



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO.1 OF 2012

Consolidated with

CRIMINAL CASE NO.65 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

PACIFICA H KENYANSA SAMUEL.....1ST ACCUSED

DENIS OCHOKI NYABUTO alias

DENIS OBITA alias BOY.....2ND ACCUSED

DOUGLAS NYANDEKO OMWAMBA.....3RD ACCUSED

RULING

1. The accused persons herein **PACIFICA H KENYANSA SAMUEL, DENNIS OCHOKI NYABUTO alias DENNIS OBITA alias 'BOY', and DOUGLAS NYANDEKO OMWAMBA** are jointly charged with the offence of **Murder contrary to Section 203** as read with **Section 204 of the Penal Code**.
2. The particulars of the charge are that on 25th December 2011 at Bomwari village/Botabori Sub-Location, South Mugirango Chache Location in Gucha South District jointly murdered **SAMWEL OTONDI ONGANGI**.
3. All the accused persons pleaded not guilty to the said charge of murder and the hearing of their case commenced on **16th November 2015** when the prosecution presented 2 witnesses to testify in the case.
4. The prosecution however declared its witness number 2 one Wilfred Onyiego, a hostile witness after the prosecuting counsel Mr. Otieno, noted that the said witness had become evasive, uncooperative and was disowning the statement that he made to the police.
5. Mr. Otieno sought and obtained leave to cross-examine the said witness and at the close of the said cross-examination applied to have the statement of witness No.2 produced as an exhibit in court.
6. Mr. Omwega, counsel for the accused vehemently opposed the production of the statement as an

- exhibit while stating that its production was not anchored on any law or rule of evidence and that since the witness had already been declared hostile, it meant that the State had found his evidence unfavourable. Mr. Omwega stated that in any event, the State had noted that the witness did not understand the English language that was used in the statement and neither was a certificate attached to it to show that the witness understood the language.
7. Mr. Omwega added that the witness had stated under oath, that he was threatened by the police to record the statement. In a rejoinder to Mr. Omwega's submissions, Mr. Otieno submitted that the intention of producing the statement as an exhibit was purely to enable the court weigh the variance between what the witness had said under oath in his testimony in court and what he had said in his signed recorded statement with the police.
 8. According to Mr. Otieno, the witness was out to subvert the course of justice by attempting to exonerate the accused persons from blame. According to Mr. Otieno, the purpose of producing the statement was not so that it could be used in determining the case, but so that it could be used to assess the credibility and candour of the witness.
 9. It is therefore the application by Mr. Otieno to produce the statement of PW2 as an exhibit and the opposition by Mr. Omwenga that has necessitated the making of this ruling.
 10. The main issues arising out of the application to produce the witness statement as an exhibit are:
 - a. Whether the prosecution can produce, as exhibit, the written and signed statement of a witness who has recanted the said statement and has been declared hostile;**
 - b. Whether the witness statement has any probative value in a murder trial or any trial for that matter.**
 11. Producing any document as an exhibit in court pre-supposes that the court would rely on the contents of the said document in arriving at its findings.

Section 33 of the Evidence Act states as follows:

“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. 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 and 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;*
- b. When the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;*
- c. when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;*

d. when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen;

e. When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;

f. When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised;

g. When the statement is contained in any deed or other document which relates to any such transaction as is mentioned in Section 13(a);

(h) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.”

The above section provides for instances under which statements by a certain category of persons, who cannot be called as witnesses, are admissible. Clearly, a witness who has been declared hostile does not fall under that category.

12. The procedure for declaring a witness hostile is provided for under **Sections 161 and 163 (1) (c)** of the **Evidence Act**. **Section 161** gives the court the discretion to allow the person who calls a witness to put any questions to him which might be put in cross-examination by the opposite party.

13. **Section 163 (1) (c)** categorizes the evidence which may be called by an adverse party or, with the court's leave, by the party who calls him for impeachment of his credit. Evidence that may be called to impeach the credibility of the witness includes proof of former statements whether written or oral inconsistent with any part of the evidence which is liable to be contradicted.

14. Faced with a similar scenario, the defunct Court of Appeal for Eastern Africa in **Mahati Bin Ruadiha –vs- Rex [1938] EACA 52**, referred to **Section 155** of the **Indian Evidence Act 1872**, which was *pari materia* with **Section 163 (1)** of the **Evidence Act** stated as follows at page 53:

“Section 155 of the Indian Evidence Act provides that the credit of a witness may be impeached by the adverse party or with the consent of the Court, by the party who calls him by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. The proper procedure is to apply for leave to treat as hostile, prove and put in the former statements and then put to the witness the passages which are alleged to be inconsistent with the evidence given by at the trial. It is essential that the witness should be given an opportunity of explaining the inconsistencies as it sometimes happens that apparent inconsistencies are capable of completely satisfactory explanation. If serious and substantial inconsistencies are proved the effect is to render the witness unworthy of belief and not to make what he said in the former statement available as evidence at the trial.”

15. In **Shiguye –vs- Republic [1975] EA 191** the court stated as follows:

“After having declared Shizya a hostile witness, the effect would be that Shizya was an unreliable witness, whose evidence would not be accepted by court. All parts of the

evidence of a witness declared hostile would be rejected as untrustworthy not only some parts. The purpose of having a witness declared hostile by a party who calls him is to discredit him completely.....”

16. In tandem with the holding in the case of **Mahati Bin Ruadiha –vs- Rex** (*supra*) I find and hold that the former statements of a witness who has been declared hostile cannot be availed as evidence at the trial.

17. In addition to the above, it is trite law that documents are produced in court as exhibits by their makers. In the instant case, it is counsel for the State Mr. Otieno who applied to produce the statement of PW1 as an exhibit. I find that this was totally unprocedural.

18. Statements recorded by prosecution witnesses at the police station are not made under oath and therefore cannot be admissible in evidence as if that were the case, then there would be no need of conducting a trial.

19. Applying to have a witness statement produced as an exhibit in court and more so, a hostile witness who has already disowned the same statement cannot therefore be countenanced by the court. Such a statement would serve no useful purpose as the maker’s credibility is already in doubt.

20. It is for the above reasons that the law of evidence requires that the evidence of a hostile witness be corroborated if it is to be relied upon.

21. I therefore uphold the objection raised by Mr. Omwega over the application by the prosecution to produce the statement of PW2 as an exhibit in this case. In the end, I hereby disallow the said application.

22. It is so ordered.

Dated, signed and delivered in open court this 27th day of January 2016

HON. W. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Accused 1, 2 & 3 present in person

Omwoyo: court clerk