



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 7 of 2006

REPUBLIC.....APPLICANT

-VS-

PETER KARIUKI MUIBAU.....RESPONDENT

RULING

This ruling relates to an objection that was raised by Mrs. Kinyori who has been representing the accused. She objected to the admissibility of the evidence of confession that was about to be produced by Mrs. Grace Nzioka, Principal Magistrate Kangundo. Prior to her posting, the witness was the Magistrate-in-charge of Makadara Law Courts. Specifically, the learned Magistrate stated that the accused was taken to her chambers on 17th November, 2005 with a view of recording a statement.

According to Mrs. Kinyori, the accused was not taken to a court. She was of the view that the accused should have been taken to the trial court where he should have given a confession. Besides the above, Mrs. Kinyori submitted that the learned Magistrate has no jurisdiction to hear murder cases and that the courts should not be made an investigative arm of the Executive. In support of her submissions, she quoted the case of **Republic –vs- Maalim Komora Godana, Akare Komora Maalim**.

The ruling in the above case was delivered on 13th October, 2006 by Hon. Justice William Ouko at Malindi High Court. In conclusion, Mrs. Kinyori urged me to find that the statement that was recorded by Mrs. Nzioka is inadmissible.

On the other hand, Mr. Ndemmo, Senior State Counsel replied that Section 65 of the Constitution gives Parliament the power to establish courts that are subordinate to the High Court. He submitted that he is of the view that Section 25 (a) of the Evidence Act gives the court powers to receive confessions. Mr. Ndemmo also referred the court to the Interpretation and General Provisions Act, Cap.2 which defines a court as any court in Kenya of competent jurisdiction. That apart, he also pointed out that the confession was taken at Makadara Law Courts which has been lawfully established and gazetted. His interpretations of Section 25 of the Evidence Act is that a confession should be taken in court and not before the trial court. He further submitted that a confession before a trial court would be equivalent to a plea of “guilty” which would be completely different. In addition to the above, Mr. Ndemmo also submitted that the mischief that was meant to be cured was to avoid forced confessions and that the same did not in any way make the courts parts of the investigating process.

While he referred to the quoted authority of **REPUBLIC –VS- MAALIM KOMORA GODANA**

Mr. Ndemmo stated that the same was only of persuasive value and not binding to this court. That apart, he also referred to the case of

REPUBLIC –VS- JOHN NDUNDA MWANIKA

CRIMINAL CASE NO.111 OF 2005 NAIROBI

That case was handled by the trial Judge in this case.

Mr. Ndemmo pointed out that a confession of similar nature was admitted and formed part of the judgment.

This court has carefully considered the submissions made by the learned counsels. Section 25 (A) of the Evidence Act states as follows:

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 unless it is made in court.

With tremendous respect to my colleague viz, Hon. J. William Ouko, I hereby wish to differ with his decision on the following grounds:

Firstly, the above section refers to a “Court”. The same does not refer to a trial court. The Evidence Act, Cap.80 Laws of Kenya defines the word “court” as follows:

“includes all judges and magistrates, and all person except arbitrators, legally authorized to take evidence.”

Had the Legislature wanted only the trial court to receive confessions, then nothing would have been easier than to have indicated that in the amendments. The fact that they never did so, persuades me that they were alive to the definition of the word “Court”.

In this case, the witness is a Principal Magistrate and hence falls under the above definition.

Secondly, assuming that confessions were to be given before the trial Court what would be the difference with the above to a plea of “guilty”. Does it also show that the legislature is not aware that litigants (or accused persons) have always pleaded “guilty” when they appear in courts?

Thirdly, I do not subscribe to the view that by Magistrates recording confessions, then they will form part of the police investigation team. At this stage, one has to appreciate the legal, historical and political context under which the amendments were promulgated in 2003. Prior to that period, there was a lot of hue and cry due to the torture and intimidation that was being meted out to suspects in police custody. It was not uncommon for suspects to appear in Court while badly battered by some police officers. When the new regime came into power, it sought to curtail and eliminate human rights abuses within the police cells. Besides the above, despite the fact that Section 29 of the Evidence Act, Cap 80 was not repealed, the same cannot be used to lose sight of the drastic changes that have been brought by Section 25 (A). The broader picture explicitly shows that junior officers of below the rank of an Inspector of Police cannot record any lawful and valid confessions. That was the effect of the amendments that were brought by the Criminal Law (Amendment) Act No.5 of 2003.

Fourthly, the decision by my learned colleague was made by a court of concurrent jurisdiction and hence is not binding to me. Since the same is also not of persuasive value to me, I do wish to respectfully depart from the stance taken by my colleague.

Lastly, the issue of jurisdiction does not arise at all. The learned Magistrate merely recorded a confession as provided by law. She never purported to hear any Murder case.

Given the clear position of the law and above analysis, I hereby dismiss the objections raised by Mrs. Kinyari. I hereby find that the confession made before Mrs. Grace Nzioka, Principal Magistrate was valid, lawful and admissible in evidence.

MUGA APONDI,

JUDGE.

Ruling read, signed and delivered in open court in the presence of the accused.

Ogutu for Mrs Kinyori - Defence Counsel

Ndemmo - State Counsel

MUGA APONDI,

JUDGE.

DATED: 26TH JULY, 2007.