



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 57 OF 2016

LESIT, J.

REPUBLIC.....PROSECUTOR

V E R S U S

FREDRICK OLE LELILMAN.....1ST ACCUSED

STEPHEN CHEBURET MOROGO.....2ND ACCUSED

SILVIA WANJIKU WANJOHI.....3RD ACCUSED

LEONARD MAINA MWANGI.....4TH ACCUSED

PETER NGUGI KAMAU.....5TH ACCUSED

RULING: ADMISSIBILITY OF STATEMENT BY THE 5TH ACCUSED

1. This is a ruling on admissibility of the statement allegedly made by the 5th accused and recorded by CIP Kinyua on the 9th August, 2016 in the presence of the brother to the 5th accused.

2. The 5th accused objected to the production of the statement. In the address by Mrs. Kinyori in support of the objection to the production of this statement Counsel urged that the basis for the objection was fivefold:

- (a) That the 5th accused was not fluent in the English language and could hardly write in English or Kiswahili due to his level of education.**
- (b) The 5th accused was tortured and his statement was not given voluntarily.**
- (c) The 5th accused was given promises he would be made a prosecution witness, coerced and induced to make the statement.**
- (d) That 5th accused was compelled to sign the statement.**
- (e) That the 5th accused did not write the statement.**

3. A trial within a trial was declared. The prosecution brought six witnesses while the 5th accused gave a sworn statement without calling any witness.

4. The six prosecution witnesses in the trial within trial were PW1 the witness who took the statement in question. He stated that he ascertained the language the 5th accused desired to use in his statement as English and that the 5th accused explained he was more confident reading English than Kiswahili and Kikuyu. Before recording it he ensured 5th accused was comfortable and had no complaints. PW1 testified that he waited for few hours for the 5th accused nominee to be present before recording the statement from him in the presence of the nominee.

5. PW2 and 6 were IP Clement Mwangi and Sgt Ole Sena. Their evidence was that they were part of a team of the Investigating Officers in this case. They testified that the two of them and others arrested the 5th accused on 8th August 2016 in the evening hours at Waithaka stage. They stated that they took the 5th accused to Flying Squad offices in Nairobi and that on the way the 5th accused used English and Kiswahili languages interchangeably giving vital information into the case they were investigating. They said that they arrived at the offices at 11.30 p.m. and that they interviewed the 5th accused until 2am when all of them slept on benches in the office.
6. PW2 testified that at 7 a.m. he, PW6 and other officers took the 5th accused to DCI Headquarters to have his statement recorded. On arrival at the Headquarters he bought the 5th accused and PW6 breakfast.
7. PW2 stated that he took the 5th accused to PW1 for purposes of recording a statement at around 11 a.m. The statement was however not taken as PW1 insisted that the 5th accused must have a nominee. PW2 stated that he called a brother of 5th accused who went to the offices at 1p.m. which is when he took the 5th accused back to PW1 accompanied by his brother. This time the statement was recorded. PW6 testified that no force was used on the 5th accused at any time on the material day.
8. PW3 was Dr. Kizzie Shako the Police Surgeon who examined the 5th accused as to his mental status. Her testimony is that in the course of examining him she ascertained that 5th accused had gone up to Fourth Form and that he was conversed in English. PW3 testified that the two used English language and that he was fluent in it.
9. PW4 was Mr. Kigen Kipkorir an officer from Naivasha Maximum Prison said that he received the 5th accused at the Prison on 6th September, 2016 in good health. He said that he interviewed the 5th accused for purposes of filling his background information at the back of the committal warrant. PW4 stated that the 5th accused informed him he was conversant with English having gone up to the fourth form in secondary school. He said that the 5th accused then gave him answers to the documentation prescribed questions in the English language. PW4 said that the 5th accused was well conversant with English.
10. PW5 was a Practicing Clinician one Sgt. Wambugu who saw the 5th accused at Naivasha Maximum Prison as part of his official work. His testimony was that he saw the 5th accused on 6th September 2016 for purposes of filling Part B of the PF10 of the 5th accused for the record. He said that the part was filled if the remandee had any complaint. PW5 testified that the form was blank signifying that the 5th accused had no complaint.
11. The 5th accused gave a sworn statement. He called no witness. His evidence was that when PW2, PW6 and others stopped their vehicle across the road from his shop in Waithaka, a man walked to his shop and told him he was required at the vehicle. He said he recognized Mr. Owino a Flying Squad Officer who was standing outside the vehicle. He had known him for 2 years in his (5th accused) capacity as a Police Informer. He straight away walked to the vehicle and sat between two people at the middle of the back seat. There were four occupants. He said he was driven off and eventually landed at the Flying Squad officers.
12. The 5th accused testified that they entered an office and sat in a semi-circle and chatted nicely. He said he was asked for help but he declined because in 2013 after giving vital information he was not given the amount of pay he had been promised. He said that the group who were strangers to him changed and started kicking his private parts and slapping him. He was stripped naked and pressed with something which caused him to develop wounds.
13. The 5th accused said that PW2 entered at that time for the first time and that he defended him and had him put back his clothes. PW2 then bought him cigarettes and took him to DCI Headquarters along Kiambu road where he said he was based. The 5th accused said he was told by PW2 that they needed his help with a case without being specific. He said that some papers were placed on the table and PW2 showed him where to sign which he did.
14. He said that after being asked about his wife and siblings he was given back his phone to call his brother John which he did. He said that PW2 explained to him that if his brother also signed the documents, he would be paid Kshs.30,000/= per month and his wife's business be located from Kawangware, and that he would be placed under protection because the case he was to help them in involved Police Officers.
15. The 5th accused testified that when his brother came it was 3 or 4 p.m. He said that he was asked to sign some papers in PW1's office. He said things changed and he was taken to a flat at Thindigua and well fed. The next day he was booked by synonym XYZ and kept for 3 weeks, well fed and well treated.
16. The 5th accused stated that eventually he was driven to Naivasha Maximum Prison. That on 6th September 2016 he was brought to court. He complained of beatings to the court and was taken for Medical treatment at Naivasha District Hospital. This was confirmed by PW5.
17. The 5th accused testified that he went up to standard 4 Primary School and did not know English language beyond words '**boy**' and '**girl**'. He denied speaking in English with any of the witnesses.
18. Mr. Mutuku for the prosecution and Mrs. Kinyori for the 5th accused filed written submissions which they highlighted in court after the close of the trial within a trial. I will summarize those submissions herein below.
19. Mr. Mutuku on his part urged that the statement in question, PMFI.90 was voluntarily recorded from the 5th accused. Counsel urged that the prosecution called six witnesses to prove that point. As regards language, Mr. Mutuku urged that PW1 to 6 testified on the issue of language.

20. Mr. Mutuku submitted that from the evidence PW1 complied with the **Evidence (Out of Court Confession) Rules 2009**, (hereinafter referred to as the Rules). On the issue of language Mr. Mutuku urged that PW1 inquired from the 5th accused and established the language the accused preferred to use was English. He urged that the 5th accused told PW1 that he was more comfortable using English rather than Kiswahili and Kikuyu because he could easily read the English language.

21. Learned Prosecution Counsel urged that PW1, 2 and 6 made inquiries of accused educational background and that the accused told each of these witnesses that he went up to form 4. Counsel urged that there was no evidence to show that these witnesses would lie against the accused.

22. Prosecution Counsel submitted that the prosecution had 2 independent witnesses in the trial within a trial, PW3 Dr. Kizzie Shako and PW4 Mr. Kigen Kipkorir from Naivasha Maximum Prison, Documentation Section. Mr. Mutuku urged that PW3 examined the accused as to his mental status and injuries. She established that the accused understood English and Kiswahili. Counsel urged that Dr. Kizzie has no interest in matter, that she met accused for first time that day she examined him and would have no reason to lie.

23. As for PW4. Mr. Mutuku urged that he interviewed the accused at Naivasha Maximum Prison. He also filled Prison Form 10 as well as the back of Warrant of Committal way back in 2016 when the accused was committed to that prison. Mr. Mutuku drew the court's attention to the back of Warrant to see the information the accused gave to PW4 which he entered there. Among the information he gave was the fact that he went up to form 4 in his education. Mr. Mutuku submitted that PW1 complied with the **Evidence Act, Article 49 and 50 of Constitution** and the **Evidence (Out of Court Confession) Rules 2009** at the time of recording the statement from the 5th accused.

24. Mrs. Kinyori on behalf of the 5th accused submitted that the defence was objecting to the production of the confession because it was not given voluntarily due to the manner in which it was extracted. Counsel urged that the rights of the accused under **Articles 40(d), 50(1) and 50(4) of the Constitution**, and the **Evidence Act and The Rules** were contravened.

