



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 33 OF 2002

REPUBLIC.....PROSECUTOR

- Versus -

NYALE NYAWA MWACHITI.....ACCUSED

R U L I N G

While being led in evidence in chief in this case P.W.1, Nyawa Mwachiti Nyawa, started testifying on what appeared to be a confession. Mr. Anyanzwa raised objection to that line of evidence on the ground that it was going to contravene Section 25A of the Evidence Act. That Section provides that:-

“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”.

Mr. Anyanzwa argued that the admission or confession that the witness was about to testify on having not been made in court was inadmissible and that the witness should not be allowed to testify on it. He contended that the Act is in mandatory terms and that the court has to apply the law as it now stands. Mr. Anyanzwa further submitted that although the offence in this case was alleged to have been committed on the 24th October 2001 and the admission or confession the witness was about to testify on was allegedly made about that time, the court is receiving evidence in the year 2004 when the law has changed with the result that confessions or admissions not made in court are in admissible. He said if Parliament had intended to save confessions made under the previous provisions of the Evidence Act it could have stated so in no uncertain terms.

Mrs. Mwangi, the Assistant Deputy Public Prosecutor, could not have any of those contentions. She submitted that the offence in this case having been committed on the 24th October 2001 and the Accused having been subjected to the committal proceedings long before the enactment of the Criminal Law (Amendment) Act of 2003 which amended the Evidence Act by repealing some sections and introducing Section 25A, the Accused in this case should be tried under the law as it existed before the said amendment. She further submitted that Parliament cannot have intended to render inadmissible all confessions made before that amendment. If that was the case, she continued to argue, then it could have also repealed Sections 26, 27, 29 and 32 of the Evidence Act. She concluded that the Accused person has not lost on the matter as he can still challenge the confession and that the said amendments should not be interpreted to have retrospective effect with the result that the prosecution is deprived of its right to adduce evidence of a confession made by the Accused in this case. She urged me to follow the decision of Khaminwa J in the case of **Republic Vs Humphrey Ochieng Oduor Mombasa HCCC No. 5 of 2001** (unreported) in which the learned Judge held

that such a confession is admissible and that the court should consider it in the light of the changed law.

From these rival submissions it is clear that the issue for my decision in this matter is whether or not Section 25A of the Evidence Act has retroactive effect with the result that confessions made under the old provisions of the Evidence Act are inadmissible. Before I rule on the issue I would like to consider the law on the retrospective operation of statutes.

When is a statute said to have retrospective effect? In the words of *Craies on Statute Law, Sixth Edition* at page 386 a statute is retrospective when it:-

“... takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past”.

Usually the law frowns at any retrospective operation of any enactment and in some cases it does, in express terms, outlaw such operation. Section 23(3) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya for instance provides:-

“23(3) where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not:-

- (a) revive anything not in force or existing at the time at which the repeal takes effect or;**
- (b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed;**
- (c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or**
- (d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or**
- (e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealed written law had not been made.”**

On its part Section 77(3) of the Kenya Constitution is in the following terms:-

“77(3) No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.”

These provisions are clear. They, however, deal with rights and privileges and they are

quite explicit.

What about where the Act is not as explicit? It seems to me that in such situations we should resort to the rules of construction of statutes. One such rule is stated by *Maxwell on the Interpretation of Statutes, twelfth Edition* at page 215 in the following terms:-

“It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.”

This is, however, a rule of construction which is not rigid or inflexible. In the same book, the learned author states this at page 216:-

“If, however, the language or the dominant intention of the enactment so demands, the Act must be construed so as to have retrospective operation, for the rule against the retrospective effect of statutes is not a rigid or inflexible rule but is one to be applied always in the light of the language of the statute and the subject matter with which the statute is dealing.” *Carson Vs Carson [1964] 1 E.L.R. Sir per Scarman J at p.516.*

This is in as far as rights and obligations are concerned. The law, however, makes an exception when it comes to matters of procedure. R.S. Wright J. in **Re Athlumney [1898] 2 Q.B. 551 at p.551, 552** stated:-

“Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed which is fairly capable of either interpretation, it ought to be construed as prospective only.”

