



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL CASE NO. 24 OF 2018

EDDLIED MANDI JILANI.....1ST APPLICANT

MAKONDE RUWA BUNI.....2ND APPLICANT

NGIRA KARISA CHARO.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. On 25th March, 2019 Mr. Kemu counsel for the DPP was ready to take evidence in chief of PW 3 who is also accused No. 3 herein who pursuant to a plea bargain agreement herein dated 18th February, 2019 became prosecution witness.

2. Mr. Magolo and Mr. Wamotsa, counsel for accused persons 1 and 2 objected to the evidence of PW 3 on the grounds that the accused person having turned prosecution witness cannot now use the statement he had recorded with the police as a suspect as his witness statement. More particularly the objection is that the said witness statement is titled “confession”; and that being so, as a confession its admissibility can be challenged by other accused persons unlike as an ordinarily witness statement. The objectors seem to relish the production of the said statement as a confession so that they may challenge it admissibility, rather than the same simply being produced as PW 3 witness statement in which event the admissibility of the same would not be challenged. Mr. Magolo submitted that PW 3 does not appear as a witness on the DPP’s list of witnesses. Mr. Magolo further submitted that even if the court allows PW 3 to testify he must still prepare a witness statement. Mr. Wamotsa associated himself with submissions of Mr. Magolo and urged the court not to allow testimony of PW 3.

3. From the outset the record must state that we are not dealing with a confession whose admissibility could be challenged in a trial within a trial. We are dealing with an accused turned witness, who is not challenging the manner in which his statement was recorded. His statement to the police is therefore not a confession. Neither does the DPP intend to make it a confession. It is just a statement upon which he will base his evidence.

Basis for the Witness

4. Section 137 (a) to (o) of Criminal Procedure Code states:

A. Plea agreement negotiation

(1) Subject to [section 137B](#), a prosecutor and an accused person or his representative may negotiate and enter into an agreement in respect of

(a) reduction of a charge to a lesser included offence;

(b) withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges.

(2) A plea agreement entered into under subsection (1)(a) or (b) may provide for the payment by an accused person of any restitution or compensation.

(3) A plea agreement under subsection (1) shall be entered into only after an accused person has been charged, or at anytime before judgment.

(4) Where a prosecution is undertaken privately no plea agreement shall be concluded without the written consent of the Director of Public

Prosecutions.

B. Plea agreement on behalf of the Republic

A plea agreement on behalf of the Republic shall be entered into by the Director of Public Prosecutions or officers authorized by the Director of Public Prosecutions in accordance with article 157(9) of the Constitution and any other person authorized by any written law to prosecute:

Provided that in any trial before a subordinate court, a public prosecutor may with the prior written approval of the Director of Public Prosecutions or officers subordinate to him, as the case may be, enter into a plea agreement in accordance with [section 137A\(1\)](#).

C. Initiation of plea agreement

(1) An offer for a plea agreement may be initiated by—

- (a) a prosecutor; or
- (b) an accused person or his legal representative.

(2) The court shall be notified by the parties referred to in subsection (1) of their intention to negotiate a plea agreement.

(3) The court shall not participate in plea negotiation between a public prosecutor and an accused person under this Part.

D. Consultation with victim, etc.

A prosecutor shall only enter into a plea agreement in accordance with [section 137A](#)—

- (a) after consultation with the police officer investigating the case;
- (b) with due regard to the nature of and the circumstances relating to the offence, the personal circumstances of the accused person and the interests of the community;
- (c) unless the circumstances do not permit, after affording the victim or his legal representative the opportunity to make representations to the prosecutor regarding the contents of the agreement.

E. Form of plea agreement

A plea agreement shall be in writing, and shall—

- (a) be reviewed and accepted by the accused person, or explained to the accused person in a language that he understands;
- (b) if the accused person has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that the interpreter is proficient in that language and that he interpreted accurately during the negotiations and in respect of the contents of the agreement;
- (c) state fully the terms of the agreement, the substantial facts of the matter and all other relevant facts of the case and any admissions made by the accused person;
- (d) be signed by the prosecutor and the accused person or his legal representative;
- (e) be signed by the complainant if a compensation order contemplated in [section 175\(2\)\(b\)](#) has been included in the agreement.

F Recording of plea agreement by court

(1) Before the court records a plea agreement, the accused person shall be placed under oath and the court shall address the accused person personally in court, and shall inform the accused person of, and determine that the accused person understands—

- (a) the right to –
 - (i) plead not guilty, or having already so pleaded, to persist in that plea;
 - (ii) be presumed innocent until proved guilty;

- (iii) remain silent and not to testify during the proceedings;
 - (iv) not being compelled to give self-incriminating evidence;
 - (v) a full trial;
 - (vi) be represented by a legal representative of his own choice, and where necessary, have the court appoint a legal representative;
 - (vii) examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;
- (b) that by accepting the plea agreement, he is waiving his right to a full trial;
- (c) the nature of the charge he is pleading to;
- (d) any maximum possible penalty, including imprisonment, fine, community service order, probation or conditional or unconditional discharge;
- (e) any mandatory minimum penalty;
- (f) any applicable forfeiture;
- (g) the court's authority to order compensation under [Section 175](#) (2)(b), restitution under [Section 177](#), or both;
- (h) that by entering into a plea agreement, he is waiving the right to appeal except as to the extent or legality of sentence;
- (i) the prosecution's right, in the case of prosecution for perjury or false statement, to use against the accused any statement that the accused gives in the agreement.

