



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 68 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MERCY CHEPCHUMBA KOSGEI.....ACCUSED PERSON**

**RULING**

1. This is a ruling on whether confession allegedly recorded by **C. P Andrew Kivindyo, No. 233065** from accused herein **Mercy Chepchumba Kosgei** is admissible.
2. The accused **Mercy Chepchumba Kosgei** is charged with the **offence of murder** contrary to **Section 203 as read with Section 204 of the Penal Code**. Particulars are that on the 13<sup>th</sup> day of November 2016 at Mariashoni location in Molo Sub County within Nakuru County, she murdered **Eric Kiplangat Chesaina**.
3. While the 5<sup>th</sup> prosecution witness **No.233065 Chief Inspector Kivindyo** was testifying, he informed court that on 19<sup>th</sup> November 2016 at Elburgon Police Station, he recorded a confession from the accused herein. The accused having denied the contents of the confession, trial within trial proceeded on 4<sup>th</sup> December 2019 to establish whether the confession was recorded voluntarily.
4. Chief inspector of police( CIP ) **Andrew Kivindyo, No. 233065**, who is now the OCS Kabarnet Police Station stated that on the 19<sup>th</sup> November 2016, he was at Elburgon Police Station when the investigating officer **CPL Wahoro** informed him that the accused in the case of murder wanted to confess what happened. The Accused was in the police station. The confession was recorded in the OCS's office by the investigating officer **CPL Wahoro**. The Accused person and himself were present. He further stated that he asked the Accused if she wanted anyone present with her to which she said she did not have anybody to avail. He further stated that despite cautioning her that whatever she said would be used against her in a court of law, she still volunteered to record a statement. He then proceeded to record her statement.
5. In Cross-examination, he stated that the accused was in the police cell from the 13<sup>th</sup> of November 2016 at 9.40 pm up to 19<sup>th</sup> of November 2016 having been brought by the villagers who included one **Chepsikau**, a person, from *nyumba kumi*. He stated that he did not have a statement in Kiswahili from the accused. He stated that he asked her questions in Kiswahili. The investigating officer was in the room and no other person other than the accused was in the room. He stated that she did not have anyone to call. He further stated that he did not have a certificate to the effect that he asked her if she could be given time to get a person present. He stated that the investigating officer told him that the Accused wanted to confess. He stated that the Accused confessed before her. She signed. He had indicated that Mercy had been brought from the Cell in his statement. The Cells were about 10 metres away. He stated that the investigating officer is the one who escorted the Accused person to his office. He did not see the reason to keep the investigating officer while taking the statement. The confession was done voluntarily and she was taken to court within 24 hours. He stated that they did not charge the suspects till March.
6. In re-examination he stated that **CPL. Benson Wahoro** who investigated this case, he upheld all the requirements before recording the confession.
7. DW1 1, **Mercy Chepchumba Kosgei**, confirmed that she was taken to the police station by the leader of the *nyumba kumi*. She was accompanied by 5 people when taking her to the police station where she stayed for one week. She testified that after a week at the police station a police officer went to the cell and took her to the OCS's office. She said at the office he told her to move aside. She saw him writing and when he was through with writing, he called her and asked her to sign. She said he threatened to hit her if she refused to sign.
8. The accused said she refused to sign and asked him to call her people so that they could tell her what she was signing. She finally signed because she was threatened with being hit.
9. She further stated that she did not tell him her name and that the officer did not tell her that he wanted to record a statement from her. She further stated that she did not talk to the investigating officer about the confession. She said she was asked to thumb print, which she refused.

10. She stated that she was never told what he had written and after signing, she was taken back to the cell by the investigating officer. She denied having recorded neither was a statement neither was a statement read to her.

11. Accused stated that if she was asked to record a statement, she would have done it in Kiswahili language because that is what she was comfortable with and that she signed 3 copies.

12. In cross-examination, she stated that she lived in Viking Tatu in Elburgon and was taken to Elburgon police station by the elders of *nyumba kumi*. She said she lived with her children and her husband David Kosgei. She stated that she was arrested in Elburgon. She stated that her brother-in-law was told that she was arrested but none of her relatives went with her when she was taken to the police station.

13. She said she did not know the name of the police officer who received her at the station but he was the one who came for her from the cells. She said that she had not met the OCS and the investigating officer from Elburgon in the police station; she saw them when she was arrested. She further stated there was no grudge between her and them. She said she only studied up to class 3; that she only knows how to write her name and she did not understand English.

#### **ANALYSIS AND DETERMINATION**

14. From the evidence above, it is clear that it was only the OCS and accused in the room confession is alleged to have been recorded. CIP Kivindya indicated that he explained to the accused that if she chose to record the statement it would be used against her in the trial. He also said that he asked her if would want to call a person to attend but she said she was not calling anyone. From his testimony, the accused voluntarily agreed to record statement after the explanation and signed three copies.

15. However, on perusal of the statement, I note that it is not signed or thumb printed contrary to **Chief Inspector Kivindyo's** evidence. There is no mark on it. There is therefore no confirmation that the statement was made by the accused.

16. From the foregoing I find that the statement is not admissible as part of evidence of the prosecution.

#### **17. FINAL ORDER**

Statement taken from accused under inquiry is inadmissible

**Judgment dated, signed and delivered at Nakuru this 13<sup>th</sup> day of February 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jeniffer/Schola – Court Assistant

Rita for State

Bichanga for accused