



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL CASE NO 29 OF 2019**

**REPUBLIC.....STATE**

**VERSUS**

**EVANS MARUBE NYABUTO.....1<sup>ST</sup> ACCUSED**

**GILBERT MUSA NYABUTO.....2<sup>ND</sup> ACCUSED**

**ABEL ORENGE OMBASAO.....3<sup>RD</sup> ACCUSED**

**RULING**

1. The accused persons, **EVANS MARUBE NYABUTO, GILBERT MUSA NYABUTO, and ABEL ORENGE OMBASAO** are facing trial for the alleged murder of **DIANA KERUBO ATUTI** and **STEPHANIE KERUBO**.
2. The prosecution has already called 9 witnesses in support of their case, however the 1<sup>st</sup> accused person, through his counsel Mr. Kaba objects to the production of a confession statement as they challenge the process by which the same was obtained.
3. A trial-within-a-trial commenced with the Prosecution calling 3 witnesses and the Accused Person testified for the Defence.
4. NO. 235082 Chief Inspector Ronald Rono Kiprotich (Pw1) testified that he was requested to take a statement from the 1<sup>st</sup> accused. He informed the accused person in Kiswahili the regulation governing the writing of confession statements and asked if he wanted to be represented by a third party. The accused elected the Children's officer Mr. David Koigi to be present and informed Pw1 that he was under the age of 18. Pw1 testified that the 1<sup>st</sup> accused preferred Kiswahili language and declined to have an interpreter present.
5. Pw1 testified that he recorded the statement in his office with the accused and the Children's Officer being the only people present. He cautioned him not to say anything unless it was his wish. He warned the accused that the statement would be used as evidence. Pw1 testified that the 1<sup>st</sup> accused was not subjected to any duress, coercion, threat, torture or any form of cruelty at the time the statement was recorded. After recording his statement, Pw1 read the statement back to the 1<sup>st</sup> accused who, satisfied with the contents of the confession, signed it by placing his thumb print on the confession. Pw1 testified that she 3<sup>rd</sup> party, Mr. David Koigi, also signed it. The statement which was written in Kiswahili was later translated into English. He testified that he did not take part in the murder investigations.
6. NO. 86157 CPL Philip Ekerapa attached to DCIO Kenyena office told court that he was the investigating officer. He testified that the suspect was arrested on 11<sup>th</sup> July 2019 and placed in custody but through a miscellaneous application for custodial order, they were granted 12 days to complete the investigations. On 18<sup>th</sup> July 2019 as they finalized their investigation, the 1<sup>st</sup> accused informed them he had a confession to make. He testified that the 1<sup>st</sup> accused person being a minor they involved the Children's Officer Mr. Koigi. Pw2 maintained that the confession was voluntary.
7. David Mwangi Koigi (Pw3) testified that he was called by the sub-county criminal investigating officer to witness the 1<sup>st</sup> accused person give his statement. He testified that before the statement was taken, he spoke to the 1<sup>st</sup> accused and thereafter Pw1 cautioned him informing him of his rights. He was cautioned and advised he could opt not to talk or give his statement. The statement writing took about 3 hours. He testified that the 1<sup>st</sup> accused was not tortured but gave his statement voluntarily. He testified that the accused person's mother was also present. Pw3 testified that he signed the statement.
8. The 1<sup>st</sup> accused, Evans Marube Nyabuto testified as Dw1. He testified that he did not write the statement voluntarily. He testified that the statement was taken when he was handcuffed in both hands and a stick was placed in between his legs. He told court that he was beaten was told to admit the crime. He testified that they then held him, placed a gun on his head while a panga rested on his neck.

9. The onus of proving that that the 1<sup>st</sup> accused person's statement was taken voluntarily lies with the prosecution. The law applicable is **section 25 of the Evidence Act and section 25A of the Evidence Act. Section 25 of the Evidence Act** defines a confession as follows:

*“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”*

10. **Section 25A** reads:

*“25A (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 Chief Inspector of Police, and a third party of the person's choice.*

*(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”*

11. Pw1 being in the rank of Chief Inspector was competent to take the 1<sup>st</sup> accused's confession. Although both the 1<sup>st</sup> accused person's mother and the Children's Officer (Pw3) were present before his confession was taken, the accused person elected Pw3 as the third party of his choice. Although Pw1 informed the 1<sup>st</sup> accused person of his right to have an interpreter, the 1<sup>st</sup> accused person declined the offer as he was well conversant with Kiswahili language. Pw1 testified on cross examination that he also informed the 1<sup>st</sup> accused of his right to legal representation.

12. Pw3 testified that he did not see any sign that the 1<sup>st</sup> accused had been tortured and maintained that he was present to ensure that the best interest of the child (1<sup>st</sup> accused person) was protected.

13. Although the 1<sup>st</sup> accused person alleged that he did not give the statement voluntarily, this assertion cannot stand in view of the evidence of the 3<sup>rd</sup> party elected by the 1<sup>st</sup> accused person. The evidence by the 1<sup>st</sup> accused person thus does not cast any doubt on the prosecution case regarding the process in which the confession was obtained.

14. Consequently, the objection raised by counsel for the 1<sup>st</sup> accused, Mr. Kaba is hereby dismissed and this court finds that the process for obtaining the confession was in compliance with the law.

**DATED, SIGNED and DELIVERED at KISII this 16<sup>th</sup> day of June, 2021.**

**R. E. OUGO**

**JUDGE**

**In the presence of;**

**1<sup>st</sup> Accused Present**

**2<sup>nd</sup> Accused Present**

**3<sup>rd</sup> Accused Present**

**M/s Kibungi For State**

**Mr. Kaba For the 1<sup>st</sup> and 2<sup>nd</sup> accused person**

**h/b Mr. Kerosi for the 3<sup>rd</sup> accused**

**Ms.**

**Rael**

**Court**

**Assistant**