The prosecutor shall lay before the court the factual basis of a plea agreement and the court shall determine and be satisfied that there exists a factual basis of the plea agreement.

G. Competence of accused to make a plea agreement

The court shall, before recording a plea agreement, satisfy itself that at the time the agreement was entered into, the accused person was competent, of sound mind and acted voluntarily.

H. Record of factual basis of plea

(1) Where the court accepts a plea agreement—

- (a) it shall enter the factual basis of the plea on record;
- (b) the agreement shall become binding upon the prosecutor and the accused and the accused;
- (c) the agreement shall become part of the record of the court.

(2) Where a plea agreement entered into in accordance with [section 137A\(1\)\(a\)](#) is accepted by the court in accordance with this section, the court shall proceed to convict an accused person accordingly.

I. Address by parties

(1) Upon conviction, the court may invite the parties to address it on the issue of sentencing in accordance with [section 216](#).

(2) In passing a sentence, the court shall take into account—

(a) the period during which the accused person has been in custody;

(b) a victim impact statement, if any, made in accordance with [section 329C](#);

(c) the stage in the proceedings at which the accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given;

(d) the nature and amount of any restitution or compensation agreed to be made by the accused person.

(3) Where necessary and desirable, the court may in passing a sentence, take into account a probation officer's report.

J. Rejection of plea agreement

(1) Where the court rejects a plea agreement—

(a) it shall record the reasons for such rejection and inform the parties accordingly;

(b) the plea agreement shall become null and void and no party shall be bound by its terms;

(c) the proceedings giving rise to the plea agreement shall be inadmissible in a subsequent trial or any future trial relating to the same facts; and

(d) a plea of not guilty shall be entered accordingly.

(2) Where a plea agreement has been rejected by the court and a plea of not guilty consequently entered, the prosecution may, upon being informed of the fact under subsection (1)(a), proceed to try the matter afresh before another court.

Provided that the accused person may waive his right to have the trial proceed before another court.

(3) Upon rejection of a plea agreement, there shall be no further plea negotiation in a trial relating to the same facts.

(4) Where the court has rejected a plea agreement under this section, no party shall appeal against, or apply for a review of, the order of the court rejecting the agreement.

K. Withdrawal of plea

An accused person may withdraw a plea of guilty pursuant to a plea agreement—

(a) prior to acceptance of the plea by the court, for any reason; or

(b) after the court accepts and convicts on the plea, but before it passes a sentence, if the accused person can demonstrate, to the satisfaction of the court, a fair and just reason for requesting the withdrawal.

L. Finality of Judgment

(1) Subject to subsection (2), the sentence passed by a court under this Part shall be final and no appeal shall lie therefrom except as to the extent or legality of the sentence imposed.

(2) Notwithstanding subsection (1), the Director of Public Prosecutions, in the public interest and the orderly administration of justice, or the accused person, may apply to the court which passed the sentence to have the conviction and sentence procured pursuant to a plea agreement set aside on the grounds of fraud or misrepresentation.

(3) Where a conviction or sentence has been set aside, under [subsection \(2\)](#), the provisions of [section 137J](#) shall apply *mutatis mutandis*.

M. Protection of plea agreement process

Notwithstanding anything contained in any written law for the time being in force, the statements or facts stated by an accused person in a plea agreement shall not be used for any other purpose except for the purpose of this Part.

N. Application

This Part shall not apply to—

(a) offences under the Sexual Offences Act, 2006 ([No. 3 of 2006](#));

(b) offences of genocide, war crimes and crimes against humanity.

O. Rules under this sub-Part

The Attorney-General may make rules for the better carrying into effect the provisions of this Part and such rules shall apply *mutatis mutandis* to prosecutions conducted under [Section 88](#) of the Act.

5. It is therefore clear that an accused person who has entered into a plea bargain, can us his statement recorded while he was a suspect, as a witness statement. In any event, this should be the correct position so that the accused does not have the option to change contents of his statement. However, the defence should not feel helpless because they still have the opportunity to cross examine the witness on his statement.

6. Mr. Magolo cited authority **Republic vs. Elly Waga Omondi [2015] eKLR**. In that case the accused successfully objected to the production of his confession in a trial within a trial. That case is not however, very helpful in the matter at hand. As I have already stated the issue herein is not a challenge to admissibility of an alleged confession. The witness simply wants to rely on his statement he had recorded with the police while he was still a suspect.

7. I have looked at the provisions of Section 347 CPC which anchors plea bargain agreements. In my view there is no legal bar to PW 3 using the statement he recorded with the police while he was a suspect. That statement is properly on record and may be used as PW 3 witness statement.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 8th day of April, 2019.

E. OGOLA

JUDGE

In the presence of:

Mr. Magolo for 1st Accused

Mr. Wamotsa for 2nd Accused

Ms. Oyier for 3rd Accused

Mr. Isaboke for DPP

Mr. Salim for Family of the victims

Mr. Kaunda Court Assistant