



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL REVISION 46 OF 2014**

(From Original Conviction and Sentence in Criminal Case No.786 of 2013 of the Chief Magistrate's Court at Mombasa)

**1. HASSAN JILO BWANAMAKA**

**2. MWANASITI SHEE MASHA.....APPLICANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

This Revision application is brought by way of a letter dated the 15<sup>th</sup> day of October 2014 addressed to this court by Counsel for the Applicants.

It is expressed to be brought under the provisions of Section 362, 364 (1) (b), (2) and 367 of the Criminal Procedure Code Section 49 (1) 57 (5) and 59 (2) of the National Police Service Act Cap; 84 Laws of Kenya and Articles 25, 49 (1) (d) & (L), 50 (2) (a) and 50 (4) of the constitution.

Orders sought are for the calling of the record of the lower court so as to satisfy itself as to the correctness, legality and propriety of the following rulings:

1. *The ruling by S. Riechi CM dated 28.3.2013 denying the 1st accused bail and setting an unreasonably high amount of bond for the 2<sup>nd</sup> accused.*
2. *The ruling by Hon. I. Ruguru SRM dated 31.3.2014 directing that the signed inventories by the 1<sup>st</sup> accused person did not amount to a confession.*

***What is a confession?***

Section 25 of the Evidence Act defines a confession thus,

“A confession comprises words or conduct or a combination of words and conduct from which whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

Section 26 provides

***“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person's proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”***

In the instant case the two accused persons Hassan Jilo Bwanamaka and Mwanasiti Shee Maha are charged with the offence of being in possession of unauthorized explosive contrary to Section 6111 (a) as read with Section 29 of the Explosives Act on the first count. The particulars being that on the 21<sup>st</sup> day of March 2013 at about 3.00 p.m at Majengo Mapya area of Likoni Mombasa County, jointly were found with explosives namely three hand grenades with identification numbers HDgr69, 147 – 86 and 28 – 83/349 - 2 without authority from an explosive officer.

In the 2<sup>nd</sup> count the first accused is charged with being a member of unlawful society contrary to section 6 (a) of the Societies Act. The particulars being that on the diverse dates between the year 2005 and 17<sup>th</sup> March 2013 at Majengo Mapya area Likoni – Mombasa county, without lawful excuse was found being a member of an unlawful society, namely MOMBHASA REPUBLICAN COUNCIL (MRC) without registration.

On the 3<sup>rd</sup> count the first accused is charged with being in possession of paper or implements of forgery contrary to section 367(a) of the Penal Code.

The particulars being that on the 21<sup>st</sup> day of March 2013 at Majengo Mapya Likoni – Mombasa Country without lawful excuse or authority he was found in possession of 305 pieces of papers intended to resemble and pass as special paper such as is used in making one thousand Kenya Shilling notes.

In the 4<sup>th</sup> count the two accused persons are charged with incitement to violence contrary to section 96 (a) of the penal code.

In that on 21.3.2013 at Majengo Mapya area of Likoni - Mombasa County without lawful excuse, jointly published a document with the words ***Gikuyu fraternity position***” We the descendants of Gikuyu and Mumbi hereby declare Kenya our own (***freed by Mau Mau***) with regard to our position, Hakuna siku Jalu atatawala Kenya, Uhuru Kenyatta pekee, otherwise no peace in Kenya Jalu akipita. This is not the first time we are doing it we did it in 2007. This time with move decisive force get warned)” which contents were calculated to bring death or physical injury to members of certain communities.

When the charges were read to the accused person they denied them. The prosecution objected to their release on bond. Bond was granted in respect of the 2<sup>nd</sup> accused. That for the first accused was denied.

On 31.3.2013 Counsel for the accused Mr. Nabwana objected to the production of an inventory and its marking for identification on grounds that it amounted to a confession and that it was not admissible as it ran contrary to the provision of article 50 (2) (1), Article 25 of the Constitution – in her ruling the learned trial magistrate observed that an inventory is prepared upon search of a suspects house and signed by the officers present and the accused person. That the accused has the option of refusing to sign the document.

It is this ruling that this court is being asked to revise in addition to the issue of the denial of bond to the first accused.

Superintendent George Mbugua P.W.2 was the DCIO Likoni at the time. This is what he told the court (at page 12 from the last paragraph onwards to page 13)

***“On 21.13.2013 Hassan Jilo was brought to my office by CID Officers together with one Rashid Ware who was a cousin to Jilo. During interrogations, Jilo volunteered to take us to***

*his house where he stayed with his girlfriend one Mwanasiti in Maweni.....We gained entry and requested the accused and his cousin to observe keenly.*

*It was a one roomed house. Behind the door we found a black polythene paper. We checked the contents and found a hand grenade serial No. HdG 69 mf 2. We also found a suitcase with assorted male and female clothings. Inside the suitcase between the clothes, we found another hand grenade serial No. 147 – 86 – 9. We also recovered a third grenade in a worn out pillow under the bed. Hand grenade serial No. 28 – 83/349-2.*

*A light blue black track suit written Administration police Kenya”*

*.....Hand written notes “Dua ya Kuombea risiki Document Gikuyu fraternity position”*

MRC literature – suspected witch craft paraphernalia . After the search we drew an inventory of the things we had recovered from the accused house.

