



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 68 OF 2012

BETWEEN

REPUBLIC.....PROSECUTOR

AND

WALTER OGINDOACCUSED

RULING

1. Walter Ogindo Olweny (“the accused”) is facing a charge of murder contrary to **section 203** read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. This court was informed that on 23rd October 2012 at Apoko village, Nyakach District within Nyanza province he murdered Kennedy Odhiambo Adero.

2. During the trial, when taking the evidence of Cosmas Oluoch Were (PW 6), counsel for the accused, Mr Nyanga, objected to his testimony to the effect that the accused confessed to the offence before the area assistant chief. Counsel was of the view that a confession is only admissible if it is made before a magistrate or an inspector of police in line with **section 25A** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. Counsel for the prosecution, Mr Sirtuy, submitted that testimony of PW 6 was direct evidence and an admission of the offence to a third party could be proved against the accused.

3. The Court of Appeal in *Sango Mohamed Sango & Another v Republic MLD CA Criminal Appeal No. 1 of 2013[2015]eKLR* dealt with a similar objection raised by counsel for the accused at length and observed as follows:

The appellants contend that confessions to private citizens are not admissible because under Section 25 of the Evidence Act confessions as a general rule are not admissible. They contend further that section 26 of the Evidence Act must be read together with section 25. In our view, that contention is not correct, and subject to the normal safeguards, a confession to a private citizen is admissible and may be proved in evidence against an accused person.

*The same argument was presented and rejected by this Court in **Mary Wanjiku Gitonga v Republic, CR. APP. NO. 83 OF 2007 [2010]eKLR**. The appellant in that appeal was charged with the murder of her husband. The High Court admitted in evidence a confession made by the appellant to her brother regarding the killing of the deceased. On appeal the admission of the confession was challenged. This Court held firstly that the statement was admissible under section 63 of the Evidence Act as direct evidence of what the witness had heard and secondly that to treat such statements as inadmissible “**would be enlarging the provisions of section 25A (of the Evidence Act) beyond reasonable limits.**” The Court concluded:*

It was agreed that it was the appellant herself who went to Titus in Nairobi and told Titus what had happened between her and the deceased. Titus, we have held, was not a person in authority over the appellant and the evidence of Titus could not be held to be inadmissible on that basis. The evidence could be disbelieved and rejected but it was admissible.

The court concluded that:

We do not see anything in the Evidence Act as amended that prohibits an accused person voluntarily making a confession to a private citizen. Indeed if the intention was to introduce a general prohibition of confessions even to private citizens as the appellants claim, there would have been no need to retain the provision in section 26 of the Evidence Act which specifically prohibits confessions made to persons in authority.

4. The statements made by an accused to a third party are admissible as they are direct evidence under **section 63** of the **Evidence Act** and may be proved against him subject to the normal safeguards. By insisting on safeguards, the Court of Appeal in the **Sango Case (Supra)** meant that even such a confession or admission must be voluntary and must not have been procured by torture, threats, inducement, or similar conduct that would impact on its reliability.

5. PW 6 testified that the accused confessed to the area Assistant Chief in the presence of a crowd which the Assistant Chief had requested to bring the accused to the scene of the incident. This court must therefore determine the circumstances under which the accused made the statement and whether it should be admitted. This determination can only be made by a trial within a trial.

6. It is so ordered.

DATED and DELIVERED at KISUMU this 28th day of November 2016.

D.S. MAJANJA

JUDGE

Mr Nyanga instructed by Nyanga and Company Advocates for the accused.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.