



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE NO.36 OF 2000

REPUBLIC..... STATE COUNSEL

VERSUS

1. JULIUS OBARA KENYANYA

2. ENOCK BARONGO ONGAGA

3. NICODEMUS MAKORI ONGAGA ACCUSED

4. ANDREW NYANGARESI KENYANYA

5. JAMES NYAKENGITA KENYANYA

6. WILFRED TINEGA MICHIEKA

RULING:

It is not in dispute that on the 20th January 1998 at around 2 p.m., one FRANCIS MATOKE KIBAKI was battered to death by people in his locality who suspected him of practicing witchcraft on their kinsman named JOHN ONDUSO NDEERA who had perished of the same fate.

Following the killing of the said Francis Matoke, several people were suspected of having fatally battered the said deceased. One of them is Andrew Nyangaresi Kenyanya, 1st accused in these proceedings.

According to the evidence of Chief Inspector Charles Kamito (PW4) who was then OCS of Nyangusu police station. This particular accused was arrested on the 22nd March 1998 and not on the 8th March 1998 as allegedly by the accused himself. Be that as it may, it is the evidence of the Chief Inspector Kamito that on the 24th of March 1998, this accused was taken to him for a charge and caution statement. The Chief Inspector swears (and he did so repeatedly) that he observed all the stipulated rules regarding the recording of a charge and caution statement from an accused person.

He denied having used force, threats, promise, or any inducement in order to obtain a statement from the accused. According to him the statement of the accused was voluntarily made to him. On his part, the accused said that he was arrested on the 8th of March and was detained in police custody for a long time during which he was subjected to various forms of torture which, he said, included having his sexual organ being pulled and his being assaulted and injured on the right side of his ribs. He showed to court a healed scar on the right side of the ribs which he said was as a result of the beating inflicted on him while he was in the police custody.

It should be mentioned that he gave the names of P.C. Peterson Kunga and Inspector Joseph Ademba as being the persons who assaulted him when he was in custody. Then the accused said two things which

appeared contradictory. He said that as a result of the beating inflicted on him, he “agreed to record that statement in order to save my life” but then the accused immediately changed that line of defence and turned around and said “now I say that I signed a statement which had been pre-recorded.”

At the outset, it is clear that the accused did not appear sure as to which defence he wanted to present to court. Did he give the statement to the Chief Inspector Kamito because he was under duress and that is what he actually said or did he merely sign a prerecorded statement whose contents he did not know? His inability to give a straightforward defence on that point is quite telling i.e. it shows that he was simply fabricating a defence. I cannot understand his inability to be consistent to what exactly happened nor did he make an attempt to rationalize the two versions as to what may have happened during the accused’s stay in the office of Inspector Charles Kamito. On his part Chief Inspector Charles Kamito was consistent as to what transpired. He said that he remained alone and the accused in his office and that after he had charged and cautioned the accused the latter elected to make a cautioned statement to him which he recorded in Kiswahili before he read it back to him and asked the accused to sign below it when the accused indicated to him that he did not have any addition, alterations or amendments to make to the said statement. In these circumstances, I am absolutely satisfied that the statement was properly received from the accused and that the same was voluntarily given to the Inspector by the accused and therefore, it is admissible in evidence.

It is ordered accordingly.

Dated and delivered on this 6th day of April 2001.

I.C.C. WAMBILYANGAH

JUDGE

Delivered in the presence of the accused, Omutelema, the 3 assessors and Mr. Onyancha for accused.

I.C.C. WAMBILYANGAH

JUDGE