Republic v Raeli & another (Criminal Case 21 of 2016) [2023] KEHC 2193 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2193 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL CASE 21 OF 2016

EM MURIITHI, J

MARCH 16, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

MARY SYOMBUA RAELI ..... 1ST ACCUSED

SAMUEL GATHOGO MIANO ..... 2ND ACCUSED

RULING

1. On October 5, 2022, PW11 Inspector Peter Kamau's intention to produce a statement under inquiry of September 4, 2020 and confession dated September 15, 2020 allegedly made by the 2nd accused was met with objection from Mr Karanja, the latter's counsel. On his part, counsel urged that the confession is inadmissible as it was not made in accordance with section 25 A (2) of the *Evidence Act* and article 49 of the *Constitution*, and relied on *R v Kibori Kibelion* (2018) eKLR and *R v Isaac Kigiri Wagithu* (2021) eKLR. Miss Nandwa prosecution counsel for the state took the view that the confession was made voluntarily and within the confines of the *Evidence (Out of Court Confessions) Rules 2009*.

2. With respect, it is not for the counsel for the prosecution merely to submit that the confession complies with the rules for the taking of confessions; it is for the prosecution to demonstrate by the testimony of the person who recorded the confession that it was made voluntarily and that the safeguards for the taking of confessions in accordance with the statute and applicable rules were observed. In the leading case of *Karukenya & 4 Ors v R* (1987) KLR 458, 485, the Court of Appeal lamented that –

> " An unusual practice [that] was adopted whereby the prosecuting senior state counsel read out the alleged sate (a role played by a prosecution witness) and produced it. It is clear from what transpired at the trial that the appellant had no opportunity of cross-examining the police officer alleged to have recorded his (appellant's) charge and caution statement and

the prosecution tendered no evidence to prove that the statement, if any was voluntary. The circumstances surrounding the alleged recording of the statement and the lack of any evidence to prove the voluntary nature of the statement made it imprudent and improper to admit the alleged stamen in evidence at the trial."

3. The correct procedure is that once a confession has been retracted or repudiated, the court will conduct a trial within a trial in which the prosecution and the defence are heard on the question of voluntariness and, therefore, admissibility of the confession, apart from the general trial for the offence. The Court of Appeal in *Shah v R* (1984) KLR 674 underlined a trial within a trial as a tool to determine the voluntariness of the statement tendered by the prosecution.

4. In *Njarura s/o Ndugo v R* (1944) EACA Vol XI 61, the Court of Appeal for Eastern Africa, expressed itself thus:

> "It is well settled that the decision of any question of fact or law upon which the admissibility of any piece of evidence depends is for the judge alone, and when once the voluntary character of a confession is challenged by the defence the judge should make a thorough inquiry: *R v Kalicharan* (AIR 1933 C 835). He should therefore hear the evidence on both sides, including, if it be tendered, that of the accused himself, upon the question whether or not the confession was extorted by pressure or obtained by improper means."

5. Similarly, the Court of Appeal (Potter, Kneller & Hancox JJA) in *Imbindi v Republic* (1983) KLR 345, held that:

> "Where accused persons challenge the admissibility of statements, a separate trial within a trial should be held for each impugned statement and each challenge is entitled to its own individual consideration."

6. Section 25A of the *Evidence Act* provides that:

> "(1) 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 before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice."

7. Section 26 of the *Evidence Act* provides that:

> "26. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

8. The rights of an accused are listed under rule 4 of the *Evidence (Out of Court Confessions) Rules 2009* as follows:

> " 4. Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person–
>
> (a) has stated his preferred language of communication;
>
> (b) is provided with an interpreter free of charge where he does not speak either Kiswahili or English;
>
> (c) is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;
>
> (d) is informed of his right to have legal representation of his own choice;
>
> (e) is not deprived of food, water or sleep;
>
> (f) has his duration, including date and time of arrest and detention in police custody, established and recorded;
>
> (g) has his medical complaint, if any, adequately addressed;
>
> (h) is availed appropriate communication facilities; and
>
> (i) communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under rule 5."

9. This court finds that it is prudent to conduct a trial within a trial to determine the voluntariness or otherwise of the 2nd accused's confession and statement under inquiry in order to inform its decision whether the same are admissible in evidence or not. That is the course prescribed for by the courts since *Njarura s/o Ndugo*, supra.

10. In *Shah v Republic* (1984) KLR 676, the Court of Appeal (Kneller, Hancox JJ & Nyarangi Ag JA) held that:

> " The purpose of a trial within a trial is to determine the voluntariness of the statement tendered for the prosecution, because a statement by an accused person is not admissible against him unless it is proved to have been voluntary."

11. More recently, in *Ogama v Republic* (2006) 2 KLR 125, the Court of Appeal (Tunoi (as he then was), Bosire & Githinji JJ A) held that:

> " The basis upon which a trial within a trial was held was the objection which an accused raised as to the admissibility of an extra judicial statement. In such a trial, therefore, if an accused person elected to say nothing the court might not have a basis for exercising its discretion on the admissibility of the statement unless of course the circumstances were such that it would be clear even without him saying anything that the statement was not voluntary which was highly unlikely. In trials within a trial, an accused who raised an objection to the admissibility of an extra-judicial statement, and wished the court to exclude such a statement, was obliged

to make a statement, either on oath or not on oath as to the basis for his objection. Section 211 of the Criminal Procedure Code had no application in proceedings in a trial within a trial."

12. In the language of the Kenya Judiciary Criminal Procedure Benchbook, 2018, at p. 93 the duty of the court on an objection to admissibility of a confession is set out as follows:

> " 125. To satisfy itself that a confession complies with the *Evidence Act* and the Evidence (Out of Court Confessions) Rules, the Court should conduct a voire dire to determine whether the confession was obtained voluntarily. Where an accused retracts a confession, the prosecution bears the burden of proving that the laws regarding confessions were complied with."

13. It is only after a trial within a trial has been conducted that the court will be able to establish whether the safeguards, as listed hereinabove, in taking the 2nd accused confession and the statement under inquiry, were scrupulously followed, and consequently, whether the alleged statement under inquiry and confession are admissible. As observed in Ogama, supra, at p. 128, "the proceedings [of a trial within a trial] are confined to the circumstances under which the statement was made with reference to ground or grounds the appellant has proffered for objecting to its admissibility".

Orders

14. Accordingly, for the reasons set out above, the court makes the following directions:

    1. The further trial of the accused by presentation of the prosecution evidence is adjourned.

    2. A trial within a trial to determine the admissibility of the 2nd accused's statement under inquiry and alleged confession will be conducted on a date to be fixed in consultation with counsel.

    Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE