



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 22 OF 2017 [MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

PASCAL OCHIENG OYOKO.....ACCUSED

RULING ON ADMISSIBILITY OF A STATEMENT UNDER INQUIRY

1. The accused person herein **PASCAL OCHIENG OYOKO** stands charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the Information dated 20th September 2017 are that on the 6th Day of September 2017 at around 2100 hours at Ochiengu Sub Location in Rarieda Sub County within Siaya County, murdered one Linda Atieno Odiembo.
2. The accused person denied the charge and a plea of not guilty was entered. The prosecution lined up eleven witnesses who testified and among the 11 witnesses is PW5 No, 231217 Chief Inspector Micah Chepkwony, who, at the material time in question, was based at Rarieda Sub County Headquarters as the DCI. The witness testified on his role as the officer who recorded a statement under inquiry from the accused person on 13/9/2017 at the Rarieda police station when the accused person was brought to him by other police officers who informed him that he had surrendered to the police in a murder incident. In the course of his testimony as PW5, the officer wished to produce the statement under inquiry, which production was objected to by counsel for the accused on account that the said statement was signed a few seconds earlier in court by the witness and that it was not signed by the accused person. Counsel also contended that the accused denies ever making a confession. This is what prompted this court to order for a trial within a trial in order to determine the admissibility of the statement allegedly taken from the accused person by PW5 CIP Micah Chepkwony.
3. The trial within a trial was conducted on 3/3/2020 in the presence of the accused, his advocate Mr Odongo and the Prosecution led by Mr Okachi, Senior Principal Prosecution Counsel.
4. 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, and whether the statement was taken in accordance with the established procedure and law, without compromising the rights of an accused person to remain silent and not to incriminate himself.
5. In support of its case in the trial within trial, the prosecution called one witness, PW5 and the accused testified on oath without calling any witness.
6. No.231217 Chief Inspector Micah Chepkwony based at Rarieda Sub-County Headquarters, as DCI as at 13.9.2017 testified on oath and recalled that he was at the Office at Aram Police Station. That at around 10.30 a.m. on 13.9.2017 a suspect of murder was brought to him, he was a Chief Inspector then. The suspect was called Pascal Ochieng. The officer was then told that he was to record a statement under inquiry from the suspect.
7. He stated that before recording the statement from the suspect, he informed him that he was to record a statement under inquiry because the suspect had allegedly confessed to committing the offence so, the statement under inquiry could only be taken by a Chief Inspector of Police and above.
8. The witness stated that this was happening in his office and that the environment was quite conducive. That he informed the suspect that the suspect was not under any threat and that the suspect opted to make a voluntary confession. That the witness cautioned the suspect that he was not obliged to say anything and that if he did so, it would be used against him during the trial, after which the suspect told the witness all that was recorded in the statement under inquiry, marked as MFI 5, amounting to a confession by the accused person.
9. He then stated that the suspect signed the statement, and the witness also signed the statement and a certificate thereunder was made to the effect that the Officer had received the statement from the suspect voluntarily without force, intimidation, or favour of any kind. He then signed the said statement on 13.9.2017. He identified the accused person in the dock as the suspect he recorded a statement under inquiry from, and also identified the said statement that he allegedly recorded from the suspect and it was marked as MF1 5.

10. On being cross examined by Mr. Odongo counsel for the accused person, the witness stated that when he recorded the statement under inquiry, the suspect had already spent the night in the Police Cells. He stated that he did not ascertain whether the suspect had eaten. He could also not recall the exact time that the suspect had gone to the police station but that at the said time of recording the statement from the suspect, they were only the two of them. He stated that he asked the suspect if he wished his relatives to be present when recording his statement but that he never indicated that in the statement. He further stated that he was aware that he had to caution the suspect, upon confession and that he had to do a certificate in the form provided for in law. He stated that the second certificate was present but the 1st certificate was missing.

11. In re-examination by Mr. Okachi Senior Principal Prosecution Counsel, the witness stated that he gave the Accused the opportunity to state what he wanted to say and he went ahead and signed the statement.

12. The accused person then testified on oath and introduced himself as Pascal Ochieng Oyoko, from Rarieda Sub-County. He stated that prior to his arrest, he was a businessman operating a video show room at the Centre. He recalled that on 7.9.2017 he received a call from his friend Eric Ochieng that Police at Aram were looking for him so he went there and on arrival at 6 a.m. he was placed in the cells. He stated that between 7th and 13th September 2017 he was in the cells at Aram Police Station. He denied the allegation that he was alone with the DCIO, PW5 herein when the statement was recorded. He stated that at 10 a.m. he was taken to the office of DCI where he met PC Mulwa and the DCIO PW5 herein and that the latter asked the accused what happened in the presence of PC Mulwa who was at the door holding a short gun. That he was forced to write whatever he wrote. That he was asked his name and questioned whether he knew Linda Atieno but he denied. That PC Mulwa told him that if he admitted that he knew Linda Atieno he would be set free. He denied that he was ever asked to avail a guardian or third Party to be present. He also denied recording his statement voluntarily.

