

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 4 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

HUSSEIN ABDI KOLO.....ACCUSED

RULING

1. This ruling relates to a trial within a trial on the admissibility of the statement which the accused is said to have recorded with the police, in respect of the allegations against him.
2. In the trial within a trial, the prosecution called two witnesses; Assistant Superintendent of Police Joseph Osugo Obare and Superintendent of Prison Jocktan Komora Jilo.
3. Assistant Superintendent of Police Joseph Osugo Obare stated on oath that on 27/2/2013 he proceeded to the Garissa G.K Prison in a Police Land Cruiser vehicle in the morning at 9.30 am from Madogo Police Station. On arrival at the prison he met the incharge Mr. Jilo to whom he requested production of the suspect Hussein Abdi (accused) who had a pending case of assault.
4. The said Assistant Superintendent of Police was in the company of a brother of the suspect by the name Ali Abdi Ali.
5. It was his evidence that while in the office of the incharge of the Prison, the accused was brought and voluntarily made a statement to him in Kiswahili language in the presence of his brother Ali Abdi Ali, which he recorded and the accused and brother signed and he counter signed. He then prepared a certificate and also translated the statement into English language.
6. The second prosecution witness Superintendent Jocktan Jilo testified on oath that, indeed that morning a police officer came to the Garissa GK prison and asked for the accused, a remandee, to record a statement. He availed the accused to the police officer and gave them his office for the exercise and left. He was later informed that the exercise had been finalized and took over his office.
7. The accused gave unsworn testimony. He stated that he met the police officer (Chief Inspector Osugo) at Garissa G.K Prison, and that he did not know how to write and that the police officer misled him, and then signed for him a statement whose contents he did not know. He stated further that indeed his brother Ali Abdi was with Chief Inspector Osugo, but denied admitting fighting the deceased.
8. Having considered the evidence of the prosecution and the defence in this trial within a trial, I find that has been agreed that on the material day the accused was in Garissa GK prison custody. It was also agreed that Chief Inspector Osugo and a brother of the accused went to the prison together, and that C.I Osugo (now Asst. Superintendent) called the accused to record a statement in the presence of his brother Ali Abdi Ali.
9. The variance is that the accused said in his testimony that he was threatened and tricked by Asst. Superintendent Osugo, who signed that statement for him while, Asst. Superintendent Osugo said that accused made the statement and signed the same. The second variance is with regard to time when the police Land Cruiser vehicle left Madogo Police Station to the Garissa G.K Prison. Though Asst. Superintendent Osugo said it was in the morning at 9.30 am, the motor vehicle work tickets on scrutiny during cross-examination showed that it was in the early hours of the night.

10. From the explanations given by Asst. Superintendent Osugo, in my view, the entries in the motor vehicle work ticket must have been a mistake of the motor vehicle entries made by the driver, as all witnesses including the accused agreed that the time when Asst. Superintendent Osugo went to the Garissa GK prison was in the morning. They also all agreed that the police officer met the accused that day to record a statement.

11. As to whether the statement was a fabrication by the police, my answer is in the negative. The accused's brother was present and in my view, if the accused wanted to show he was a tricked, and then there would be nothing easier than calling the said brother as his witness to support his version. It is of note that the accused has not indicated any difficulty in calling his brother as a witness.

12. I thus conclude the trial within a trial by finding for the prosecution. I find that the statement was voluntarily made by the accused and as such is admissible in evidence in this case.

It is so ordered.

Dated and delivered at Garissa on 14th December, 2017.

George Dulu

JUDGE