



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 56 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

WAMBUA MBITHI.....ACCUSED

RULING

1. The accused, **Wambua Mbithi**, is charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged that on 23rd day of June, 2015 at Kimongo Area in Athi River Sub-County within Machakos County, the accused murdered **Esther Nthoki**.

2. In the course of this trial when taking down the evidence of **Chief Inspector Nerbert Makokha**, (PW6) who had recorded a charge and caution statement of the accused, the defence opposed the production of the statement citing the manner in which it was extracted from the accused as being objectionable and the court directed that a trial within a trial be conducted to determine the admissibility of the statement. This ruling is therefore on the said trial within a trial.

3. A trial within a trial in our criminal justice system is an enquiry into the manner in which a statement by an accused person in respect to the case before the court was recorded. It seeks to determine the voluntariness of that statement. In **Patrick Ngesa Ogama vs. Republic [2006] eKLR** the Court of Appeal explained what a trial within trial is all about as hereunder:

“...the Criminal Procedure Code (CPC) has no provision with regard to trials within a trial. Trials within a trial are held on the basis of the Judges Rules, which are rules of practice which are intended to guide police officers where an issue of the voluntariness of an extra judicial statement by an accused to the police arises during his trial. In holding a trial within a trial the court is conducting inquisitorial proceedings to determine whether the accused voluntarily made the statement in issue. So when an accused person is called upon to make a statement in regard to the admissibility of that statement he is not putting forward a defence. That is because in that trial there is no accused person. The proceedings are confined to the circumstances under which the statement was made with reference to the ground or grounds the appellant has proffered for objecting to its admissibility. The Court of Appeal for East Africa stated in **Dafasi Magayi and Others v. Uganda [1965] EA 667**, relying on the case of **Kinyori Karuditu v. R [1956] 23 E.A.C.A 480**, that trial within a trial, is a rule of practice. And adopting a dictum by Lord Devlin in **Connelly v. D.P.P [1964] 2 ALL ER 401 at 446**, that court held that it is a practice which must be followed until it is declared to be obsolete. In our view, the basis upon which trial within a trial is held is the objection which an accused raises as to the admissibility of an extra judicial statement. In such trial therefore, if an accused person elects 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 are such that it would be clear even without him saying anything that the statement was not voluntary which is highly unlikely. In the circumstances therefore, in trials within a trial while it is trite law that as a general rule the prosecution have the duty of showing that the statement was voluntarily obtained, an accused person has the duty of presenting to the court reasons and circumstances for objecting to the admissibility of the extra judicial statement. He cannot appropriately do so unless he makes a statement in that regard. In such proceedings the court exercises judicial discretion and like all judicial discretion such discretion must be exercised on the basis of facts and law. So an accused cannot elect to keep quiet in a trial within a trial, because if he keeps quiet what the Court will be left with is what the prosecution has presented and such a trial would not then serve any useful purpose. Appropriately the proceedings being inquisitorial in nature the accused’s statement ought to be made on oath but because there is the danger that in the course of his cross-examination he might be led to incriminate himself on the charge or charges against him, it is undesirable, unless the accused himself elects to make a sworn statement, to mandatorily require the accused to make the statement on oath in such proceedings. It is our judgement, therefore, that in trials within a trial, an accused who raises objection to the admissibility of an extra judicial statement, and wishes the court to exclude such a statement, is obliged to make a statement, either on oath or not on oath as to the basis for his objection. That being our view of the matter, it is our judgment that section 211 CPC has no application in proceedings in a trial within a trial.”

