The prosecution replied by stating that the statement was not a confession but a cautionary statement and he was cautioned that the statement may be used against him.
3. The defence relied on **Section 25A(1) of the Evidence Act** which provides:-

“(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 Inspector of Police, and a third party of the person’s choice.”

4. The provision deals with statements which are recorded by accused person and amounts to an admission or a confession. When the prosecution wishes to rely on such a confession and the accused denies that he made the statement or the statement was obtained through duress, the court will not allow the statement to be produced as against the accused but will conduct a trial within a trial to determine whether it is admissible or not. This has been stated by the court of Appeal in -

Musili Tulo v Republic [2014] eKLR

The Court of Appeal in dealing with cautionary statement of accused held;

Once the objection was raised, it was the duty of the trial court to make an order for a ‘trial within the trial’ and to deliver a ruling to determine such admissibility, even before the statements were marked for identification. The purpose is to determine the voluntariness of the statement intended to be tendered for the prosecution, because a statement by an accused person is not admissible in evidence against him unless it is proved to have been voluntary. It is a matter of law and is for judge alone to decide upon hearing evidence - see Shah v. Republic 1984 [KLR] 674. Indeed it is an aspect of fair trial. We do not know what decision the trial court would have arrived at had it held a trial within the trial. What we can say for certain is that the court fell into error by failing to determine the issue of admissibility of the two extra-judicial statements.....

5. The submissions by the defence counsels are not relevant. They apply to situations where the prosecution wishes to produce the statement as exhibit. The court holds a trial within a trial to determine whether the confession was voluntary and whether the statement is admissible against the accused.

6. The statement which the accused is being cross-examined on is said to be a charge and cautionary statement which the accused recorded. The crucial question which the court has to consider is whether cross-examination on previously recorded statement by the accused can be limited. Sections of the **Evidence Act** are relevant here.

Whether cross-examination can be limited.

Section 153-156 of the Evidence Act provides:

153. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict a witness by a previous written statement, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

154. When a witness is cross-examined he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(a) to test his accuracy, veracity or credibility;

(b) to discover who he is and what is his position in life;

(c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

155. If any question asked under paragraph (c) of subsection 154 of this Act for the purpose of affecting the credit of the witness relates to a matter relevant to the suit or proceeding, the provisions of section 128 of this Act shall apply thereto.

156. A person charged with an offence and called as a witness for the defence may be asked any question in cross-examination notwithstanding that the answer may tend to incriminate him as to the offence charged.

Julius Mwendwa Musyoka v Republic [2013] eKLR

The Court held;

The provision (Section 153 of the Evidence Act) allows cross-examination of a witness on his previously recorded statement which is relevant to the matters in question. The latter part of the provision requires that if the cross-examination is intended to contradict a witness by a previous written statement, the attention of the witness must be drawn to the parts of the previous statement to be used for the purpose of contradicting him.....

The proceedings show that the witness was referred to his statements during cross-examination and that he was questioned on the said statements. The statements were also marked for identification as DMFI 1 and DMFI 2 on application by the defence counsel. It is borne by the record that the court did not record which specific paragraphs were intended to be used by the defence to contradict the testimony of the witness as required by Section 153 of the Act. The witness was cross-examined on the statements generally. The issue which arises is whether the omission to point out the specific paragraphs or sentence to be used to contradict the witness amounts to a mistrial.....

In the case before us, we observe that the procedure was followed and the provisions of Section 153 of the Evidence Act were complied with save the failure to point out, or to record the specific sentences or paragraphs intended to contradict the testimony of the witness. It is our finding that there was no mistrial in the trial.

Republic v Thomas Patrick Gilbert Cholmondeley [2006] eKLR

The Court held;

Secondly, as far as the cross-examination is concerned the law relating to the same has been clearly outlined by the Court. Specifically, Sec.154 of the Evidence Act provides all the parameters. These relate to the accuracy, veracity, credibility, position in life and character of a witness. My considered view is that in an adversarial system of law, that section has to be interpreted widely and liberally to test the evidence being adduced.

7. Cross-examination of a witness whether for the defence or for the prosecution is meant to test the credibility of the witness. That is why cross-examination is wide and a witness can be asked leading questions and questions need not only be confined to the testimony even in the evidence in chief or in previously recorded statements. Cross-examination is a useful tool for use in trials and in administration of justice whereby it is used by prosecution against its witnesses who become hostile in order to expose what was previously recorded by them and shake their credibility. This must apply to both the prosecution and defence. **Section 153 of the Evidence Act** answers the question why cross-examination on previous statements. That is, to contradict a witness on what he states and what he had previously recorded. It goes to test his credibility, discover who he is and shake his credit.

8. Where an accused opts to give a sworn evidence he becomes a defence witness and must be subjected to cross-examination like any other witness. **Section 145 (2) of the Evidence Act** defines cross-examination as examination of a witness by the adverse party. **Section 146(2) of**

the Evidence Act provides that cross-examination need not be confined to the facts to which the witness testified in his Examination in Chief. It is therefore true to hold that cross-examination of a witness cannot be limited.

9. For these reasons I find that the Evidence Act provides that a witness can be cross-examined on a previous recorded statement. It matters not that the statement was a confession. The key word under Section 153 of the Evidence Act is that he may be cross-examined as to *“previous statements made by him in writing or reduced into writing.”*

10. The upshot is that the objection by the defence which was based on Section 25A(1) of the Evidence Act is irrelevant and is without merits. Cross-examination cannot be limited and the state is therefore free to cross-examine on the previously recorded statement by the accused person. The objection by the defence is overruled.

Dated at Kerugoya this 21st day of February 2019.

L. W. GITARI

JUDGE