



**CONFESSION
TO A CIVILIAN**

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO.81 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

SIMON NGAHU NJUGUNA.....1ST ACCUSED

JOHN MUNYAO

MAKAU.....2ND ACCUSED

RULING

The accused persons are being tried for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. So far, only one witness has testified, objection having been raised with regard to the testimony of the second witness, Gerald Ngichu Tarira (Gerald), the brother of the deceased in this trial. Gerald was in the process of relating how **P.W.1, Anne Wanjiku** had reported to him that some person had been heard discussing how the deceased died. Gerald went and saw the 1st accused person.

The following day, Gerald in the company of some ten (10) villagers returned to where he had seen the 1st accused. They arrested the 1st accused and on interrogating him, he admitted having committed the offence but explained that he was not alone. This line of evidence is what is in contention and the subject of this ruling.

Learned counsel for the accused persons has submitted that that evidence is inadmissible as it amounts to a confession in terms of **sections 10** and **25A** of the **Evidence Act**. Learned counsel for the state, on the other hand argued that in terms of **sections 25A** and **26** of the **Evidence Act**, the statement in question was admissible as it was not made to a person in authority; that **sections 25A** and **26** aforesaid must be read together. Further that an explanation given by an accused person to a person in authority which leads to the discovery of admissible evidence under **section 111(1)** of the **Evidence Act** is admissible; that **section 25A** did not repeal **section 111 (1)**.

I have considered the foregoing arguments and the following authorities cited by both counsel namely:

- i) **Mary Wanjiku Gitonga Vs. Republic**, Criminal Appeal No.83/2007
- ii) **Douglas Thiongo Kibocha Vs. Republic**, Criminal Appeal No.335 of 2006
- iii) **Muriuki Vs. Republic**, (1975) EA 223
- iv) **Republic Vs. Hodgson** (2000) 1 LRC 203
- v) **Republic Vs. Sharp** (1998) LRC (crim) 2227
- vi) **Phipson on the Law of Evidence**, 9th Edn By Sir Roland Burrows
- vii) **Sarker's Law of Evidence** Vol. 1 16th Edn

Although this objection was raised on 12th July, 2010 a month before the Constitution was promulgated, the basis of the law on confession are:

- i) **Articles 49(1)(b), (d) and 50(2)(a) and (4) of the Constitution**
- ii) **Sections 25 to 32 (inclusive) of the Evidence Act**
- iii) The Evidence (Out of Court Confessions) Rules, 2009 and
- iv) The case law.

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The effect of **Articles 49(1)(b), (d) and 50(2)(a) and (4)** of the Constitution is that:

1. An arrested person has the right to :
 - a) remain silent
 - b) not to be compelled to make any confession or admission that could be used in evidence against him
2. Every accused person has the right to a fair trial which includes the right:
 - a) to be presumed innocent until the contrary is proved.
3. 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.

The Evidence Act, on the other hand makes the following provisions with regard to confessions by criminal suspects;

- i) that a confession or any admission of a fact tending to prove the guilt of an accused person is not admissible
- ii) only confessions and admissions made in court before a judge, a magistrate or made before a police officer (not the investigating officer) of the rank higher than Chief Inspector and a third party of the accused person's choice is admissible

iii) any confession or admission purported to be made by an accused person which appears to the court to have been made as a result of any inducement, threat or promise by a person in authority is not admissible if it gives the accused person grounds to believe that by making it he could gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him

iv) a confession made by one accused person which affects his co-accused person and the confession is proved, the court may take the confession into consideration as against the co-accused person and the accused person whose confession has been admitted

The Evidence (Out of Court Confessions) Rules, 2009 were made by the Attorney General pursuant to the provisions of **section 25A(2)** of the **Evidence Act**. It lays down the procedure for recording a confession of a suspect by the police. It does not make provision to the matter under consideration in this objection, namely a confession made to a person other than a judge, magistrate or police officer of the rank of or higher than an inspector.

Although in the case of **Mary Wanjiku Gitonga** (supra), the Court of Appeal held that what the appellant in that appeal told her brother, one Titus was admissible for the reason that Titus was not a person in authority in term of **section 26**, the words or the effect of what the appellant told Titus are (is) not stated in the judgment. Secondly, that decision appears to me, with respect, to be based only on the application of **section 26** and therefore is a narrow interpretation of the term confession and its admissibility as set out in the Constitution and in **sections 25** and **25A** aforesaid.

The decision in **Douglas Thiongo Kibocha** (supra) is to the effect that a confession made pursuant to the discharge of evidential burden placed on the suspect by **section 111(1)** of the **Evidence Act** is admissible. That decision is based on clearly distinguishable scenario from that obtaining the case.

The witness (Gerald) was in the process of stating that the 1st accused person in this case admitted to him and the rest that he caused the death of the deceased and further that he did so with another or the other person (s). Does this statement allegedly made by the 1st accused person amount to a confession?

According to **section 25** of the **Evidence Act**:

“A confession comprises words or conduct, or a combination of words or 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.”

The statement attributed to the 1st accused person is clearly a confession. As a general rule, a confession to a criminal offence is inadmissible in view of the clear provisions of the Constitution and the Evidence Act set out earlier in this ruling. **Sections 25A** and **26** of the **Evidence Act** are explicit.

They stipulate:

“25A(1) A confession or any admission of a fact tending to the proof of guilty made by an accused person is not admissible and shall not be proved as against such person.....”

Emphasis mine)

Section 26 provides:

“A confession or any admission of a fact tending to the proof of guilty made by an accused person is not admissible in a criminal proceeding.....”

Emphasis are supplied)

The exceptions to that general rule are confessions made in court before a judge, magistrate or before a police officer (other than the investigating officer) of the rank not below chief inspector.

A confession made by an accused person is not admissible if made pursuant to an inducement, threat or promise made by a person in authority to the accused person which may give the accused person ground to believe that by making the confession he stood to gain an advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Of course, if the court is satisfied that a confession was made after the removal of the inducement, threat or promise issued or made by a person in authority, it would be admissible. These are the only instances when a confession can be admitted in evidence.

All confessions not made in court must be obtained in accordance with the **Evidence (Out of Court Confessions) Rules 2009**. There is no room as far as I understand the law today for admissibility of a confession made to a member of the public without the necessary safeguards of law as provided under **sections 25 to 32 (inclusive) of the Evidence Act** and under the **2009 rules**.

To admit confessions made in the streets would extend the law of mob justice to new levels. It is inconceivable how it can be said that Gerald not being a person in authority was permitted by law to obtain a confession from the 1st accused person. Can such a confession be said to be free of threat, intimidation or even physical assault considering that Gerald was accompanied by over ten (10) villagers? The law of the jungle has no room in Kenya today. A confession envisaged in the Constitution and the statute law is one obtained and given free of any threat, promise or intimidation.

The witness's (Gerald's) testimony to the effect that the 1st accused confessed the commission of this offence is, I rule, inadmissible.

Dated, Delivered and Signed at Nakuru this 21st day of March, 2011.

W. OUKO

JUDGE