Nearer home in the case of **Municipality of Mombasa Vs Nyali Limited [1963] E.A. 371** Newbold J.A. of the Court of Appeal for Eastern Africa stated at page 374:-

“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention.”

In **Patel Vs Republic [1967] E.A. 97** a traffic charge against the Appellant was dismissed. The state moved the High Court by way of case stated to reverse the decision of the subordinate court that being the procedure authorized at that time. Before the matter was heard by the High Court, the law was amended and a right of appeal on a point of law was given to the state instead of moving the court by way of case stated.

The state having obtained leave of the High Court abandoned the appeal by way of case stated and filed an appeal and argued that the amendment was procedural and therefore had retrospective effect. Opposing the appeal counsel for the Appellant contended that the amendment gave a right of appeal which did not exist before and that a right of appeal cannot be procedural but a substantive right. The High Court ruled in favour of the state. On appeal to the Court of Appeal it was held, following the decision in **Municipality of Mombasa Vs Nyali Ltd.** (supra), that the amendment affected a procedural matter and therefore had retrospective effect.

I have gone into the details of the facts in this case to try to give the rationale for the decision I am about to make in this case on whether or not the repeal of certain sections of the Evidence Act and the introduction of section 25A into that Act by the Criminal Law (Amendment) Act of 2003 were procedural or whether they affected substantive rights. Among the repealed provisions is section 28 of the Evidence Act which provided that an admission or confession made by an accused person, while in police custody, to a magistrate or a police officer of or above the rank of inspector of police was admissible. The new section 25A which I quoted in full at the beginning of this ruling provides that no admission or confession made by an accused person is admissible against him unless it is made in court. The crucial point to be decided as I have already stated is whether or not these changes affected matters of procedure only in which case they have retrospective effect or whether they affected substantive rights and must therefore be interpreted to have prospective effect.

The taking of admissions or confessions from accused persons has not been outlawed. What has changed is the procedure of taking them which now requires that for them to be admissible they now, by dint of the said new section, have to be made in court. It seems to me therefore that these amendments affect matters of procedure only. Support for this view is to be found in the authority of the English case of **Selangor United Rubber Estates Ltd. Vs Cradock & Others [1968] 1 W.L.R. 319**. The issue in that case related to the admissibility of transcripts of evidence given by the defendant in answer to questions put to him by inspectors of a company under Section 167 of the English Companies Act of 1948. In 1967 there was an amendment to that Act. Section 50 of the 1967 Act provided that an answer given by a person to a question put to him in exercise of powers conferred by Section 167 of the Act of 1948 may be used in evidence against him. The court held that Section 50 of the 1967 Act was a procedural provision providing for the admissibility of evidence taken on matters which arose before that Act was passed. Being a provision dealing with procedure and not affecting substantive rights the retrospective operation of the new provisions was upheld.

In our case the issue is also one of admissibility of evidence. Section 25A of the Evidence Act forbids the admissibility of confessional evidence not given in court. There is nothing in the section itself to suggest that Parliament intended it to be applied only prospectively. To the contrary, in my view, Parliament intended, by that section, to immediately halt receipt of confessions hitherto given to police officers. If it had intended to save the confessions thus given but not yet tendered in court it could have said so in no uncertain terms.

Although the alleged admission or confession in this case was given to a member of the public and not to police as the repealed section 28 provided, I agree with Mr. Anyanzwa that the new section 25A of the Evidence Act is in mandatory terms and forbids the admissibility of all admissions or confessions not made in court.

The section being procedural as I have already held it applies retrospectively with the result that the admission or confession allegedly made by the Accused in this case to P.W.1 is inadmissible.

For these reasons I uphold the objection raised by Mr. Anyanzwa and rule that P.W.1 shall not testify on any admission or confession allegedly given to him by the Accused.
DATED and Delivered this 14th day of September 2004.

D.K. Maraga
Ag. JUDGE