4. The prosecution called one witness in the said trial, **CIP Norbert Makokha, PW1** in the trial within a trial. According to him, he was the Officer in Charge of Mai Mahiu Police Station though in June, 2015 he was based at Athi River Police Station as an inspector in charge of petty crimes. On 25th June, 2015 at about 1.00 pm the Officer in Charge of the Station assigned him the duty of recording a confession from **Wambua Mbithi**, the accused herein. According, to the witness, he cautioned the accused that he was not required to say anything unless he volunteered to do so and that anything he said could be used in evidence against him.
5. According to him the accused was in custody and he was the one who called him from custody. He stated that the accused was with his mother, **Jane Nzilani**, who was outside. The accused was informed by the investigation officer that he had the right to have with him someone else, a relative or an advocate. It was his evidence that the accused confessed that he raped a child and threw him into a latrine. According to the witness, the accused was narrating in Kiswahili language, after the witness sought from him the language which he understood, and he was recording the same in English. Similarly, the mother confirmed that she understood Kiswahili language.
6. After the accused was through, the witness read the statement over to him, and he confirmed its contents and thumb printed. The witness stated that the accused had no injuries and was not forced to confess and that is the reason he called the mother. After the accused thumb printed both the mother and the witness signed the statement. It was his evidence that though the accused said he had no ID, he confirmed that his name was **Wambua Mbithi**, from Kimango Phase I, Kinani, Athi River and used the mother's phone number 0716423309. The witness also prepared a certificate and signed the same on 25th June, 2015 at 2.16 pm.
7. In cross-examination by **Mr Mwangangi**, learned counsel for the accused, the witness stated that he removed the accused from the cell and that previously, neither the accused nor the mother were known to him. Before talking to the accused he informed the mother that the accused had requested for her presence. He said that the statement was recorded in the presence of both the accused and the mother though it was the accused who was narrating what happened while the mother just listened. The witness inquired from the accused whether he had been threatened but he denied the same. He said that the accused did not disclose that he had been beaten and was taken for treatment. According to him the statement was recorded on 25th June, 2015 while the offence took place on 23rd June, 2015.
8. On re-examination by **Mr Mwangangi**, the witness stated that the accused did not appear worried or having been assaulted.
9. On his part, the accused testified on oath that on the of recording of the statement, he was at the police station when he was called from the cell by a person whom he could not recall and told to sign a statement. After being called he was taken to an office where he found his mother and a police officer other than the one who had called him. He was then told that he was required to sign a document though it was not disclosed to him what the document was and was not read to him. Prior to that nobody had told him to confess and he did not confess to anyone the offence. Similarly, his mother did not tell him anything as they did not talk.
10. According to the accused, it was the police officer who informed him that he was charged with murder which he denied. The accused insisted that he did not know what he was signing as he has never been to school and does not know how to read and write. Since he had not talked to the mother before he was called, he was not able to know what the mother had discussed with the police officer. He therefore denied the contents of the statement since he did not record what was stated therein. According to him, he was arrested when he was from drawing water when he was informed that a body of a child had been removed from the toilet and he never discussed with anyone that he was connected with the death of the deceased.
11. He stated that he saw many people who alleged that he was connected with the death and when he denied, they threatened to lynch him but he still denied and the police went when he was about to be killed after being beaten. The said people however insisted that he must confess to the commission of the offence.
12. In cross-examination by **Miss Mogoi**, learned prosecution counsel, the accused stated that he could not remember the date of the statement and could not remember the police officer. He however confirmed that he was **Wambua Mbithi** from Kinani Athi River and his mother was **Jane Nzilani**. He admitted that he was told to sign the statement in the presence of his mother and nobody asked him any questions. He admitted that the person who disclosed his particulars must have known him though his mother did not say anything in his presence. He stated that at the time of his arrest he was 19 years old and that at the time of the recovery of the body from the toilet, the police officer was not present. He however insisted that he was assaulted and was taken to the police station at 6.00 pm and nobody talked to him, though his underwear was remove. It was his testimony that no officer had even interrogated him since his arrest either at home or at the station. He also did not talk to any police officer save for telling them that he was injured and was in need of treatment.
13. The accused called his mother, **Jane Nzilani**, as his witness. According to her, on 24th June, 2015, she went to Athi River Police Station though prior to that date she had visited the deceased's family who informed her how the accused was arrested. When he visited the accused on the said 24th June, 2015, she informed the accused what she had heard but the accused denied. She however told the accused not to deny if he had committed the offence but the accused denied having committed the same. She was told to return to the station the following day. On that day, she went and asked the accused to accept since she was told that the accused had confessed. According to her, it was her who was narrating the events because she was informed by the deceased's mother that if the accused denied, he would be compelled to take the Kamba Traditional Oath and if found that he was the culprit would die. However, the deceased's mother told her that if the accused accepted, the clan would organise for compensation. It was then that she informed the police officer who recorded the statement. She reiterated that she was the one who narrated what was recorded in the statement based on what the deceased's mother informed her though the accused denied having committed the offence.
14. In cross-examination by **Miss Mogoi**, the mother said that when she went to the station, she found the investigating officer who took her to the recording officer. She was with the accused after the accused was removed from the cell and she did not know the recording officer prior to that date. When the accused was asked about the incident, he denied. According to her, the accused disclosed his name and some information. It was her evidence that they were not forced to sign. She insisted that she told the accused to sign the statement because the deceased's mother threatened to administer the oath if he denied and if he had committed the offence, he would die. According to her the deceased's mother did not tell her that she was present during the incident, and she, herself was not present when the accused was arrested. According to her, she was told by the officers who were unknown to her that if the accused accepted the offence, the case would be

withdrawn and that she recorded the statement in the presence of the accused. She however admitted that the information that she gave could only have emanated from the accused since both herself and the deceased's mother were not present.