13. On being cross examined by Mr. Okachi for the prosecution, the accused stated that as at 13.9.2017, he was 24 years old. He reiterated that P.C. Mulwa sat at the door, while the Chief Inspector sat in his office and that the accused sat on a chair facing the Chief Inspector. He stated that the CIP never greeted him and never invited him to have a seat. He stated that the Chief Inspector was not armed but P.C. Mulwa was carrying a short gun although he did not point the short gun at the accused person.

14. He admitted that the signature on MFI 5 was his and stated that this was his first time to be arrested but that he was never told that he could allow a person to be present.

15. The accused then closed his case and his counsel filed written submissions dated 7th October 2019 which he adopted urging the court to reject admission of the accused person's statement under inquiry.

16. In the said submissions, Mr. Odongo contended that on the 13th September 2017, PW5 received the accused Pascal Ochieng Oyoko in the police station as a suspect in a murder case. That the accused was brought in while hand cuffed and under the escort of CPL Chege Christopher. That although PW5 testified that upon taking charge of the accused, he proceeded to interrogate him as per the Force's Standing Orders, in cross-examination it did emerge that the said witness did not ascertain **the age of the accused** at the time **nor was a guardian or parent of the accused present at the time**. In addition, it was submitted that there was no legal representative present. That the said Officer did not bother to ascertain whether the accused person was a minor at the time of his arrest, and that even after ascertaining that the accused has a father, he did not bother to ascertain whether it was necessary for the father to the accused to be present during the interrogation. He relied on **NBI HCCR NO. 24 OF 2012, REPUBLIC VS ELLY WAGA OMONDI**, where Mutuku J declined to admit a confession on the basis that the necessary caution was not taken and held:

“Care was not taken to ensure that the accused was not threatened before he went to CIP Kyaa's office and it is obvious that the requirements to have a third party present under section 25A Evidence Act were not followed. The section does not give the recording officer an option in the matter. It is a requirement that must be met.”

17. Further submission was that in terms of the Evidence (*out of court confession*) Rules 2009, the purported confession is inadmissible as the said Officer did not comply with **Rule 4 (3)** which does require that the accused person should be permitted to nominate a third party to be present during the duration of the confession session.

18. It was further submitted that the purported confession offends Regulation 9 of the Evidence (*out of court confession*) Rules 2009 as there is no **“Certificate of Confession**.

19. **Counsel further submitted that** a police station is an intimidating place for any individual and especially for those persons who have never been arrested before, coupled with the fact that the witness being a Chief Inspector of police, a person in authority makes the situation even more complicated and extremely intimidating if not scary.

20. In the present case, it was submitted in contention that the accused person was brought to the police station at night and that the circumstances under which he was arrested through to the interrogation process could not have elicited a confession given voluntarily and that **Article 49 (1),(a), (b) and (c)** of the Constitution was not complied with. Reliance was placed on **NBI CA NO. 238 OF 2007 – KANINI MULI vs REPUBLIC**, where the Court of Appeal cited **Rex v Todd** where it was held:

“A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason it is a rule of law that confessions made as a result of inducement held out by persons in authority are inadmissible is clearly this, that the authority that the accused knows such persons to possess may well be supposed in the majority of instances both animates his hopes of favour on the one hand and on the other to inspire him with awe.”

21. Counsel maintained that in the present case, the witness was a person in authority capable of influence and control over the accused

person and thus procured a confession by virtue of his position and without following the laid down procedure. He added that under Article 25 of the Constitution of Kenya, the non – derogable rights are clearly stipulated, amongst them is the right to a fair trial and that in a criminal trial, that commences with the arrest of an accused person, and taking into account the rights envisaged under Article 49 (1) of the Constitution of Kenya, an important question arises as to the constitutionality of Section 25A and 29 of the Evidence Act. That the presumption of innocence is paramount in any criminal proceeding/trial and must remain as such until the conclusion of the trial. He relied on **CCT NO. 5 OF 1994 - ZUMA & 2 OTHER VS THE STATE**. (See paragraphs 25, 29, 31, 33 & 39). Counsel maintained that the purported confession does not meet the minimum legal threshold and should be rejected.

22. Mr. Okachi for the prosecution submitted orally asserting that the statement made under Inquiry on 13.9.2017 by C.I.P. Chepkwony was taken within the parameters of the Law and the Constitution. He submitted that on taking of confessions under the Evidence Act, the condition for taking confessions are laid out in Rule 9. That the recorder and the giver of the statement signed the statement. That the suspect confirmed the statement to be his true words and signed the same. Counsel relied on the manuscript by the Chief Inspector adding that the lacuna on the issue of the certificate of the accused is a want of form since it is not mandatory that the wordings be as is in the Act but the substance thereof that matters. Counsel maintained that the confession was properly taken without any threat or coercion and that the objection is meant to deny justice.

23. In a rejoinder, Mr. Odongo Counsel for the accused submitted that Confession Rules 2009 stipulate that there must be a certificate, and that failure to explain why there is no certificate is a fatal omission not a technicality, considering the nature of the charge facing the Accused.