25. Counsel cited the persuasive case of **Republic versus Elly Waga Omondi(2015) eKLR**. In the cited case, my learned Sister Judge S.N. Mutuku in rejecting to admit to evidence a retracted statement observed that it was the prosecutions duty to discharge the burden of proof that the statement in issue was voluntarily made. That court observed thus;

“while the two prosecution witnesses in trial within a trial told the court that they followed the law, it is highly doubtful that this is the case. The recording officer, CIP Kyaa, may as well have contrary view. 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. The law, from the constitution guarantees the accused certain rights to the Evidence Act and the Confession rules, is clear on how a statement of an accused person ought to be recorded”

26. Mr. Mutuku submitted on behalf of the state that the law and the rules were complied with fully. Counsel cited the persuasive case of **Republic versus Thomas Mokaya Akera, HCCR Naivasha No. 4/2015**. In the cited case the court found that the retracted statement met the definition of a confession under **section 25 of the Evidence Act**, and was taken in accordance to the **Evidence Act**, even though two languages were used interchangeably by the accused and the recording officer.

27. I have taken time to go through the two cases cited by the respective counsels and my analysis of the facts and circumstances shall bear the persuasive cases in mind.

28. Generally, confessions made by an accused person are not admissible in Kenya unless when made strictly in compliance to the law. **Section 25 of the Evidence Act, Cap 80**, 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.”

29. This section was amended by **Act No. 5 of 2003, Act No. 7 of 2007 and Act No. 19 of 2014** by inserting into the Act **Section 25A** which reads:

Confessions generally inadmissible

(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 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.

30. There is no dispute that the confession in question was taken by a Chief Inspector of Police who was qualified in rank under the law to take the confession. There is no dispute that at the time the confession was made, the brother of the 5th accused was present.

31. Pursuant to **section 25A (2) of the Evidence Act, Cap 80**, we now have **The Evidence (Out of Court Confessions) Rules, 2009** in

which **The Judges Rules** were codified. The rights of an accused are set out in **Rules 4 (1) to (3)** as follows:

Rule 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.

(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.

(3) The recording officer shall ask the accused person to nominate a third party who shall be present during the duration of the confession session, and upon the appearance of the third party, the recording officer shall record the third party's particulars and relationship to the accused person.

32. The issue is whether the statement in question was made under threats, inducement or promise. **Sections 26 and 27** of the **Evidence Act** deal with confessions made under inducement, threat or promise and states as follows:

26. Confessions and admissions caused by inducement, threat or promise

A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

27. Confession made after removal of impression caused by inducement, threat or promise

If such a confession as is referred to in section 26 of this Act is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is admissible.

33. It is important to bear in mind that these amendments were informed by the prevailing concern arising from consistent claims of use of torture by the police to extract confessions from suspects. The primary purpose of the amendments was to ensure that statements taken from suspects in the course of investigations were taken in an environment free of torture, force or such maladies. Even where the proper environment is alleged to exist, the court has duty to interrogate and satisfy itself that the statements were made voluntarily.

34. In addition to this, **Rule 7** requires that the accused be informed of the option to record his own statement in his preferred language or to have it recorded for him. **Rule 8** gives the accused the opportunity to clarify or add anything in the statement after the confession has been recorded.

35. In this case, the accused is challenging the admissibility of the confession he made on the following grounds:

i. That the confession he made was recorded in English, which language he is not familiar with due to his level of education. The accused claims he only reached class 4 and is therefore not fluent in English.

ii. That he was tortured.

iii. That he was coerced/induced to make a statement/confession and given promises that he will be placed under witness protection and be made a prosecution witness.

iv. That he was compelled to sign the confession.

36. The Court of Appeal in **KANINI MULI -VS- REPUBLIC [2014] eKLR** observed thus:

“In *NAYINDA S/O BATUNGWA VS R* (*supra*), the same court once again emphasized the importance of a magistrate to administer a caution before taking a statement from an accused person. In that case, as in the present appeal, the appellant was convicted of murder by setting fire to the house in which the deceased was sleeping. The main evidence against the appellant was an extra judicial statement made by him to a magistrate. That statement was recorded without the appellant being cautioned by the magistrate. The Court of Appeal stated as follows regarding the failure to caution the appellant:

“The Judges’ Rules are not applicable to the taking of statements by magistrates, since they are rules drawn up for guidance of police officers engaged in the actual investigation of criminal offences. There is nevertheless, an established procedure which is normally followed by magistrates and which is designed to the same end, namely, to ensure that a statement taken by the magistrate is a voluntary one. To this end, we certainly think it advisable that a magistrate who is about to take a statement should administer a caution in the normal form as laid down in the Judges’ Rules. If there was anything to suggest that the failure to administer a caution had resulted in the making of a statement which was not voluntary in the sense explained in *R. VS VOISIN [(1918) 1 KB 531]* a trial judge might well, in the exercise of his discretion, reject the statement.”

