



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 53 OF 2009**

REPUBLIC.....PROSECUTION

=VERSUS=

ERICK ODHIAMBO AKUMU.....1<sup>ST</sup> ACCUSED  
 JUDITH AKINYI MWAI.....2<sup>ND</sup> ACCUSED

**RULING**

This ruling concerns the admissibility of a statement allegedly made by **ERICK ODHIAMBO (A-1)** to **PW14 CHIEF INSPECTOR ELUID NJERU** the Officer Commanding Central Police Station. The law regarding confessions is found in S. 25A of the Evidence Act which provides:

*“25A(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 persons choice (2) .....*”

In this case the 1<sup>st</sup> accused did make his statement before a Chief Inspector of Police as was required. However he alleges that he did not make the statement voluntarily. A trial within a trial was duly conducted. Mr. Wameyo for the 1<sup>st</sup> accused raised two objections to the admissibility of the statement.

- (1) That the statement was extracted from the 1<sup>st</sup> accused by way of intimidation, threats and torture.
- (2) That the 1<sup>st</sup> accused was denied an opportunity to have a person of his choice present whilst making the statement as provided by Section 25A

In his evidence at the trial within a trial the 1<sup>st</sup> accused told the court that he was beaten by officers at Urban Police Station. He also alleges that he was hit by **PW14** on his hands and feet using a rungu. The 1<sup>st</sup> accused also claims that officers at Urban Police Station where he was held threatened to beat him if he did not record the confession. In addition the 1<sup>st</sup> accused produced medical records in the form of his treatment notes for injuries which he sustained as a result of this beating.

It is curious that the 1<sup>st</sup> accused who claims to have been beaten intimidated and tortured never made any

complaint at all to any person in authority. He made no complaint to the O.C.S. of Urban Police Station where he was being held and neither did he raise any complaint at his first appearance in court or indeed at any of his subsequent court appearances. As a result I harbour serious doubts as to whether such beating and/or intimidation actually occurred. The treatment notes produced in court by the 1<sup>st</sup> accused are from the remand prisons clinic. These relate to treatment which the 1<sup>st</sup> accused received in April and May 2011. The alleged torture took place in December 2009. It is not possible that the two are related. It is not possible that the 1<sup>st</sup> accused is being treated in the year 2011 for injuries sustained two (2) years earlier in 2009. The 1<sup>st</sup> accused has been in custody since December 2009. If he had truly been tortured as he alleges then he would have sought and obtained treatment in 2009 or at the very latest early 2010. I find that these treatment notes relate to a totally different and subsequent ailment and have no connection with any alleged torture in 2009. I do not believe that the 1<sup>st</sup> accused was tortured at all. This is a mere afterthought, a story fabricated in an attempt to deny his statement. Thus this ground of the objection must fail.

The second objection raised by Mr. Wameyo to the admission of the 1<sup>st</sup> accused's statement is that he was not permitted to have a relative or friend present at the time the statement was being recorded. S. 25A of the Evidence Act clearly provides that any confession must be recorded in the presence of a Judge or in the presence of a Chief Inspector of Police ***"and a third party of the persons [suspects] choice"***. This right is clear, unequivocal and the law has it down in black and white. The 1<sup>st</sup> accused claims that he was denied this right. **PW14** on his part maintains that he did inform the 1<sup>st</sup> accused of the right to have a third person of his choice present but that the 1<sup>st</sup> accused said he was an orphan and thus had no relative to call. Firstly the question of whether or not the 1<sup>st</sup> accused had any relative is neither here nor there. The words used in Evidence Act is a ***'person'*** of his choice. That person need not be a relative. It may be a lawyer, a chief, a village elder, or even a friend. If as **PW14** claims he did inform the 1<sup>st</sup> accused of this right then nothing would have been easier than to put it down in writing. Yet **PW14** admits that apart from recording the caution which he administered to the 1<sup>st</sup> accused he did not record anything else in writing. This is a major omission by so senior an officer and raises serious doubts as to whether the 1<sup>st</sup> accused was actually informed of the right to have a person of his choice present at the recording of his statement. As defence counsel pointed out this right is sacrosanct. The law has included this right to guard against any form of manipulation and/or intimidation in the recording of statements from suspects. It is a guard to ensure that such statements are truly made voluntarily. Any police officer or indeed any Judge recording a statement from a suspect **must confirm in writing** that the right to have a person of his choice present has been explained to a suspect. It then remains up to the suspect to either waive that right or call in a third person of his choice. It is also essential that the response of the suspect be recorded in writing. The fact that **PW14** omitted to record this crucial provision in writing leads me to doubt that the 1<sup>st</sup> accused was informed of the right. As such any statement recorded from the 1<sup>st</sup> accused would be invalid and therefore inadmissible in law. For this reason I find that the statement recorded from the 1<sup>st</sup> accused did not meet the requirements of S. 25A of the Evidence Act. Therefore that statement is not admissible as evidence in this case.

**Dated and Delivered in Mombasa this 16<sup>th</sup> day of December 2011.**

**M. ODERO**  
**JUDGE**

In the presence of:  
Mr. Wameyo for Accused  
Mr. Onserio for State