

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL CASE NO 32 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

ROBERT GITAU.....ACCUSED

RULING

1. This ruling is in respect of the objection by Ms Nkurrinah for the accused, which I sustained on 26th September 2018. I reserved the reasons for the objection. Those reasons are as follows.

2. The objection followed the recalled evidence, No 67045 PC Charles Obade [Pw 5], who was the investigating officer. In his recalled evidence PW 5 testified that after arresting the accused he started to interrogate him. As a result, the accused told PW 5 that he saw the deceased with a male person in a wheat farm; who ran away on seeing the accused. The accused then suspected that the deceased had a love affair with that man. As a result, the accused then started to question the deceased about it. In response the deceased kept quiet. The accused then started to hit the deceased. She then died. It is at this juncture that Ms Nkurrinah objected to the admission of this evidence for two reasons. First, it amounted to a confession to a policer officer, who did not hold the rank of chief inspector, since PW 5 was a police constable. Section 25A of the Evidence Act [Cap 80] Laws of Kenya allows admission into evidence confessions that are made to a judge, a magistrate, or a police officer who holds the rank of inspector and above in addition to a person of the choice of the accused being present.

3. Furthermore, the second reason for the objection was that PW 5 was recalled only to identify and produce the jembe and headscarf of the deceased. Instead of doing so, he went beyond.

4. The constitutional basis of Ms Nkurrinah's objection is that under article 49 [1] of the 2010 Constitution of Kenya the accused had a right to remain silent. The admission of that confession was a violation of his right to silence. And since the constitution is the supreme law of the land, it took precedent over the provisions of the Evidence Act that appeared to permit the production of that incriminating evidence.

5. Mr. Omwega for the prosecution submitted that the evidence was admissible by virtue of the provisions of section 111 (1) of the Evidence Act. Those provisions permit the admission of the said evidence on the basis that the said evidence was peculiarly within the personal knowledge of the accused. In support thereof he cited the Court of Appeal decision in *Douglas Thiongo Kibochav. R (2009) eKLR*, which supports his submissions.

6. The issue for decision is whether the constitutionally guaranteed right to silence of the accused was violated. The provisions of article 49 (1) (a) and (b) provide as follows: ‘

i) An arrested person has the right – (a) to be informed promptly, in a language that the person understands of – i) the reason for the arrest;

ii) the right to remain silent and iii) the consequences of not remaining silent, b) to remain silent,.....” The same right to silence is also constitutionally guaranteed as one of the fair trial rights of an accused by article 50 (2) (i) of the constitution. This shows the importance of the right to silence by the Constitution. The evidentiary basis in this regard is that PW 5 did not inform the accused of his right to silence before he started to interrogate him. By virtue of the supremacist provisions of article 2 of the Constitution, the provisions of section 111 (1) of the Evidence Act and authorities interpreting those provisions cannot override the provisions of article 49 (1) of the Constitution.

7. The decision of the Court of Appeal in *Douglas Thiongo Kibocha v R, supra*, was decided before the promulgation of the 2010 Constitution. The repeal independence Constitution of 1963 did not have similar provisions in respect of the right to silence (see section 77 of that constitution). This decision is not helpful.

8. In passing I note that where two provisions of the law are in conflict in respect of the rights of an arrested person, one rule of construction is that the court will lean in favour of the provision that is favourable to the arrested person. In instant it is the provisions of section 25A of the Evidence Act that are favourable to the arrested person. Furthermore, where there are two provisions of the law that apply to a disputed matter, one of which is of a general application and the other one is specific, it is the specific provision that applies. In the instant case, the specific provision that is applicable is section 25A of the Evidence Act.

9. The foregoing are the reasons for upholding the objection by Ms. Nkurrinah.

Ruling delivered in open court this 19th day of November, 2018 in the presence of Mr. Mwangi for the state and Ms Nkurrinah for the accused.

J M BWONWONGA

JUDGE

19/12/2018