



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL CASE NO. 7 OF 2014

REPUBLICPROSECUTION

VERSUS

JOHNSON IRERI NJIRU.....ACCUSED

RULING

1. This is a ruling on trial within a trial in respect of a confession recorded from the accused person in this case Johnson Ileri Njiru. The mini trial was held following objection by the defence against the tendering of the confession in evidence.
2. The prosecution called two witnesses. PW1 the Deputy Officer Commanding Police Division (OCPD), the recording officer testified that on 17/03/2014, on request of the Officer Commanding Runyenjes Police Station (OCS), he recorded a confession from the accused person. The OCS brought the accused to PW1's office together with two other people who were to the 3rd party representatives of the accused.
3. PW1 said the OCS left him with the accused and the two men. He communicated with the accused in Kiswahili language and he confessed that he had killed the deceased who had come to steal from his house. The statement which was recorded by PW1 for the accused was confirmed as correct by the accused and duly signed as required by the law. The two witnesses made and signed their declarations which was followed by PW1's certification.
4. The evidence of PW2 was that he was one of the two people who witnessed the recording of the confession. The other person was the village elder (sub-area) known as Faustino Njiru. PW1 went to the police station and together with the accused and Faustino, they were escorted to the office of the Deputy OCPD where they were handed over to him. The OCS left them there and the confession was recorded from the accused. He testified that he signed the declaration and identified the signature in the statement.
5. The defence did not call any evidence but preferred to file written submissions raising the issue of non-compliance with the Evidence (Out of Court Confessions) Rules, 2009.
6. The State filed a response to the submissions arguing that PW1 complied with the rules and that his evidence as to the voluntariness of the statement was corroborated by that of PW2.
7. As regards the language used the defence submitted that PW1 did not record whether he inquired from the accused what language he understood. PW1 told the court that he did the inquiry although did not record the relevant conversation.
8. Rule 4(1)(a) states that the recording officer shall ensure that the accused person "*has stated his*

preferred language of communication". The rule does not require that the relevant conversation on inquiry be recorded. PW1 recorded that Kiswahili was the language he used to communicate with the accused and this was confirmed by PW2 in his evidence. I do not find any breach of Rule 4(1)(a).

9. It was contended that PW1 did not record the time of duration and the time of recording the statement, the time of arrest and period of detention in police custody. This is the requirement of Rule 4(1)(f) which PW1 admitted he did not record. However, the evidence of PW1 and PW2 which was not controverted was that the accused and the third parties were taken to the office of the recording officer and the statement recorded within the morning hours from 10.00 a.m.

10. The rule was designed to safeguard the rights of the accused as to prolonged hours of recording and duration of incarceration in custody which would otherwise affect the voluntariness of the confession. In this case there was no complaint from the accused on the issue and no evidence was adduced to controvert that of PW1. The alleged breach of the rule has not been satisfied.

11. PW1 said he inquired from the accused whether he needed representation of a lawyer but did not record the conversation. Rule 4(1)(d) only requires that the accused be informed of his right. The failure to record the conversation is not a breach of the rule. Furthermore the accused had already chosen two people as third parties to be present during recording of the statement.

12. The accused was taken to the recording officer by the OCS and this was confirmed by PW1 and PW2 in their evidence. The failure to record the request by the OCS was not a breach of any of the rules and did not affect the quality of the statement.

13. It was argued that the statement was not voluntary because it was not specifically put in writing that he had said that he wished to record the confession. PW1 testified that he administered the following caution:-

"Do you wish to say anything? I caution you that you are not obliged to say anything but whatever you say will be put down in writing and may be used against you in evidence..."

14. PW1 testified that the accused said he understood the caution and elected to give a confession.

15. In my considered opinion, the caution was properly administered and the accused voluntarily elected to give the confession.

16. The heading of the statement a "*Statement under inquiry*" instead of "*confession*" does not affect the nature of the statement. It was clear from PW1 as he communicated with the accused that he was recording a confession.

17. Rule 4(1)(c) requires that the recording officer ensures that the accused is not subjected to any form of coercion, duress, threat, torture or any other form. PW1 testified that he inquired about this as required by the rules. He further said that in his own assessment the accused was in good health, was comfortable and co-operative. PW2 the 3rd party confirmed this information in his evidence. There was no evidence adduced by the accused to the contrary. The court is satisfied that PW1 complied with the rule.

18. The fact that the OCS Runyenjes had already inquired from the accused at the station as to whom he wanted as his third party (to be present during the recording) does not make the statement inadmissible. This is for the reason that PW1 validated the process and the accused appeared before him with the two third parties.

19. PW2 testified that the accused had already rejected a person suggested to him and instead nominated one Faustino Njiru. If accused did not want any of the two persons, he had the chance to reject them. There is no evidence that he complained about the two or that they were forced on him. Rule 3 was therefore complied with.

20. PW1 recorded the names of the third parties nominated by the accused. The names in the absence of addresses and other details are sufficient for purpose of recording the confession since the relationship to the accused was explained in the evidence by PW2.

21. The recording officer's rank was that of a Chief Inspector which was in compliance with Section 25 of the Evidence Act.

22. There is no requirement in the rules that the confession be recorded in a certain form i.e. in form of questions and answers or otherwise.

23. Rule 9 requires that the recording officer at the end of the confession makes a certificate that the accused has made the statement on his own free will. PW2 made a certificate and duly signed it. The failure to include the words "*on my own free will*" does not affect the validity of the certificate.

24. The evidence of PW1 as corroborated by PW2 establishes that the confession taken from the accused was voluntary and in accordance with the rules.

25. I hereby so find and direct that the statement will be admitted in evidence.

26. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 23RD DAY OF OCTOBER, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Manyal for State

Mr. Njage Morris for accused