



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI

Criminal Case 4 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

MAALIM KOMORA GODANA

AKARE KOMORA MAALIMACCUSED PERSONS

RULING

In the course of this trial, the prosecution called its ninth witness, IP Julius Mbatia whose role in this case was to escort the first accused to the Resident Magistrate, Miss Nderitu for purposes of recording a confession. Learned counsel for the accused objected to the confession recorded by the magistrate being tendered in evidence through the witness, who he argued was not the maker.

Secondly, he submitted that a confession could not be given in a murder case to a Resident Magistrate, who has no jurisdiction to try such a case. That a confession as contemplated under section 25A of the Evidence Act, with regard to the instant case could only be received by the High Court.

Counsel for the State submitted that “Court” as defined in the Evidence Act includes the Resident Magistrate Court.

The statement, he continued, is admissible by virtue of section 79 of the Evidence Act as a public document. It is only when the confession is retracted that the maker may be called. But counsel saw a problem with this, bearing in mind that the maker is a judicial officer who enjoys judicial privilege. In this regard counsel for the State urged the Court to find that section 25A of the Evidence Act is in contravention of the doctrine of separation of powers, in so far as it purports to give the Court executive powers to investigate crime.

What I make of the latter submissions is that the Court should either find that the statement recorded before the Resident Magistrate is admissible or in the alternative, if the Court finds that the statement is inadmissible, to declare that section 25A of the Evidence Act is unconstitutional.

The matter at hand calls for the interpretation of section 25A of the Evidence Act. I have not been able to find any decision on the matter.

Given its novelty, therefore, it is imperative that the position of the law in the period preceding the amendment of the Evidence Act by the Criminal (Amendment) Act (No 5 of 2003) be revisited. Act No 5 of 2003 introduced section 25A and repealed sections 28,30 and 31. Section 28 provided that a confession

could be obtained from an accused person while in police custody only in the presence of a magistrate or a police officer of the rank of inspector and above.

Sight must not be lost of the mischief intended by the amendment to section 28 and the introduction of section 25A. These legislative developments were clearly prompted by the raging debate at the time which brought serious doubts as to the capability of the police to extract confessions without resorting to means which would lead to gross miscarriage of justice and grave human rights violations. But a casual glance at the provisions of section 29 which was not repealed reveals that the above mischief was not achieved. It retained a provision under which a confession made to a police officer of the rank of inspector and above or to an administrative officer exercising magisterial powers and acting in the capacity of a police officer, is admissible.

That is an issue for another occasion. The concern at the moment is the role of the Court in matters of confession.

Section 25A of the Evidence Act provides that;

“25A. 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”.(emphasies added)

The provision is in contract with the repealed provision, where a confession could be made in the immediate presence of a magistrate. Under section 25A, only confessions made in Court are admissible. “Court” is defined in section 3 of the Evidence Act to include;

“.....all judges and magistrates, and all persons, except arbitrators, legally authorised to take evidence”.

So confessions envisaged under section 25A can be taken before a Court presided over by a judge or magistrate – or even a Kadhi. What kind of confession can be taken by a Court? Only judicial as opposed to extra – judicial confessions can be received by Court. Judicial confessions are those which are made in Court in the due course of judicial / proceedings, where a suspect makes unequivocal plea of guilty to a charge under the protecting caution and oversight of the judge or magistrate. The reception of a confession in this manner renders it unnecessary to call witnesses in support of the charge. The only other judicial confession relates to the now repealed Part VIII of the Criminal Procedure Code – relating to committal proceedings by subordinate courts. Specifically section 305 provided that;

“305. The statement or evidence (if any) of the accused person duly recorded by or before the committing magistrate and whether signed by the accused person or not, may be given in evidence without further proof thereof, unless it is proved that the magistrate purporting to sign the statement or evidence did not in fact sign it”.

This provision, as I have stated has been repealed by Act No 5 of 2003. Other than the above two situations where the Court is (was) authorised by law to record statements of admission from accused persons, it is inconceivable for judges or magistrates to be involved in receiving extra – judicial confessions made otherwise than in proceedings before them. The Court cannot abandon its constitutional mandate of an independent and impartial arbiter to descend in an arena where that independence and impartiality may be blurred.

To ask magistrates to record confessions of suspects in matters yet to be taken to Court is to ask them to be part of the police investigation team. The inevitable consequence would not only create a clear conflict of roles but also be against public policy. Indeed I have never come across any confession recorded by a magistrate under the repealed section 28 of the Evidence Act.

If the number of confessions recorded by police in the period preceding the repeal of section 28 of the Evidence Act is anything to go by, it will be a full time occupation for judicial officers, either recording statements of suspects or giving evidence where confessions have been retracted.

In conclusion and to the extent that section 25A of the Evidence Act does not require the Court to record extra judicial confessions; I find that section 25A is not unconstitutional. Let the police investigate and Courts to adjudicate. I find that the statement recorded by Miss Nderitu, RM is inadmissible.

Dated and delivered at Malindi this 13th day of October, 2006.

W. OUKO

JUDGE