



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 34 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**T M N.....ACCUSED**

**RULING**

T M N, the accused, is charged with the murder of F. W. N a minor girl aged five years contrary to section 203 read with section 204 of the Penal Code (Cap. 65 Laws of Kenya). The crime is alleged to have been committed on 20<sup>th</sup> February 2013 at [Particulars Withheld] Village, Githunguri District within Kiambu County.

Hearing of this case commenced on 12<sup>th</sup> June 2014 before Hon. Lady Justice Florence Muchemi (Justice Muchemi). Justice Muchemi took evidence of three witnesses. Upon her transfer to another station I took over this case. In the course of the trial when CIP Samuel Agutu, PW10, was testifying, the defence counsel Mr. Ochako objected to the introduction of a confessional statement allegedly made by the accused. I directed that a trial within a trial be conducted to determine the voluntariness and admissibility into evidence of that statement. The prosecution called two witnesses and the defence called three witnesses. This ruling is in respect of that trial within trial.

CIP Boniface Kipkemboi Samati who was PW1 in trial within trial told the court that on 21<sup>st</sup> February 2013 while at Githunguri Police Station he received a report from the OCS about a murder case. He went to Ikinu where he found the accused having been arrested by members of public. He rescued him from them because they were threatening to beat him up. CIP Samati told the court that the accused wanted to make a confession to him and he made arrangements to take him to another officer who could take down the confession. He sought an order from the court to hold the accused in custody longer than the 24 hours. He informed the accused of his right to choose the language he wished to use and cautioning him. He took the accused to CIP Agutu to record the confession on 28<sup>th</sup> February 2013. CIP Samati said he followed the procedure in taking down the confession. He said the accused did not have any injuries on him.

The second witness was CIP Samuel Agutu, PW2 in trial within trial. CIP Agutu testified that on receiving the accused on 28<sup>th</sup> February 2013 he informed him of the nature of the inquiry and of his right to choose the language he wished to use; the right to have a third party present and cautioned him using the normal caution that he was not obliged to say anything but if he wished to say anything it would be taken down and may be used in evidence. CIP Agutu told the court that the accused chose to use Kiswahili language and to have both his parents present during the confession. Both the mother and father of the accused were summoned and CIP informed them the nature of the inquiry and recorded their names. Court was informed that both the accused and his parents were ready to have the accused's

statement recorded. The accused chose to record the statement which was taken down by the CIP and signed by the accused and his father.

Defence counsel took issue with CIP Agutu that he was one of the investigators in this case but CIP Agutu said he did not investigate the case but as DCIO in the station he was aware of the case.

On the defence side T M N, the accused, told the court that he did not record any statement but the police officer asked him questions and recorded what the accused stated. The accused denied that he was cautioned and that he was asked anything about the deceased. He informed the court that he spoke in Kiswahili and that he was asked if he wished to have his parents present. He said he was not forced to record the statement and was told to feel free and say anything. It did not escape this court that the accused seemed very nervous, uncomfortable and uneasy during his testimony.

On cross examination by the prosecution counsel the accused admitted that he was told that he was cautioned before the statement was taken. He also said that he admitted because he had been beaten by the members of public.

P N (DW2), father to the accused, told the court that together with his wife they were summoned by the police and he was told to sign a document so that his son, the accused, could be taken to an approved school. He denied that he knew where the accused was to be taken to an approved school. He said police did not explain anything to them. P N was uneasy and uncomfortable throughout his testimony.

E N N (DW3), mother to the accused told the court that police told them that T was alleged to have killed someone and that police asked him questions. She said T was asked if he had killed F. W which he had denied.

E contradicted her son the accused who told the court that police did not ask him if he had killed F. W. She also contradicted her husband by stating that there were two police officers when T was being questioned.

I have considered this evidence. I am of the view that the accused and his parents were not telling the court the truth. They seemed uncomfortable while testifying and their evidence is contradictory. I doubt a parent would go to a police station, get informed that his son would be taken to an approved school and he or she does not seek to know the reason behind such an action. It is my considered view that both parents of the accused knew the reasons behind the arrest of their son, the allegations made against him in respect of this case.

Generally confessions made by an accused person are not admissible in Kenya unless when made strictly under the law. Section 25 of the Evidence Act defines a confession as follows:

**“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 25 of the Evidence Act was amended by Act No. 5 of 2003 and Act No. 7 of 2007 by inserting into the Act Section 25A which reads as shown below:

**“(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.”**

The law is very clear that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice (Article 49 (4)).

The right of an accused person to a fair trial is guaranteed under Article 50 (2) of the Constitution of Kenya 2010. Of particular relevance to us is Article 50 (2) (1) which guarantees him/her a right to refuse to give self-incriminating evidence.

Other than the Constitution and the Evidence Act, there is the Evidence (out of Court Confessions) Rules, 2009 hereinafter the Confessions Rules made under Section 25A (2) of the Evidence Act. Under these Rules, specifically under Rule 4 the rights of an accused are specified. This Rule requires the recording officer to ensure that the accused person chooses his preferred language of communication; is provided with an interpreter free of charge where he does not speak Kiswahili or English; is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment; is informed of his right to have legal representation of his own choice among others.

The accused told the court that he was not forced to record his statement and that police told him he was free to say anything. Although he said he admitted the offence because of beatings from the people, the evidence shows that he was arrested on 21<sup>st</sup> February 2013 and the statement was recorded on 28<sup>th</sup> February 2013. Evidence shows that the police officers rescued him from a hostile crowd. He did not record the statement on the same day he was arrested. It is the view of this court therefore that he was not under any threat, inducement or coercion. The record shows that both his parents were present when he was interrogated by the police and this definitely must have made him comfortable and free to answer the questions put to him without any duress. The requirement of section 25A (1) of the Evidence Act that the statement must be recorded in the presence of a third party of the suspect's choice was met.

Having carefully considered the evidence from both the prosecution and the defence in trial within trial, it is my view that the defence witnesses, the accused and his parents, were not entirely truthful to the court. They contradicted themselves as shown in this ruling and my observation of their demeanour led me to conclude that they were trying to conceal some facts from the court.

I find that the law was followed in taking down the statement of the accused and whatever he told the police in that inquiry was not forced or coerced from him. He voluntarily, in the comfort of having both his parents present, gave the statement to the police. Consequently, I find that the statement was voluntary and order that it be admitted in evidence. It is so ordered.

**Dated, signed and delivered this 22<sup>nd</sup> day of June 2015.**

**S. N. Mutuku**

**Judge**