



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 52 OF 2013

REPUBLIC.....RESPONDENT

VERSUS

JOEL MESHETI ESHO.....1ST ACCUSED

RULING

This ruling concerns the attempt by the prosecution to introduce into evidence a statement (confession) allegedly recorded from the accused person. **PW7 CHIEF INSPECTPR MICHAEL MWAURA** testified that on 17/5/2013 whilst at Elokruto Police station, the accused was brought to his office for purposes of recording his statement. **PW7** stated that after cautioning the accused in the required manner, he elected to make a statement. This statement which is alleged to have been a confession was duly recorded by the officer.

The accused on his part objected to the production of his statement as an exhibit. He claimed that he was not accorded his rights and that the statement was not voluntarily made as he was threatened and forced to sign it.

The law regarding confessions and their admissibility is to be found in Section 25 A of the Evidence Act which provides:

“25 (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer). Being an officer not below the rank of Chief Inspector of police and a third party of the person’s choice”.

PW7 who was a Chief Inspector of police was qualified under Section 25 A to record a confession. However in doing so he was obliged to comply with the Evidence (out of Court Confessions) Rules, 2009 rule 5 provides for the administration of a caution to the accused. Rule 6(1) provides:-

“(i) recording officers shall caution the accused person in the following terms and shall record his response

“Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence” (own emphasis)

PW7 insists that he did administer the caution in the required manner but he admits that he failed to

record this in writing. Rule 5(1) provides that the recording officer ‘**shall**’ record in writing the response of the accused to the caution. The use of the work ‘**shall**’ makes this a mandatory requirement.

Similarly rule 4(3) provides:

“The recording officer shall ask the accused person to nominate a third party who shall be present during the duration of the confession session, and upon the appearance of the third party, the recording officer shall record the third party’s particulars and relationship to the accused person”

Here again **PW7** insists that he did inform the accused of this right. Yet again no record exists of his ever having done so.

The only way a court is able to confirm that the rules have been complied with is if a written record is availed and the answers given by the accused recorded thereon. The failure by **PW7** to make a written record of the manner in which he recorded the accused’s confession raises doubt as to whether the same was recorded in compliance to Section 25 A of the Evidence Act. As it stands this court cannot be certain that the appropriate caution was administered to the accused nor can this court be certain that accused was in fact informed of his right to have a third party present during the recording of this alleged confession. In the circumstances it would be unsafe to admit the confession. I therefore find that there is no proof that the alleged confession was not recorded in accordance to the Evidence Act and is therefore not admissible into evidence.

Mr. Nyaribo for Accused

Accused – present

Mr Chirchir for State

M. Odero

Judge

22/7/2016