REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 73 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JOHN NG'ANG'A NJERI.....ACCUSED

RULING

1. Is a witness statement admissible in evidence if the witness cannot be procured because the witness is deceased? That is the question presented by the present Application. The Prosecution says where it is established that the witness died it is reasonable and proportionate to admit such a statement; and that section 33(a) of the Evidence Act permits such admission. The Defence says the admission of such a statement amounts to a limitation of Article 50(2)(k), which by dint of Article 24 of the Constitution is non-derogable. The Defence also says that there is no statutory basis for such an admission.

2. The basic facts of this case are simple enough. The Accused Person is charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. It is alleged that on the night of 24/02/2013 at Mwemuto Village in Gatundu South within Kiambu County, jointly with another not before the Court, he unlawfully, and with pre-meditation killed Joseph Njau Njoroge.

3. The Accused Person pleaded not guilty and the case proceeded to trial. The Prosecution called its first five witnesses. One of the witnesses who recorded a statement with the Police and who allegedly witnessed the incident was one, Peter Kimani Bibia. Sadly, the said Peter Kimani Bibia passed on during the pendency of the case and before he could testify. He had, however, recorded a statement with the Police. The Prosecution has applied for his Written Statement to be admitted into evidence. It is this application that prompted the strenuous objection by the Accused Person's counsel, Mrs. Nyamongo.

4. A number of our cases have tackled the question whether a Written Statement by a Deceased witness can be admitted into evidence in a criminal trial. See, for example, ***Dickson Mbeya Marende Alias Dickie & Another v Republic [2017] eKLR***. The starting point of analysis for these cases is section 33 of the Evidence Act. The section provides for exceptions to the hearsay rule when a witness is dead, unavailable or can otherwise not be procured to give evidence. The section gives very specific instances when such a statement would be inadmissible. Since hearsay evidence is generally inadmissible, only the specific instances enumerated under that section permit the admission of statements by a deceased person as evidence.

5. A proper place to begin the analysis is, therefore, to determine if the present application fits into any of the exceptions to the hearsay evidence provided in section 33 of the Evidence Act. Mr. Maatwa, Prosecution Counsel, claimed that the present situation fits into section 33(a). That sub-section reads as follows:

> *33.* Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
>
> > (a) Relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

6. The facts of this case do not fit into the scenario contemplated in section 33(a) of the Evidence Act. In fact, the situation here is on all fours with the one presented in the ***Dickson Mbeya Marende Case***. There, the Prosecution evidence was that, the Deceased was at his home at Huruma Estate together with one, Nyakairu, (who died during the pendency of the criminal trial of the Appellants), when the deceased was attacked by the Appellants. When Nyakairu died before he could testify in Court, the Prosecution introduced his statement to the Police and the Trial Court relied on his statement to convict the Appellants.

7. On appeal, counsel for appellants argued that Nyakairu's statement was not admissible as it did not satisfy the requirements of section 33 of the Evidence Act. The statement was not made in the ordinary course of business as required under section 33(b); and neither could it be produced under any of the other subsections. The Court of Appeal agreed with the Appellants and said:

> Turning to the admission of the statement of Peter Mukoto Nyakairu (deceased), section 33 of the Evidence Act deals with statements by persons who cannot be called as witnesses….
>
> *We do not think that Nyakairu's statement was admissible under* section 33 of the Evidence Act. Neither did the statement relate to the cause of death of its maker, Nyakairu, nor did it relate to the circumstances of the transaction which resulted in Nyakairu's death as per section 33(a). Equally, it was not a dying declaration. It did not also purport to identify the killers of the deceased. We would therefore agree with the appellants' counsel's submissions that the trial court ought not to have admitted it under section 33(a) of the Evidence Act.

8. The exact same reasoning applies in this case. The situation here is not covered by any of the sub-sections of section 33 of the Evidence Act. It is not, therefore, one of the permissible scenarios where hearsay evidence is admitted as evidence despite the dangers as to its unreliability due to lack of an opportunity to confront the maker of the statement.

9. A different way of stating this is the following. For all scenarios where Parliament has not, by creating a statutory exception to the hearsay rule, it is assumed that admissibility of statements which will not be subjected to cross-examination or confrontation is per se prohibited as definitionally violative of Article 50(2)(k) of the Constitution.

10. Article 50(2)(k) of the Constitution guarantees to every Accused Person the right to "adduce and challenge evidence." There are certain situations where statements of witnesses who are not available can be admitted as evidence. This only applies where such statements meet three criteria:

> a. The witness must be unavailable (through death; physical infirmity; mental illness; absence from the jurisdiction, and so forth);
>
> b. The statement must have sufficient indicia of reliability; and
>
> c. The statement must be admissible vide a statutorily created exception to the hearsay rule or where the statement or evidence has been subjected to cross-examination or an opportunity for such cross-examination was made available to the Accused Person or that the statement was given under oath.

11. In the present case, the statement the Prosecution seeks to rely on does not satisfy these conditions. It, therefore, must be excluded. It is not admissible as evidence in a criminal trial as against the Accused Person.

Dated and delivered at Kiambu this 26th day of October, 2018.

……

JOEL NGUGI

JUDGE