



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: R.E. OUGO J

CRIMINAL CASE NO. 6 OF 2019 (MURDER)

REPUBLIC.....PROSECUTOR

VERSUS

JOHN KERAGE MACHANA.....1ST ACCUSED

ROBIN NYANGU NYABUTI ALIAS VINCENT KAMZEE.....2ND ACCUSED

RULING

1. By an information dated the 25th March 2019 John Kerage Machana (1st Accused) and Robin Nyangau Nyabuti alias Vincent Kamzee (2nd Accused) are charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that, "on the night of 22nd and 23rd of March 2019 at Bokerira sub-location Iyabe location within Kisii South Sub-county in Kisii County the 1st accused and 2nd accused murdered **Sarah Osebe Machana**.

2. A trial within trial was held in the course of the prosecution case. The prosecution called 4 witnesses; Pw1 No. 230464 Chief Inspector David K. Terer told this court that on the 23/3/2019 at about 15.50 hours at Kisii South Divisional headquarters he was brought a prisoner called John Kerage Machana (1st accused) who wanted to record a statement. The preferred charge was murder contrary to section 203 as read with section 204 of the Penal code. Before he recorded the statement he cautioned the 1st accused that he was not supposed to say anything but that whatever he said could be recorded in writing and used in evidence later. That before he recorded the confession the 1st accused called Francis Rasana Obiri c/o ID No. 8965371 as the representative. The confession was recorded in his office in Kisii sub-county based at Gesonso. They were 3 people at the time he recorded the confession the 1st accused was present and his representative. He further told the court that when the 1st accused was brought to his office he was composed and appeared brilliant as far as the questions were concerned. Health wise he was okay, he had no injuries and he had no complaints about the police. The 1st accused recorded his confession and signed it. He was using English and Kiswahili. The 1st accused signed all the 7 pages of the confession and his representative too after he read it to him and he stated that there was no correction. He also signed the confession. During cross-examination he stated that he informed the 1st accused of his rights to have a legal representative and that the 1st accused was brought by the investigating officer called Irene. That he asked the 1st accused his preferred language and he indicated it was Kiswahili and that the 1st accused did not inform that he did not understand English nor did he inform the 1st accused that he had an option to write his own statement. That the 3rd party who represented him was the interpreter. That he did not seek to find out if the 1st accused had been threatened or beaten or tortured. That he did not know of the confession before they talked. That the environment was quiet and no one came in when the confession was being taken. That he informed the 1st accused of his right to give self-incriminating evidence.

3. During re-examination he clarified that he did caution the 1st accused that he was not obliged to say anything unless he wished to do so. That he used Kiswahili language with the accused and that he did not find out the accused's level of education. That the 1st accused did not inform him that he was threatened or beaten to make the confession. That the confession was given on his own free will without coercion or threat.

4. Pw2 Francis Rosanna Obiri told court that the 1st accused is the son of the deceased. That he was at Gesonso police station when the accused entered the police station. The 1st accused stayed for long. He was called by the officer. He entered and found a file and a writing was going on. The officer told him that he was called so that he could hear the information the 1st accused was giving. He signed the statement. The 1st accused did not have any bodily injuries. No one threatened the 1st accused. He testified that one officer and the 1st accused were in the room as he wrote the statement. Pw2 stated that he saw the 1st accused sign the statement and did not hear him complain that it needed to be amended in any way.

5. In cross examination, Pw2 testified that he is the 1st accused's uncle. He stated that the 1st accused had gone in with the police officers

while they waited for him outside. That the officers who were inside came out and left the officer with the 1st accused. He was then told that he had been called to be a witness to the statement. He told court that when he got in, he found them proceeding with the recording of the statement. According to Pw2, the accused looked frightened as he spoke. He stated that he knew the 1st accused drinks and usually when he drunk, there was commotion at his place.

6. PC Gilbert Sidayi (Pw3) recalled that on 23rd March 2019 at about 3:20 a.m. whilst in the office at Gesonso Police Station together with CPL Irene, a report was made by the area Chief Iyake location stating that the deceased's body had been found lying dead. They went to the scene and found the 1st accused person at the scene and took the body to Bosongo Hospital in his company. He stated that the deceased was the 1st accused's mother. He testified that he noted that the 1st accused looked tense and when they tried to interrogate him, he said that they should go to the police station where he would explain the whole saga. Pw3 testified that the accused had told them what happened and stated that they took the 1st accused to Pw1 when he said that he wanted to confess what happened. He stated that Pw2 was contacted through the phone when the 1st accused elected him to be present during the confession.

7. Pw3 explained that the difference in time between when they got to the police station at 11:30 a.m. and when they recorded the statement at 3:30 p.m. was because they were waiting for the 3rd party to arrive at the station. He stated that before he took the 1st accused to Pw1 he did not complain of any threat or coercion and he had no reason to believe that the confession was not voluntary.

8. In cross examination, he confirmed the statement's indication that the 1st accused had been interrogated before he recorded his statement. He clarified that by interrogating, he meant getting information by asking the accused questions which he answered.

9. For his part, the 1st accused, John Kerage Machana, testified that on 22nd March 2019, he was at work when he was called by the neighbours who told him that his mother had died. He stated that he was called by the police after taking the body to the mortuary and asked to go to Gesonso to record a statement. The 1st accused told the court that he was taken to a room with 2 police officers who beat him up and told him that when he got to the boss to record his statement, he should admit and not deny. He testified that the officers had taken a phone, his ID card and Kshs. 200/= from him. They then took him to the boss's room where he was asked questions as the officer wrote down. He told the court that he had been forced to write the confession.