Determination

15. The admissibility of confessions was dealt with in **Republic vs. Elly Waga Omondi [2015] eKLR**, where in disallowing an alleged confession the court observed that:

“The law governing confessions in Kenya is the Constitution of Kenya 2010; the *Evidence Act (Cap.80)*; the *Evidence (out of Court Confessions) Rules, 2009* and case law. Article 49 of the Constitution guarantees an arrested person certain rights including the right to be informed promptly, in language that the person understands, of the reason for the arrest; the right to remain silent and the consequences of not remaining silent; to communicate with an advocate, and other persons whose assistance is necessary and not to be compelled to make any confession or admission that could be used in evidence against the person. The law is very clear that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice (see Article 49 (4)). The right of an accused person to a fair trial is guaranteed under Article 50 (2) of the Constitution of Kenya 2010. Of particular relevance to us is Article 50 (2) (1) which guarantees him/her a right to refuse to give self-incriminating evidence. **Generally confessions made by an accused person are not admissible in Kenya unless when they are made strictly under the law. But what is a confession? 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.”

Section 25 of the *Evidence Act* was amended by Act No. 5 of 2003 and Act No. 7 of 2007 by inserting into the Act Section 25A which reads as shown below:

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.

The rules envisaged under (2) above are known as the Evidence (out of Court Confessions) Rules, 2009 hereinafter the Confessions Rules. Under these Rules, specifically under Rule 4 the rights of an accused are specified. This Rule requires the recording officer to ensure that the accused person chooses his preferred language of communication; is provided with an interpreter free of charge where he does not speak Kiswahili or English; is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment; is informed of his right to have legal representation of his own choice among others.

Rule 4(2) requires the recording officer to ensure that the accused has not been subjected to any form of torture and Rule 4(3) requires the recording officer to ask the accused person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.

In addition to this, the Confessions Rules require the accused to be informed of the option to record his own statement in his preferred language or to have it recorded for him (Rule 7); the option to clarify or add anything in the statement after the same has been recorded (Rule 8) and the requirement to administer a caution before recording the statement (Rule 5). In addition to the legal provisions on this issue, there are numerous pronouncements by judges on the subject of extra-judicial confessions.”

16. Rule 4(1) of the *Evidence (Out of Court Confession) Rules* which outlines the rights of an accused person when he is recording a confession provides that;

(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-

- 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.*

17. In this case, PW1 (in the trial within trial), testified that the accused was informed by the investigation officer that he had the right to have with him someone else, a relative or an advocate. First, the person who is in charge of taking a confession is the recording officer who the law states ought to be a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police. The investigating officer has no role at all in the recording of the confession and ought not to take any part therein. Because it was the investigating officer who allegedly informed the accused of this right, PW1 did not indicate what the accused's response was. According to DW2, the accused's mother, he was at the police station on 24th June, 2015 when she was told to return the following day as the accused had confessed. This begs the question: Did the accused confess on 25th June, 2015 or 24th June, 2015.

18. According to DW2, it was the deceased's mother who narrated to her what had happened and based thereon she narrated the same to the recording officer in order to save her son, the accused, from dying from the oath. The prosecution has contended that if the oath was only effective if the accused had committed the offence, then she would not have compelled the accused to admit as alleged since the accused had denied the commission of the offence. DW2 however stated that she was told that if the accused admitted, then the charge would be withdrawn and the clan would arrange for compensation. If that was true then DW1 would have been led to believe that it would have been better to take the second option.

19. In my view the provisions of section 25 of the *Evidence Act* as read with the *Evidence (Out of Court Confessions) Rules, 2009* are a limitation to the right under Articles 49 and 50 of the Constitution. However, with the exception of the rights set out in Article 25, all other rights may be limited in the circumstances prescribed under Article 24 which provides that:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;***
- (b) the importance of the purpose of the limitation;***
- (c) the nature and extent of the limitation;***
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

- (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;***
- (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and***
- (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.***

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

20. The phrase 'justifiable in an open and democratic society' was dealt with in **Obbo and Another vs. Attorney General [2004] 1 EA 265** expressed itself as follows:

“It is not correct that the test of what is acceptable and demonstrably justifiable for the purposes of limitation imposed on the freedoms of expression and freedom of the press in a free and democratic society must be a subjective one. The test must conform with what is universally accepted to be a democratic society since there can be no varying classes of democratic societies for the following reasons:- (i). First Uganda is a party to several international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy. The African Charter for Human and Peoples Rights and the International Covenant on Civil and Political Rights are only two examples. (ii). Secondly, the preamble to the Constitution recalls the history of Uganda as characterised by political and constitutional instability: recognises the people’s struggle against tyranny, oppression and exploitation and says that the people of Uganda are committed to building a better future by establishing through a popular and durable constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. When the framers of the Constitution committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails but they meant democracy as universally known...It is a universally acceptable practice that cases decided by the highest courts in the jurisdictions with similar legal systems which bear on a particular case under consideration may not be binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so.”

