



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 111 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JAMES OBONG'O ABEL.....ACCUSED

RULING

James Obong'o Abel is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on the 4th day of October 2013 in Utawala area in Embakasi District within Nairobi County he murdered Enock Muthiani Munyoki.

This case is in progress. After the prosecution called its 11th witness, CIP Moses Mwangi (PW11) to the witness stand, he introduced in evidence a confessional statement allegedly made by the accused in the cause of police investigations. Counsel for the accused person Mrs. Kinyori raised an objection. This court made a ruling that a trial within trial be conducted to determine the voluntariness and admissibility into evidence of the said statement. The prosecution called two witnesses while the defence called one witness in the trial within trial. This ruling is in respect of that trial within trial.

CPL Burure Marwa, PW1 in trial within trial, told the court that the accused was arrested together with his brother and cousin, Victor Abuga Abel and Benson Abuga Mayagi in a case of abduction; that they were taken to Makadara Law Courts and were remanded for further investigations; that the accused said he wanted to record a confession in order to exonerate his brother and cousin; that the accused did not complain of any harassment, intimidation or mistreatment and that he had no injuries. CPL Burure denied intimidating, coercing, harassing or mistreating the accused.

He further testified that at the station level, the accused requested not to be remanded at Shauri Moyo Police Station because the family of the deceased lived near there; that he was remanded at Buruburu Police Station; that the accused was taken to Dandora Police Station on 8th November 2013 to record a confession before CIP Mwangi. CPL Burure Marwa produced in court as exhibit 1 a letter dated 4th November 2013 from DCIO Buruburu requesting the prosecutor at Makadara Law Courts to seek more time to enable police to further investigate the case following the recovery of the body of the deceased. He also produced copies of Occurrence Book extracts showing temporary removal of the accused to Dandora Police Station to record a statement and return to Buruburu Police Station.

On cross-examination CPL Marwa denied intimidating or coercing the accused. He admitted omitting to record in his statement that he took the accused to record his confession. He admitted that the confession was taken before the abduction charges against the accused had been withdrawn and that the accused was moved from Shauri Moyo to Buruburu Police Stations before his confession was taken.

CIP Moses Mwangi testified as PW2 in trial within trial. He told the court that he recorded the statement on 8th November 2013 and he ensured that the statement was taken between 6.00am and 6.00pm; that the accused had not been deprived of food or sleep; that he had not overstayed in police custody; that during the confession the accused was given time to rest; that he asked the accused whether he wanted to have an advocate, a third party or a member of his family present to which the accused said he did not require a family member, a third party or advocate present; that the accused did not complain of any medical complications or of any beatings or ill-treatment.

CIP Mwangi testified further that the accused chose to speak in English and that he cautioned him that he was not obliged to say anything and that if he wished to say anything, this may be recorded and may be given in evidence; that the accused narrated his statement to CIP Mwangi who recorded it after which CIP Mwangi prepared a certificate that the statement was given by the accused voluntarily without threat, force or inducement of any kind and read out the statement to the accused who signed and CIP Mwangi countersigned.

On cross examination, CIP Mwangi told the court that at the time of recording the statement at 4.00pm he was told that the accused was facing an abduction case and that he had been in custody for two days; that the accused did not tell the officer how many police stations he had been held in custody; that he recorded the statement from 4.00pm to about 5.00 or 5.30pm; that he asked the accused if he wished to record his statement to which he said he was not in a position to record it; that he (CIP Mwangi) asked him why he was not in a position to record the statement but the accused did not answer; that the accused did not have any medical complications and did not wish to have present a family member, an advocate or a third party; that he did not complain of denial of food and that it is not intimidation to move accused from Buruburu to Dandora Police Stations.

Further evidence by CIP Mwangi on cross-examination is that he had gone to Buruburu Police Station to record statement but found CPL Marwa absent and that there was no Chief Inspector of Police from Directorate of Criminal Investigations in Buruburu at the time.

The accused on his part denied recording any statement. He told the court that he was arrested and taken to Shauri Moyo Police Station and later moved to Buruburu Police Station with his brother Abuga Abel and cousin Abuga Mayagi; that they stayed in Buruburu for 5 days before being taken to Makadara Law Courts where abduction charges were read to them; that they were remanded at Industrial Area Prison for two weeks; that they were returned to court and told of possible murder charges and remanded at Buruburu Police Stations for further investigations; that they were taken to Jogoo Road Police Station and back to Buruburu Police station; that they were returned to court where his brother and cousin were released; that he was taken to Jogoo Road Police Station and that in all the police stations he was taken he was tortured by beating, was denied food and sleep; was placed in a cell with water; that he was taken to record a statement before CIP Mwangi; that CIP Mwangi told him he would help him and gave him a letter said to be from a state counsel and told to sign it so that the office would assist him; that he was not told to call a relative or lawyer and that he had no shoes, clothes and had not eaten and that he was not given a chance to record his own statement.

