



REPUBLIC OF KENYA

High Court at Eldoret

Criminal Case 1 of 2011

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH KIPOECH

PAUL KIPTOO.....ACCUSED

RULING:

The Accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The Accused pleaded “**NOT GUILTY**” to the charge and the matter was set down for hearing.

On the date fixed for hearing the prosecuting Counsel for the State requested that a “**trial within a trial**” be conducted to determine the voluntariness and admissibility of the confession made by the Accused.

The State proceeded to call the officer who recorded the confession, one James Karira Kidzomo.

The officer stated that he was formerly stationed at Eldoret Police Division and at that time held the rank of Acting Superintendent of police.

He testified that he first cautioned the Accused herein, **JOSEPH KIPROTICH SANG** and proceeded to record the Accused's confession on the 12th February 2011 at 10.50 a.m.

Under cross-examination the officer stated that the Accused elected to use the English language and that the Accused was jovial and happy and recorded the statement voluntarily in the presence of his father and uncle.

Thereafter the statement was read back to the Accused and he confirmed its correctness and appended his signature thereto.

Based on these facts presented, this court has been called upon to determine the admissibility of the confession.

It is trite law that the onus is upon the prosecution to show that statement was made voluntarily. It is also apparent that the prosecution is seeking a conviction solely based on this confession and that is the main reason that the prosecution is seeking that it be admitted.

The Accused denied that he had been cautioned and in cross-examination the issue of the language used was also brought up.

After hearing the evidence of the officer and after perusing the court record, this court notes that the matter has been mentioned severally before this very court and at all times the Accused has elected to use the Kiswahili language.

This court has also perused the confession and nowhere does it give any indication that the Accused elected to use the English language.

The court notes that the Accused was arrested and brought to court on the 12th January, 201 for his plea to be taken. One month, thereafter the Accused recorded his confession on the 12th February, 2011 in the presence of his father and uncle.

The Accused had been jailed prior to this date for stealing from his parents.

The court is of the view that there was an element of mental coercion or a promise made to the Accused.

For the reasons stated above the court finds that there is doubt raised as to whether the confession was made voluntarily and the court also finds that there is also a fatal omission as to the language used when cautioning the Accused and when recording the confession.

It is trite law that the language used must be the one the Accused person understands and or has elected to use and this must be indicated on the record.

CONCLUSION.

The only conclusion this court can reach is that the confession was not made voluntarily and due to the fatal omission the caution was not properly administered.

The Statement of confession is therefore in admissible.

It is so ordered.

Dated and delivered at Eldoret this 8th day of November 2012

**A.MSHILA
JUDGE**

Coram: Before Hon. A Mshila J
CC: Andrew

Counsel for the 1st Accused: Buluma holding brief for Oduor

Counsel for the State: Chirchir holding brief for Kabaka

Koros: For 2nd accused.

Marube: Holding fire for lime watching brief for family of Deceased.

**A.MSHILA
JUDGE**