21. As regards the limitation in R vs. Oakes [1986] 1 SCR 103, it was held that:

“Firstly the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective the more severe the deleterious effects of a measure, the more important the objective must be.”

22. International human rights bodies have developed a detailed guidance on how the restrictions on the right can be applied and to meet so called the ‘three-part test’. First, the restrictions must be prescribed by law: this means that a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly (see, Human Rights Committee, Leonardus J.M. de Groot v. The Netherlands, No. 578/1994, U.N. Doc. CCPR/C/54/D/578/1994 (1995)).

23. Second, restrictions must pursue a legitimate aim, exhaustively enumerated in Article 19(3)(a) and (b) of the *International Covenant on Civil and Political Rights* (ICCPR) as respect of the rights or reputations of others, protection of national security, public order, public health or morals.

24. Third, restrictions must be necessary and proportionate to secure the legitimate aim: Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression/information and the protected interest.

25. The provisions of Article 24 of the Constitution reflect what has emerged from judicial precedents which are persuasive in nature-see R vs Oakes (1986) ISCR 103. The limitation of rights must, first, be by law, and secondly, the objective of the law must be pressing and substantial and must be important to society -see R vs Big Drug Mart Ltd (1985) ISCR 295.

26. The third principle is that of proportionality-whether the State, in seeking to achieve its objectives, has chosen a proportionate way to achieve the objectives that it seeks to achieve. The question to consider in this regard is whether the legislation meets the test of proportionality relative to the objects or purpose it seeks to achieve: see R vs. Chaulk (1990) 3 SCR 1303.

27. In considering the test of reasonableness and proportionality set out in the *Oakes* case, *Emukule J*, in his decision in Martha Karua vs. Radio Africa Ltd t/a Kiss F.M. Station & 2 Others [2006] eKLR observed as follows:

“On the issue of reasonableness in relation to the limitation we fully approve and endorse the reasoning in the Canadian case of *R v OAKES* (1986) 26 DLR 4TH 200. One of the principles in the case concerning reasonableness of the limitation is that the interest underlying the limitation must be of sufficient importance to outweigh the constitutionally protected right and the means must be proportional to the object of the limitation. Our interpretation of the use of reasonableness in the limitation clause is that since what is at stake is the limitation of fundamental rights, that must mean the legislative objective of the limitation law must be motivated by substantial as opposed to trivial concerns and directed towards goals in harmony with the values underlying a democratic society.”

28. With respect to the question of proportionality, *Emukule, J* expressed the view that:

“[The] Proportionality test requires the following of any limitation:

- (a) that it be rationally connected to its objective,
- (b) that it impairs the right or freedom as little as possible and

(c) that there is proportionality between its effects and its objectives – see OAKES case (supra).”

29. In my view, the measures limiting a constitutional right must be strictly interpreted and the Court must ensure that the said measures are strictly adhered to if the Court is to uphold the limitation. In this case the limiting measures required that the accused to be informed of the option to record his own statement in his preferred language or to have it recorded for him and that he be informed of his right to have legal representation of his own choice. In this case there was no evidence at all that the accused, who according to PW1, was informed that he could record his own statement. As regards representation, the evidence on record is simply that the investigating officer, an inappropriate officer in the circumstances, informed the accused that he had the right to have with him someone else, a relative or an advocate. The accused’s response to this inquiry, even if it had been made by the right officer, was never recorded. Accordingly, there is no evidence that the accused opted to be represented by his mother instead of an advocate. DW2 stated that she was just informed to appear he next day as the accused had confessed. Again the information relayed to DW2 was incorrect. It was meant to portray the impression that the matter was *fait accompli* even before the confession was recorded.

30. It is therefore my view that the confession was not recorded strictly in accordance with the law and is therefore inadmissible. It is not the details in the alleged confession that determines and dictates its admissibility but the process and the circumstances under which the same was recorded.

31. I associate myself with the sentiments of **Mutuku, J** in **Republic vs. Elly Waga Omondi** (supra) that:

“It seems that the police who are the investigators in all criminal trials have not fully acquainted themselves with the law governing confessions especially after the Confessions Rules and the Constitution of Kenya 2010 came into effect. Because of this many criminal trials where police wish to rely on statements made by accused persons may suffer the consequences of such limitations. This may be so especially where there is no other evidence to corroborate retracted and repudiated statements. My considered view is that the voluntariness of the statement in question is questionable. All that the accused needs to do is to raise doubts in the court’s mind about the voluntariness of such a statement which in my view has been done in this case.”

32. The alleged confession is therefore rejected.

33. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 12th day of February, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr J M Kimeu for Mr Mwangangi for the accused

Ms Mogoi for the State

CA Geoffrey