24. He cited Article 49(1) 10 of the Constitution which guarantees the Accused person the right to communicate with other persons whose assistance might be necessary. Further reliance was placed on Rule 4(i)(i) of the confession Rules which he contended was not adhered to. Further, it was submitted that in Article 49(1)(d), the Accused is entitled not to be compelled to make any confession to be used against him. Counsel maintained that PW5 failed to comply with out of Court confession Rules. He urged the court to reject the confession by the accused person.

DETERMINATION

25. I have carefully considered the evidence adduced by the prosecution and the defence as well as the submissions for and against the admissibility of the accused person's statement under inquiry as recorded by Chief Inspector Chepkwony, who testified as PW5.

26. Although the said witness testified on what he recorded from the accused person, that statement as of now is irrelevant as the court has not made a decision on its admissibility.

27. The basis of the law on confession can be found in the following:

- i. Articles 49(1) (b), (d) and 50(2) (a) and (4) of the Constitution.
- ii. Sections 25 to 32 of the Evidence Act.
- iii. The Evidence (Out of Court Confession) Rules, 2009; and
- iv. The case law.

28. The effect of Articles 49(1) (b), (d) and 50(2) (a) and (4) of the Constitution is that: **(49) (1) An arrested person has the right to:**

a) Remain silent

b) Not to be compelled to make any confession or admission that could be used in evidence against him.

(50)(2) Every accused person has the right to a fair trial which includes the right:

(a) To be presumed innocent until the contrary is proved.

(4) 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.

29. The Evidence Act, on the other hand makes the following provisions with regard to confessions by criminal suspects:

Under Section 25A (1): A confession or any admission of a fact tending to prove the guilt of an accused person is generally not admissible; and Only confessions and admissions made in court before a judge, a magistrate or made before a police officer (not the investigating officer) of the rank higher than Chief Inspector and a third party of the accused person's choice are admissible.

30. Under Section 26 of the Evidence Act, any confession or admission purported to be made by an accused person which appears to the court to have been made as a result of any inducement, threat or promise by a person in authority is not admissible if it gives the accused person grounds to believe that by making it he could gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

31. All confessions therefore not made in court must be obtained in accordance with the Evidence (Out of Court Confession) Rules, 2009. There is no room for admissibility of a confession without the necessary safeguards of the law as provided for under Sections 25 to 32 (inclusive) of the Evidence Act and under the Evidence (Out of Court Confession) Rules, 2009.

32. In this case, PW5 sought to produce a statement he had recorded from the accused person on 13/9/2017, which was objected to by the defence giving rise to the trial within a trial. According to PW5, the statement was made voluntarily by the accused person at the police station and in an environment that was amiable. According to the accused person, the statement under inquiry which purports to contain a confession was taken from him but not voluntarily. He testified that during the recording of the said statement, PC Mulwa was standing at the door holding a short gun and the he was told what to say in the statement. His counsel Mr., Odongo submitted for the accused that the statement was obtained without complying with the Evidence (Out of Court Confession) Rules, 2009 and more specifically Rule 4(1) which outlines the rights of an accused person when he is recording a confession.

33. For avoidance of doubt, the said Rule stipulates:

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-

- 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.

34. 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.

35. 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.

36. **Rule 4 (3)** requires that the accused person should be permitted to nominate a third party to be present during the duration of the confession session.

37. Under Regulation 9 of the Evidence (*out of court confession*) Rules 2009 there must be a **“Certificate of Confession.**

38. In the instant case, there is no allegation or evidence of torture of the accused person. He however claimed that he was promised that he would be released if he said what he was told to say. From the evidence adduced by PW5 and his demeanor as observed by the court, iam unable to find that he told the accused person what to write.

39. However, PW5, in my humble view, did not follow the laid down procedure in recording a statement under inquiry from the accused person herein. There was no evidence that he made the accused person aware of his rights under Article 49 and 50(2) of the Constitution. There is no evidence that he asked the accused person to nominate a third party of his choice to be present or that he was entitled to a lawyer at that stage. Further, there is no Certificate of Confession. The court also observed that he only signed the statement under inquiry as the person who recorded it, while he was in court meaning he did not sign it at the time that he recorded it. There is also no evidence that the accused was given the option of recording the statement in his own handwriting as he knows how to read and write. There is also no evidence that the accused person, after recording his statement which was being written by PW5, it was read back to him or that he was given the opportunity to read , and make any amendments or corrections to the statement if he so wished.

40. The prosecution did not call any witness to corroborate the retracted statement made under inquiry by the accused person.

41. In my humble view, therefore, iam not persuaded that the Statement under Inquiry as recorded from the accused person was done in compliance with the law and constitutional dictates. I therefore find and hold that the said statement recorded on 13/9/2017 from the accused person is inadmissible in evidence. I reject it.

Orders accordingly

Dated, signed and Delivered at Siaya this 4th day of May 2020 via skype due to Covid 19 situation

R.E. ABURILI

JUDGE