10. In cross examination the 1st accused stated that he knew Pw2 from home and acknowledged that he did not report anywhere that he had been beaten up by the officers.

11. The statement the prosecution intends to produce in support of its case is a confession as defined under **Section 25** of the **Evidence Act** (Chapter 80 of the Laws of Kenya) ("the Act"). **Section 25 A** of the Act, provides the conditions under which a confession is deemed admissible in the following terms;

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 persons choice.

12. **The Evidence (Out of Court Confessions) Rules, 2009** made pursuant to Section 25 A (2) of the Act, provides the guidelines to be complied with where an accused person intimates to the police that he wishes to make a confession.

13. Pw1, who testified that he was a Chief Inspector of Police, stated that the 1st accused was brought to Kisii South Divisional Headquarters wanting to record a confession. The inspector stated that he cautioned the accused that he was not obliged to say anything and if he chose to say anything, it would be recorded and used in evidence later. Pw1 also told the court that he had informed the accused of his right to have legal representation.

14. After cautioning the 1st accused, Pw1 called in Pw2 whom the 1st accused had elected to be present as he made the confession. Pw2 confirmed that the confession had been made in Kiswahili and read back to the 1st accused who stated that it did not need to be amended and signed it.

15. However, Pw1 admitted that he did not inform the 1st accused person of his right to sign his own statement as opposed to having him record it in accordance with **Rule 7** of the **Evidence (Out of Court Confessions) Rules, 2009** which provides;

7. Where the confession is to be recorded in writing, the recording officer shall inform the accused person of his option to write his own statement in his preferred language or to have the recording officer record it.

16. It is also evident from the foregoing that the 1st accused was not given a chance to communicate with Pw2 before the caution was recorded in accordance with **Rule 4 (1)(i)** which provides as follows;

4. (1) 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-

(i) communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under rule 5.

17. Further Pw1 appears not to have satisfied himself that the confession had been taken voluntarily in accordance with Rule 4 (2) which provides;

4(2) The recording officer shall not record a confession from any accused person who complains to him of being a victim of torture or whose physical appearance shows signs of physical injuries including open wounds, body swelling, or shows extraordinary fatigue or any other indicators that would suggest that the accused person has been tortured.

18. In his evidence, Pw1 testified that the 1st accused did not tell him that he had been intimidated by anyone to record the statement. This was reiterated by Pw3. Conversely, the 1st accused testified that he had been beaten up by the police and forced to record the confession. According to Pw2, when they got to the Police Station after taking the deceased's body to the mortuary, the 1st accused went with the police officers and stayed in for a long time. When he was finally asked to go in, Pw2 testified that the accused looked frightened as he spoke to Pw1.

19. Pw3 had testified that they got to the police station at 11:00 a.m. and the confession was recorded at 3:30 p.m. His explanation that the delay was because they were waiting for the 3rd party to arrive contradicted Pw2's testimony that he was kept waiting for a long time before he was asked into the room where the confession was being recorded.

20. It was the duty of the prosecution to prove the voluntariness of the confession made by the accused. Where the accused raises doubts in the court's mind regarding the voluntariness of the recorded confession, the court has no choice but to deem the confession inadmissible.

21. Both Pw2 and Pw3 stated that at the material time, the 1st accused did not appear to be at ease. Being the recording officer, Pw1 had a duty to ensure that the accused person's right not to be subjected to *any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment* had not been infringed before recording the statement but failed to do so.

22. **Section 26** of the Act provides that where a confession is made by an accused person and it appears that it had been caused by a threat proceeding from a person in authority and it appears that the accused may have made the confession to avoid any evil of temporal nature in reference to the proceedings against him, such a confession is not admissible in the proceedings.

23. I am also guided by the finding of the Court of Appeal in the case of **Kanini Muli v Republic Criminal Appeal No. 238 Of 2007 [2014] eKLR** where it was held;

“It has consistently been stated by the courts in this country that it is the duty of every trial judge and magistrate to examine with the closest care and attention, all the circumstances in which a confession has been obtained to ensure that it was made voluntarily. The rationale for insisting that a confession should be voluntary is to ensure that it is ultimately reliable. A confession that is made due to torture, threats, promise, inducement, or similar conduct is not reliable since it could have been made with no regard to the truth but purely to avoid harmful consequences or to gain some advantage. (See NJUGUNA S/O KIMANI & OTHERS VS REGINA (1954) EA 316, GITHINJI S/O NJAGUNA & ANOTHER VS REGINA (1954) EA 410). The duty of every trial court to examine with the closest care and attention, all the circumstances in which a confession has been obtained is not restricted to confessions recorded by the police. Rather, it applies to all extra-judicial confessions.”[Emphasis mine]

24. For the foregoing reasons, I find that the confession recorded on 23rd March 2019, by the 1st accused person **John Kerage Machana** is inadmissible in evidence.

Dated, signed and delivered at KISII this 20th day of February 2020.

R.E.OUGO

JUDGE

In the presence of;

1st Accused Person- John Kerage Machana -Present

2nd Accused Person- Robin Nyangau Alias Vincent Kamzee-Present

Mr. Kaba h/b Mr. Nduhukire For the 1st Accused Person

Mr. Kaba For the 2nd Accused Person

Mr. Otieno Senior State Counsel Office of the DPP

Ms Rael Court Assistant