

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE 9 OF 2007

REPUBLIC.....PROS

VERSUS

JACOB NJUE DANIEL ALIAS KIMWITHA.....ACCUSED

RULING

An issue arose as to the admissibility of a cautionary statement made by the accused person herein pursuant to Section 25 A of the Evidence Act. The said statement was taken by Mr. Onyango who was a Senior Resident Magistrate based at Runyenjes.

Mr. Okwaro counsel for the accused person objected to the production of the said statement saying that it offended the provisions of Section 25 A of the Evidence Act. This provision has been challenged many a times by defence counsel. There are several rulings from the High Court on the subject but none so far from the Court of Appeal. Personally, I have delivered at least two rulings following such objections. These rulings are nonetheless only of persuasive force and are not binding on me. The situations I have dealt with however have been different from the present situation. In my earlier matters, the accused person had been present before a magistrate in chambers which also acted as a court and the statement was taken there.

In this case however, the magistrate went to the police station and took the statement there. This in my view is outrightly contrary to the Section 25 A of the Evidence Act which provides:-

“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 is made IN COURT before a Judge, a Magistrate or before a Police Officer.....”

Even on the face of it, this section requires the accused person to be present before a Judge or a Magistrate in Court (read to include Chambers) but definitely not at the police station.

The mere fact that this statement was not taken in court by a magistrate or Judge but a police station but by the magistrate invalidates it. It runs contrary to the spirit of Section 25 A Evidence Act. I do not even need to go into the discourse as to the viability or legality of Section 25 A of the Evidence Act or the doctrine of separation of powers. That I will leave for another day. The said confession is therefore inadmissible and it will not be produced in evidence.

W. KARANJA

JUDGE

Delivered in open court this 8th day of June 2009.

In presence of:- Mr. Okwaro for accused Mr. Omwega for stat and the accused person.

W. KARANJA

JUDGE

8/6/2009