



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL CASE NO. 50 OF 2017

REPUBLIC.....PROSECUTION

-VERSUS-

MUEMA DISHON.....ACCUSED

RULING ON OBJECTION TO PRODUCTION OF A STATEMENT UNDER INQUIRY

1. In the course of the prosecution's case, Counsel for the accused person, Mr. Muthiani objected to the production of a statement under inquiry by PW8, Chief Inspector Jimmy Kimaro. The Court ordered that a trial within a trial be conducted.
2. **PW1** was Chief Inspector Jimmy Kimaro. He testified that the accused person was taken to his room by an officer. The accused person requested that his sister be present and his request was granted. They were therefore 3 in the room; PW1, the accused and his sister. PW1 knew it was advisable to have an independent person and was therefore ready to allow anybody who the accused wanted to be present. He therefore called the sister as identified by the accused.
3. Upon enquiring as to whether the accused wanted any other person, he said he was satisfied with the presence of his sister. He then cautioned the accused and took time to understand him. He was satisfied that the accused was in a fair condition without fear or intimidation. The accused was also in a good state of mind and ready to tell him what had happened. The sister also informed him that the accused was okay. The accused only said that he had a problem with one ear. The accused communicated properly and there was no hurry.
4. PW1 then proceeded to introduce his office and rank. He then cautioned him after reading the charge, ingredients and particulars. He cautioned the accused by telling him that he was under no obligation to say anything and that anything which he chose to say could be used as evidence. The accused said he understood the charge. The three of them signed. PW1 proceeded to record the statement but was not aware that the sister was a witness.
5. PW1 proceeded to testify that the process was proper, free, fair and there was no intimidation. He was also satisfied that the presence of the accused's sister was enough. The accused freely narrated what had happened. After recording the statement, he read it and it was translated and then the accused signed.
6. On cross examination, he said that the statement was in English though accused talked in Kiswahili. The accused could not read Swahili but he understood. Accused told him that his ear problem was caused by the father. PW1 certified that he could hear properly and indicated as much in the statement. He said that he was aware of the confession rules but was hearing about the sister being a witness for the first time in Court. That it was the accused who decided that he only required the sister. That the room where the statement was recorded is just outside the police station and had enough light.
7. **DW1** was the accused, Peter Muema Dishon. He said that on 18/02/2016, he was in Makindu police station and wrote a statement. His finger prints were taken. He was never questioned and had never seen PW1. He never appeared before him and never went to a room with PW1. His sister was at the police station but did not know why she was there. He talked to her but never appeared before officer with her. She went to see him in the cells.
8. On cross-examination, he said that he was in the police station for 10 days but was not told why he was arrested and did not ask them. When his sister arrived, he was in the cells with other persons. Kyalo was in the cell with him. He agreed having signed the statement.
9. After the close of the trial within a trial, Counsel for the accused indicated that he would be filing written submissions which he did and which I have duly considered. The only issue for determination is whether the statement under inquiry recorded by PW1 should be admitted in evidence.

Analysis:

10. The accused through Counsel submits that the statement under inquiry is not admissible for want of compliance with the Evidence (Out of Court confessions) Rules, 2009 (*herein after 'the rules'*). He also submits that in the last paragraph of the alleged confession, he does not admit fully killing the victim but instead offers a defence.

11. At the time of objecting to the production of the statement, Mr. Muthiani stated that there was no independent witness contrary to the provision of rule 13. That the accused's sister was PW3 in the main case and as such, she could not be considered as independent.

12. Rule 13 provides that;

“The recording officer, having informed himself of [section 26](#) the Act, shall be the proper prosecution witness to prove to the court beyond reasonable doubt that the Rules were complied with.”

13. Section 26 provides that;

“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.”

14. Section 25A(1) of the Evidence Act provides that:

“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.”

15. The law talks about a third party of the person's choice. In fact, the cited rule 13 does not talk about an independent witness anywhere. In our case, the accused chose his sister despite being a witness in the case. Further, the statement was recorded by PW1, who was a Chief Inspector of police and was not the Investigating officer. As for section 26, the accused agreed that indeed he signed the statement and contrary to the submissions, nothing in his evidence shows that he was intimidated or threatened to give the statement. It is my considered view that sections 13 and 26 were complied with.

16. The accused also submits that there was non-compliance with rule 4(1) because the language which he used to give the confession was not stated in the confession. The rule provides that;

“Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person—

a) has stated his preferred language of communication

b) is provided with an interpreter.....

c) is not subjected to any form of coercion....

d)

e)

f)

g)

h)

i)

17. The rule, in my interpretation, gives the requirements which a recording officer should comply with where an accused person wants to give a confession. 'Ensuring' as used in the rule does not mean that it must be captured in the confession otherwise one can argue that all those requirements in sub-paragraphs (a)-(i) should be captured. Be that as it may, the statement in our case has a sub-heading which says 'states in Kiswahili'. It is therefore evident that the accused used the Kiswahili language to give the statement which was then translated into English. The rule was therefore complied with.

18. Further, the accused submits that the thirds party's particulars and relationship with accused were not recorded hence there was non-compliance with rule 4(3) which provides that;

“The recording officer shall ask the accused person to nominate a third party who shall be present during the duration of the

confession session, and upon the appearance of the third party, the recording officer shall record the third party's particulars and relationship to the accused person."

19. The statement has a sub-heading written 'certificate of witness' under which the identification number and name of the third party is indicated. It also brings out the relationship between the accused and third party clearly. Evidently, there is compliance with rule 4(3).

20. The accused also submits that the statement offends rule 5(3) for not stating the place of recording and the time of commencement. The rule provides that;

"The recording officer shall ensure that the confession is recorded at the same time it is made and shall record the date and time of commencement of the confession session and the place where the confession is recorded."

21. The margin of the statement clearly indicates the date (18/02/2016), time (1304 hours) and place (Makindu police station). PW1 also confirmed that the recording was done at Makindu police station. Again, the rule was evidently complied with.

22. In a nutshell, the recording officer proved beyond reasonable doubt that the rules were complied with.

Conclusion:

i. The statement under inquiry is hereby admitted and shall be produced as evidence.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

C. KARIUKI

JUDGE