I have considered the prosecution and defence cases in trial within trial. The law on confessions in this country is governed by **Section 25A of the Evidence Act (Cap. 80 Laws of Kenya)**. The section provides that:

- 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.**
- 2. The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.**

On 27th March 2009 the rules envisaged under Section 25A (2) of the Evidence Act were published as **The Evidence (out of court confessions) Rules, 2009** (The Confession Rules).

I wish to lay emphasis on Rule 3 that requires that the Confession Rules shall be readily available for reference by police officers, accused persons and members of the public and in particular, shall be displayed prominently at every police station and police unit and upon request, be made available by a police officer, in a form of a copy to an accused person.

In my view, no police officer who purports to record a confession has any excuse not to comply with these Rules because the requirement which every officer in charge of a police station or police unit should comply with is that every station or unit must have these Rules on display at the station or unit and the same should be made available to the accused person. The problem is simple: that an accused person will not know the Rules exist unless the officer recording the statement informs the accused of their existence. This can be done in the course of explaining the rights to an accused person. From the many statements being introduced into evidence in court, it can be concluded that the police officers are not aware of these Rules. If they are aware of them, they do not practice them. It seems that the police know, in a rudimentary manner, that these requirements are there without the details.

Further, Rule 4 requires that the accused is informed of his rights as to his preferred language of communication or provided with an interpreter if he does not speak English or Swahili; 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 a legal representation of his choice; is not deprived of food, water or sleep; has his duration, including date and time of arrest and detention in police custody established and recorded; has his medical complaint, if any, adequately addressed; is availed appropriate communication facilities and communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under rule 5.

Under Rule 4 (2) the recording officer shall not record a confession from any accused person who complains to him of being a victim of torture or whose physical appearance shows signs of physical injuries including open wounds, body swelling, or shows extraordinary fatigue or any other indicators that would suggest that the accused person has been tortured.

And under Rule 4 (3) 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.

My understanding of Section 25A (1) and Rule 4 (3) is that a recording officer has no choice in the matter. It is mandatory that he must ask the accused to nominate a third party who shall be present during the duration of the confession session. This legal requirement does not allow an option to the recording officer to ask the accused if he wishes to have a third party present. The recording officer must tell the accused that before the confession is taken, the accused has to nominate a third party to be present. This third party could be a relative, an advocate, a friend or any other person known to the accused. The third party must be present and must communicate with the accused before the recording officer administers the caution under Rule 5. The recording officer must record the particulars of the third party and his relationship to the accused.

My careful consideration of the evidence by the prosecution leaves me with doubts as to whether CIP Mwangi complied with the requirements specified in Section 25A of the Evidence Act and the Confession Rules. While he told the court that he followed procedure and ensured that the confession was taken according to the law, there is no indication that he followed the Confession Rules specifically by ensuring that the accused nominated a third party of his choice who was to remain during the duration of the confession. In my understanding, the third party is required to remain from the time the recording officer takes into his custody the accused person to the time the accused leaves his custody. This will ensure compliance with the law.

In most cases in recording confessional statements it is always the word of the accused against that of the

recording officer that the law was followed. Unfortunately for the prosecution, the law requires not the accused, but the prosecution to prove the case before the court. When a confession like the alleged one before this court is put under scrutiny in a trial within a trial, then it comes out clearly that the recording officer has failed to comply with the law.

My considered view is that this confession was not taken in strict compliance with the law. It will therefore be a miscarriage of justice to admit it in this trial.

From my experience as a judicial officer trying criminal cases, it seems the police are not following these rules to the letter. A good confession may be rejected in court for the reasons that the proper procedure in taking down the confession has not been followed. This leads to miscarriage of justice where a case may be lost due to the shoddy manner the confession was taken.

Finally, I wish to remind police officers who record statements from accused persons the requirements of section 25A (1) of the Evidence Act that 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 compliance with the law.

I wish also to offer my unsolicited advice to the Office of Director of Public Prosecutions in consultation with the Inspector General of Police to take up the issue of training the police officers and to some extent the prosecution counsels on the requirements of Section 25A of the Evidence Act and the Confessions Rules. It is a simple procedure that if followed would make the prosecution work easier.

In view of the reasoning in this ruling, I hereby decline to admit the confessional statement made by the accused for the reason that it was made outside the legal requirements and is therefore not voluntary. Hearing in the main trial shall continue.

Orders shall issue accordingly.

Dated, signed and delivered this 17th December 2015.

S.N. MUTUKU

JUDGE

In the presence of:

Ms Macharia for the prosecution

Mrs. Kinyori for the accused

Mr. James Obong'o Abel, the accused

Mr. Daniel Ngumbi, court clerk