The inventory is shown to have been prepared by Sgt. Arthur Onyango, the first accused signed it in the presence of his cousin one Rashid Ware who also signed, the document was also signed by the senior superintendent of police and the arresting officers present. Mr. Nabwana Counsel for the applicants has cited the Supreme Court of USA case of Miranda vs. Arizona where it was held:

*“The prosecution may not use statements, whether exculpatory or exculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demon states the use of procedural safeguards effective to secure the fifth amendments privilege against self incrimination”*

Article 50 (2) (L) of our constitution provides:

*“Every accused person has the right to a fair trial, which includes the right to refuse to give self – incriminating evidence”*

It is the contention by Counsel for the applicant, that the inventories were hand written, they did not bear the police stamp. It was not indicated who drew them. The applicants were not informed the purposes for signing them further that by their very nature the inventories amounted to a confession and were therefore self incriminating and they should be expurged from evidence.

Mr. Jami for the state places reliance in the Supreme Court of Canada case of Terence Lawrence Caslaka v. Republic.

In that case the question arose on the issue of the Canadian charter of rights and freedoms as to whether – evidence seized as a result of inventory search conducted pursuant to police policy and without warrant or permission whether evidence found in search in violation of charter admissible. It was held:

*“Searches and seizures must be authorised by law and can fail to meet the requirements if any one of the three conditions is not met. First the state authority conducting the search must be able to point to a specific statute or common law rule that authorizes the search. Secondly the search must be carried out in accordance with the procedural and substantive requirements the law provides,*

*Third a search must not exceed in scope as to area and is to its items for which the law has granted the authorities.”*

Section 57 of the National Police Service Act No. 2011 provides for powers to enter premises and stop vehicles by police without warrant.

Section 57 (5) provides:

***“A police officer who exercises the powers conferred under this section shall:***

- a. Identify himself before hand***
- b. record the action***
- c. make a report regarding such exercise and make it available for the superior”***

It is not correct to posit as Counsel for the applicant does that inventories are not founded on any law. They were formerly provided for in the Police Act which has been repealed by the National Police Service Act.

Section 57 of the National Police Service Act clearly provides for inventories as enumerated above.

It is this section of the Act that Counsel should have submitted to be unconstitutional so as to grant him the basis of asking the court to expunge the inventories which form the basis of the case in the lower court.

The questions that ought to have been posed would have been whether the safeguards found under section 57 (5) of the Act were followed, i.e whether the law enforcement officers identified themselves to the accused before hand, whether they recorded the items taken and whether a report was made on the exercise available to the superior.

Whether the inventory was handwritten, whether it was stamped by police, whether it was indicated who drew it, was not relevant.

What is relevant is whether the searches and or seizures were authorized by the law, whether the procedures under that law were reasonably followed and carried out, whether the search, exceeded its scope.

It has not been argued that the provisions of Section 57 of the National Police Service Act are unconstitutional.

Section 25 of the Evidence Act defines what a confession is.

An inventory is defined in the concise Oxford English Dictionary as ***“a list of what is found.”***

Section 2 of the Evidence Act provides that a confession is not admissible in criminal proceedings if it can be shown that there was inducement threat or promise from a person in authority to the accused person.

Counsel for the applicant has equated the inventory to a confession but nowhere has it been indicated that there were threats, promises or inducements made to the applicants before they signed the inventory indeed as relates to the first applicant it is noted that his cousin one Rashid was present during the search and he also signed the document “As observed by the learned trial magistrate an inventory is not the same as a confession. Signing an inventory does not necessary mean that the items in question belong to the signatory only that they have been recovered in his/her presence. There are many ways to counter the inventory. The prosecution cannot proof their case beyond reasonable doubt by simply relying on the signatures in the inventory. They must adduce further evidence in corroboration.

On the issue of bond. This matter on 28.3.2013 went before the chief magistrate and he made his determination on the issue of bond. A further application for bond was made before Hon. Ruguru SRM in which she declined to grant bond as the matter had been determined by her superior. Thereafter the matter was placed before this court, while this court has the jurisdiction to hear the matter for bond application its only fair and procedurally reasonable to exhaust the avenues in the lower court. The application for bond may be made before the chief magistrate.

The application for expunging the inventories is found to lack proper basis and it's rejected. The original file is referred back to the trial magistrate.

Mention before the Chief Magistrate for further directions on 23.4.2015.

Ruling delivered dated and signed in open court in the presence of:

Learned State Prosecutor Wangila

Learned Counsel for the applicant absence

Court Administrator present

**M. MUYA**

**JUDGE**

**20/4/2015**