



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 18 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JACOB ODHIAMBO AROKO.....1ST ACCUSED

KELVIN OCHIENG ODIKRE.....2ND ACCUSED

WYCLIFFE ODHIAMBO OWUOR.....3RD ACCUSED

GEORGE OPIYO ODIKRE.....4TH ACCUSED

RULING ON A TRIAL WITHIN A TRIAL

1. The accused persons are charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which are that on 23rd day of January, 2014 at BIDII AREA near Kayole police station within Nairobi County jointly murdered **JOHN AWICH ODIKRE**.

2. In the course of their trial **PW7 ASP JOHN WAINAINA** commenced his testimony and stated that he took a confession of **JACOB ODHIAMBO AROKO** the 1st accused herein which was objected to by Mr. Odero Advocate for the accused persons necessitating the conduct of a trial within a trial.

3. At the said trial the prosecutor called **PW1 JOHN WAINAINA** who testified that at the time of recording the said statement he was a Chief Inspector of police and Deputy DCIO Kayole. He stated that on 27th January, 2014 the investigating officer in this matter Corp. Mbatta went to him with the 1st accused who he wanted him to assist in recording a statement.

4. It was his evidence that he was alone in his office when the accused was brought by the investigating officer whom he asked to leave. He asked the accused his name and whether he was comfortable and whether he had anybody he needed to be present when recording his statement for which he suggested his cousin called **JOSHUA OSEWE AROKO** who was within the police station. He then prepared a caution statement and the accused said he wanted to speak to him in Kiswahili which he did and recorded the statement which he read back to him and made a translation thereof.

5. In cross examination the witness admitted that he did not record that he had not indicated whether he asked the accused if he had any problem and whether he had been threatened or promised anything. He admitted that Sgt. Omondi was one of his officers and that he would not know whether the accused had been threatened by the said Omondi. He further stated that he did not know what had happened or done to the accused before he was brought to him. He stated that his role was only to record the statement.

6. The accused on his part testified that he was arrested on 26th January, 2014 by CID from Kayole including one Omondi who assaulted him and threatened to shoot him with his pistol. He stated that he was taken to the police station where he was again assaulted and threatened by six police officers including the said Omondi who stated that the accused could only communicate after being beaten. He stated that he was locked into the police cell and then removed and taken to the CID office where the said Omondi again threatened him with a gun and asked him of the people who had paid him to kill and that he would shoot him if he did not respond.

7. He stated further that he was advised by Omondi to mention two accused persons whose names he gave so as to be released but he refused to do so. He was taken back to the cell and questioned further by Omondi on the 27th in the office of the CID so he agreed to whatever Omondi said and he put his thumb in a statement which was prepared so as to be released. He stated that his brother who was at the police station was called by Omondi and asked to talk to the accused to sign the statement as a witness so as to be released. He signed the statement

so as not to be shot by Mr. Omondi.

8. In cross examination he stated that PW1 had a statement with him when he went to him. He stated that Joshua his brother was already at the station together with other relatives.

9. The law and procedure on confession has been well stated by Justice Mutuku in **REPUBLIC v ELLY WAGA OMONDI [2015] eKLR** where she has stated that generally confessions made by an accused person are not admissible in Kenya unless when they are made strictly under the law as per evidence out of court confessions Rules 2009 which at Rule 4 states the rights of accused person.

10. In this matter the accused had raised issues with one officer called Omondi who allegedly threatened him to secure the said confessions. The prosecution opted not to call the said Omondi so as to displace the accused's claim herein thereby raising a doubt on the voluntariness of the statement herein. I have noted that the investigating officer who was the person who took the 1st accused to PW7 for his statement to be recorded was also never called to shade light into the alleged confessions herein and the best the court can do is to make adverse inference that if called their evidence would have been against the prosecution case.

11. The rights of an accused person to free and fair hearing under the Constitution of Kenya 2010 and in particular the rights under Article 49(1) (b) and 50(2) (1) and 4 which excludes evidence obtain in a manner that violates any right or fundamental freedom in the bill of rights are alive and kicking and having analyzed the evidence tendered at the trial within a trial herein it is my finding that the voluntariness of the said confession is in doubt and therefore find that it is inadmissible in evidence.

Dated, Signed and Delivered at Nairobi this 13th day of February, 2018

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Meroka for the State

Mr. Odero for the four (4) accused persons

All four (4) Accused persons present

Court clerk Tabitha