

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE NO. 34 OF 1999

REPUBLIC ::: PROSECUTOR

VERSUS

ERICKSON WAMBUA KIMOTHO ::::::::::::::::::::::::::::::: ACCUSED

Coram: J. W. Mwera J.
10 Kioko Advocate for Accused
Orinda State Counsel for Republic
C.C. Muli

R U L I N G

On 19.6.2001 IP Mwangi gave evidence here and was about to produce a charge and caution statement which he said he took from the accused on 15.1.98. It appeared to have been a confession. But the accused through his lawyer Mr. Kioko opposed the production of that statement claiming that it was taken from him after torture. In essence he refuted the claim by IP Mwangi that the said statement after 20 due caution was voluntary. This necessitated a trial-within-a-trial.

IP. Mwangi told the court that on the day in question at 9.05 a.m. IP. Waithaka who was seemingly investigating the offence of murder facing the accused requested him (IP. Mwangi) to take a statement from the accused after duly charging and cautioning him. That the accused was brought to IP. Mwangi in the C.I.D. office. He was not handcuffed and he looked normal; he did not complain of any beatings or anything. That he gave the accused a seat and explained to him why he, the accused had been presented to him – to take a charge after caution. That he spoke to the accused in English, a language he seemed to understand, explaining that he the accused was not obliged to say anything in response to the charge but that if he elected to do so the same would be taken down and could be put in evidence. That the accused elected to respond to the charge by way of dictating his statement to IP Mwangi. That after recording the statement which amounted to confessing to the charge of the murder of Fredrick Mbithi Mutisya, the officer read back the statement to him and he invited the accused to add or reduce anything from it. He did not effect any and both signed and a due certificate by IP Mwangi was appended. That the statement was taken two days after the arrest of the accused. In cross examination IP Mwangi told the court that he was in the said office alone with the accused and nobody else. That the deceased's wife was not in the vicinity. That the accused did not limp about even if the state of his clothes was not observed by the officer. That IP Waithaka did not beat the accused whereupon one IP Kimuyu declined to take a charge and caution statement from him (the accused). That the accused was not unconscious at the time his statement was taken and no blank papers were given to him to sign. IP Mwangi knew that the accused spoke English because he had given 20 some statement to IP Waithaka and he, IP Mwangi, ascertained that the accused understood English. That the accused allowed IP Mwangi to record the statement. It was concluded by showing the court the statement sheet and the place the accused signed.

The accused told the court that he was arrested on 14.9.98 by IP Waithaka, P.C. Njeru and others, when he had gone to the scene of the deceased, his brother-in-law. That there, the three officers assaulted him with an iron bar on the head and right leg. That he was taken in a police motor vehicle to Machakos but he was not directly taken to the police station. That he was kept somewhere under guard from 3 p.m. to 8.30 p.m. before being taken to Machakos Police Station. That there along with the officers who arrested him, the accused found our IP Mwangi and they all beat him in turns. The accused who had sworn in Kikamba, turned to quite clear and fluent English claiming that the beatings got him confused. He was led into a C.I.D. office 10 in blood-drenched clothes. That IP. Kimuyu declined to take a statement from him saying that the accused had been tortured and that is when IP Mwangi came in. That

the deceased's wife appeared about the police station. That these officers and IP Waithaka and IP Mwangi stood over the accused with the latter holding a pistol. This act plus a claim that IP. Mwangi joined in beating the accused on the day of his arrest were, it should be noted not put to IP Mwangi in cross examination. That then blank papers were given to the accused to sign and he did so in a state of confusion and pain. That he was threatened with more violence. In cross examination the accused told the court that he did not complain of these beatings and threats to the Machakos Police Station because of fear. But that he did so before the committing magistrate. 20 The accused concluded by saying that it was after nine (9) months in custody that a doctor was able to examine him.

On considering the evidence in this trial-within-a-trial this court is inclined to think and it rules that the accused gave his statement to a charge and caution, voluntarily to IP Mwangi without threat, force, promise or one person against another.

Indeed in a situation like this, where to determine a matter in dispute it is the evidence of other, after hearing the accused address the court in clear English, a matter which was made to appear in doubt, and having not raised in cross examination the claim that IP Mwangi assaulted the accused at the scene and later at the police offices, including holding a pistol over him, these laterly discovered allegations were in this court's view, after thoughts. It may as well be that the accused was not tortured as he claims and that ends there. The statement in question may be produced. It shall be viewed alongside other evidence in the case as by law required. 10 Orders accordingly. Statement to be produced and trial to continue.

Delivered on 3rd July 2001.

J. W. MWERA

JUDGE