



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 39 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS MUNGAI NJOKI.....1ST ACCUSED

LEONARD MWANGI NJOKI.....2ND ACCUSED

RULING

Julius Mungai Njoki, 1st accused, and Leonard Mwangi Njoki, 2nd accused, are charged jointly with others not before the court with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that they killed Monica Njeri Gichuhi on the night of 21st and 22nd of July 2017 at Waithaka Trading Centre within Dagoretti Sub-County in Nairobi County. Each of them has denied committing this offence.

In the course of the trial against the two and during the testimony of CIP Bernard Wanyoike, an objection was raised by Mr. Businge, learned counsel, for the two accused persons. CIP Wanyoike introduced statements by the two accused persons said to contain confessions. This led to the objection that the statements were not voluntarily made by the accused persons and are therefore not admissible in evidence.

This court directed that a trial within a trial be held to determine the voluntariness and admissibility of the statements of the accused persons. The prosecution and the defence each called two witnesses during the trial within trial.

Corporal Julius Oguma (PW1) was the first prosecution witness in the trial within trial. He is the arresting officer for Leonard Mwangi Njoki, 2nd accused. He is the Investigating Officer in this case. He also received the 1st accused Julius Mungai Njoki on 31st July 2017 after he was arrested by members of public at Waithaka shopping center and taken to Kabete Police Station. He said that the 1st accused appeared normal and did not complain of any harassment. He said he was at the Report Office at Kabete Police Station when the 1st accused was handed over to him. He said that he informed the 1st accused that he had been arrested in connection with the murder of Monica Njeri. He said he did not harass, intimidate, induce, coerce, force or threaten the 1st accused in any way. He said that the 1st accused told him that he had information regarding the murder and CPL Oguma told him that they had to record down that information.

CPL Oguma testified further that since the law did not allow him to record a confession, he informed CIP Wanyoike who told him to take the 1st accused to his office for the purposes of recording that statement. CPL Oguma did so and left the two together. He confirmed to the court that the 1st accused volunteered to give his statement and that the 1st accused did not raise any complaints during the time he was with him.

CPL Oguma testified that he arrested the 2nd accused on 31st July 2017 at 2nd accused's grandmother's compound in Ruiru following information he had. CPL Oguma said that the 2nd accused had been working as a tout within Waithaka shopping centre and was known in the area. He had gone into hiding after the murder of Monica. CPL Oguma said he was led to the compound of the grandmother. He told the court that the 2nd accused started running on spotting the police but he was arrested. CPL Oguma told the court that he informed him and the family members the reason of his arrest. The 2nd accused told CPL Oguma that he had information on the murder. CPL Oguma took the 2nd accused to CIP Wanyoike to record his statement. He told the court that he did not intimidate, coerce, force, induce, threaten or harass the 2nd accused in any way. He told the court that he left the 2nd accused in the office with CIP Wanyoike.

The second witness in trial within trial is CIP Bernard Wanyoike. He told the court that the Investigating Officer CPL Oguma took the 1st accused to his office to record a statement on 14th August 2017 at 10.00hrs. He told the court that he was alone at the time and was dressed in civilian clothes. CIP Wanyoike testified that he was not armed at the time and that the accused looked composed and had no injuries; that he gave the accused a seat and introduced himself to the accused and the purpose of his being in the office; that he informed the accused his rights to elect the language of his choice and have a relative or legal representative present and that he asked him if he had any medical condition. CIP Wanyoike testified that the 1st accused chose to speak in Kiswahili and told him that he did not wish to call any one to

accompany him. The recording took 45 minutes to complete and in between that time CIP Wanyoike allowed the 1st accused 10 minutes break. He also read over the statement to the accused and invited him to make any corrections but the 1st accused said he was satisfied with the statement. He then signed and thumb printed the statement. CIP Wanyoike told the court that he did not force, coerce, intimidate, induce or threaten the 1st accused and that he followed procedure in taking down the statement as required.

CIP Wanyoike testified that the same procedure was followed on 31st July 2017 when he recorded a statement from the 2nd accused at 17.40hrs. He said that CPL Oguma took the 2nd accused to his (CIP Wanyoike's) office and left them; that the 2nd accused elected to use Kiswahili and that he took 50 minutes to record the statement with 10 minutes break. He said the 2nd accused had no injuries, was composed and did not complain of anything. He was invited to make corrections after the statement was read to him but he was satisfied.

The two accused persons elected to give unsworn evidence in the trial within trial. The 1st accused told the court that he did not record any statement and that he was given some papers to sign. The same evidence was given by the 2nd accused that he did not record any statement but was given some papers to sign and he signed them.

The main contention of the production of the statements of the accused persons is that they were recorded under misrepresentation. In cross examination on that issue, CIP Wanyoike denied that he gave the accused persons some papers to sign without the accused persons knowing what they were signing. He told the court on cross-examination that the accused persons were speaking in Swahili and that he recorded the statements in English.

I have considered this issue. Section 25 of the Evidence Act (Cap. 80 Laws of Kenya) defines confessions in the following words:

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

Section 25 was amended by introducing **Act No. 5 of 2003** and **Act No. 7 of 2007** to **Section 25A** which now reads 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 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 Chief Inspector of Police, and a third party of the person's choice.”

Extra-judicial confessions must be made within the Rules contemplated under Section 25A (2). These Rules are **The Evidence (Out of Court Confessions) Rules, 2009** (hereinafter **“Confession Rules”**) published on 27th March 2009. They spell out elaborate procedure in taking down confessionary statements from accused persons.

I have noted that the only issue raised by the accused persons in regard to the manner in which their respective statements were taken is the claim that they were given pieces of paper to sign without knowing what the papers contained. This allegation was denied by CIP Wanyoike in cross-examination. The accused persons were not subjected to cross examination because they chose not to take oath before they testified and therefore their evidence was not tested for veracity.

I am guided by the decision of the Court of Appeal in **Musili Tulo v Republic, Criminal Appeal No. 30 of 2013 ([2014] eKLR)** where that Court stated that the determination of the voluntariness of a statement made by an accused person is a matter of law that is for the judge alone to decide upon hearing evidence as to the manner the statement was recorded. The enquiry to determine the voluntariness or otherwise of such a statement is done in a *trial within the trial*, a mini trial conducted within the main trial.

Having subjected the evidence of the two police officers in the trial within trial and that of the two accused persons on the issue of voluntariness of the statements by the accused persons to critical consideration, it is my finding that the prosecution has satisfied the court that law and procedure was followed in taking down the statements of the accused persons. Although CIP Wanyoike was cross examined about leaving certain areas of the confession forms unsigned, the accused persons did not complain about not being allowed to sign the forms. In fact their only complaint is that they were made to sign the documents without knowledge of what they contained on which this court has made a finding. It is my finding therefore that the accused persons volunteered their respective statements to the police. I do not believe their evidence that they were forced to sign. It is my finding therefore that these statements are admissible in evidence. The prosecution is at liberty to tender the statements of the accused persons in evidence. Orders shall issue accordingly.

Dated, signed and delivered this 27th day of June 2019.

S. N. Mutuku

Judge