



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**MISC. CRIMINAL APPLICATION NO 19 OF 2013**

THOMAS KOMO alias BILAL MOHAMED.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

**RULING**

[1] The applicant is facing criminal charges before the Chief Magistrate, Garissa (Criminal Case No 191 of 2012). While proceedings in respect of those charges are pending determination, the applicant has moved this court seeking to stop the said proceedings pending the hearing and determination of this application and leave to file an application which he does not specify the particulars of. The applicant has invoked Articles 22 (1), 20 (3) and 50(1) of the Constitution, Section 25 (A) (1) of the Evidence Act and Part III- Confessions and Section 4 (2) of the Evidence (Out of Court Confessions) Rules, 2009.

[2] In his affidavit in support of the applicant he has deposed that the admission of a confession taken by the Police into evidence in the Criminal Case before the Chief Magistrate will occasion him prejudice and is in contravention of the Evidence Act on confessions and constitutional provisions.

[3] The applicant has also made submissions in which he is stating that the prosecution bears the onus of proving the credibility of the alleged confession certificate before producing it in court; that the prosecution have nothing to connect him with the offence in the lower court and that he contests the production of the certificate of confession in court.

[4] Other than what I have stated above the applicant is challenging the evidence of the prosecution tabled in the lower court in his submissions.

[5] In opposition, the State has filed a Replying affidavit sworn by Newton Mbogo, who deposes that he is the investigating officer in Criminal Case No. 191 of 2012 in the lower court; that the application is frivolous, vexatious, scandalous and an abuse of this court's process; that the applicant made a confession before the Deputy DCIO Garissa Mr. Julius Mbatia which confession was taken in the presence of one Sadik whom the applicant identified as his friend and who the applicant stated he wanted to be present during such confession; that after receiving the confession certificate from Mr. Mbatia, the deponent put the original copy in a drawer but it was destroyed when the Garissa Police Station was burned down; that the applicant was not coerced into signing or making the confession.

[6] The Respondent has also submitted in this matter that an applicant on an application touching on the enforcement of the Bill of Rights under Article 22 must specifically state the alleged breaches and spell out the nature of infringement (**See Matiba v AG (1990) KLR 666 and Anarita Karimi v. Ag (1979) KLR 54**); that the applicant has not demonstrated the manner, nature and/or proof of breach of his fundamental rights which he has alleged. It was further submitted that before a matter can be referred to a constitutional court, it must involve the interpretation of the constitution and secondly the subordinate court must be of the opinion that the question involves a substantial question of law (see **Sylvester Mwandime Mwaliko v. Republic Criminal Appeal No 236 of 2006**).

[7] I have read the lower court file. I have noted that by the time this application was filed in court on 3<sup>rd</sup> July 2013, the trial court had already conducted a trial within a trial to determine the legality or otherwise of the manner in which a confession attributed to the applicant was received. The court had pronounced itself thus:

***“I have carefully considered the evidence from both sides and it is my considered view that the accused did give a voluntary statement in the presence of his friend Sadik. His allegations that this confession was obtained from him under duress has no basis and in my view is a creature of his wild imagination. There is no evidence that he was tied or threatened in any manner. I do rule that the confession statement shall be adopted as an exhibit before court to be considered alongside all other evidence.”***

[8] This ruling was given on 25<sup>th</sup> September 2012 and thereafter proceedings in the lower court continued until 8<sup>th</sup> November 2012 when the applicant asked the trial court to disqualify itself from handling this matter because he did not wish to be tried by that court. The trial court overruled him.

[9] Once a court has ordered a confession to be properly before it and to have been properly taken, the only thing available for the accused (applicant) was to raise an appeal against those orders. Given the history of this case and the application to have the trial court disqualify itself, it is my considered view that the applicant is trying to stop or delay the proceedings in the lower court.

[10] Having carefully considered this matter and the applicable law, it is my finding and I so hold that the applicant has not established any breach of his constitutional rights. He is being tried by a competent court facing charges according to law and the proceedings in the lower court are being conducted in accordance with the Evidence Act and Criminal Procedure Rules. By invoking this court’s constitutional jurisdiction, the applicant is abusing this court’s process. His application is frivolous, vexatious, scandalous and without merit. This court declines to grant the orders sought. The hearing before the trial court will proceed as planned. However, this does not shut the applicant from pursuing his rights by way of an appeal if he has valid grounds of appeal. it is so ordered.

**S. N MUTUKU**

**JUDGE**

**Dated, signed and delivered this 6<sup>th</sup> day of August 2013.**