37. From the above case law, it is clear that the court of appeal is of the view that the administration of the caution is the safeguard for ensuring that an extra-judicial statement was made voluntarily. Even though the court in the case I have cited was dealing with an extra-judicial statement taken by a magistrate, the safeguards discussed therein for ensuring that a statement was made voluntarily through the administration of caution applies to this case.

38. The onus of proving voluntariness of a retracted or repudiated statement/confession lies with the prosecution. The prosecution has to tender evidence to show that all the legal and procedural requirements as set out in the law and the rules have been met. **Rules 5 and 9 of The Evidence (Out of Court Confessions) Rules, 2009** speaks to these two aspects as follows:

Rule 5. Caution to the accused person.
(1) The recording officer shall caution the accused person in the following terms and shall record his response: “Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.”

Rule 9. Certificate of confession.
The recording officer shall ensure that the written confession or electronic recording media contains the following certificate at the end of the confession, in the original language of the accused person: “I have read the above statement and I have been told that I can correct, alter or add anything I wish. The statement is true. I have made it of my own free will.”

39. PW1 stated that he cautioned the accused twice before taking the statement. The first time was when the accused was escorted by PW2 to PW1’s office without a representation. The second caution was administered later in the afternoon after the accused representation of choice (his younger brother) was present. PW1 testified that the accused had elected to have his younger brother as his representation and also elected to use English language because he was more versed reading the same as opposed to reading Kiswahili and Kikuyu. PW1 went ahead to have the accused append his thumb print as opposed to signing because he was wary of the accused denying his signature in future.

40. I find that PW1 complied with **Rules 5 and 9 of The Evidence (Out of Court Confessions) Rules, 2009**. The caution was explained to the accused and he was well aware of what he was getting himself into. The accused had the opportunity and time to change his mind and withdraw from his voluntary recording of the statement as PW1 awaited the arrival of the accused nominee of choice. The accused did not change his mind and neither did the brother have any reservations after he was informed of the accused intention.

41. In light of the above analysis, I find that the circumstances prevailing in the case **Republic Versus Elly Waga Omondi supra**, cited by the 5th accused counsel are distinguishable from those prevailing in this case. I find that the accused herein was cautioned twice before the confession was recorded. I further find that PW1 who recorded the confession statement, was patient enough to await the arrival of the accused nominee for roughly three (3) hours before recording the statement.

42. Regarding torture PW1 in the trial within trial was not cross examined about torture, threats or intimidation of any kind. He was however categorical that when the accused was taken to him, he took time to observe him and that he noted few things. He noted that the accused was relaxed and quite free. He asked him if he had any complaints and he told him he had none. He also confirmed if he had eaten since his arrest and found out that the accused was arrested in the evening and had been bought breakfast at a hotel. Surely had he been beaten, the accused should have complained to the recording officer, PW1. On the other hand PW1 could have seen tell-tale signs of assault, fatigue or tiredness. He saw none of these.

43. In the accused own testimony, he said he was assaulted by flying squad officer at Flying Squad Offices. That was in the night of his arrest. He however said that PW2 rescued him and that from then on, up to 2pm when he recorded his statement with PW1, he was not assaulted again. I find that the accused was not assaulted, tortured, threatened or intimidated by PW1. I find that if at all he had been assaulted at the Flying Squad Offices, by the time he made his statement, the threat was no longer there and could not affect the recording of the statement.

44. The accused said he was bought breakfast then given certain promises by PW2 on condition he signed some documents which he was given. He said he signed them without reading them with PW2. He made no mention of PW1 being present. He said PW2 then asked him to call his brother to also come sign which he did.

45. When PW1 was being cross examined, the question whether he was given pre-recorded statement for the accused to sign was put to him. PW1 said that in fact he recorded the statement in his own handwriting in the presence of the accused and his brother before both signed it. I find that if at all the accused signed anything with PW2, it is not the document in question. I find that if any promise was made to him by PW2, it did not influence or affect the impugned confession. Furthermore the promises made to the accused, the food treats he got which appear to have made him feel important, all are irrelevant and have no bearing to the statement earlier recorded by PW1. The treats came much after the statement had been recorded.

46. PW1 was cross examined extensively about the language used during the recording of the statement. PW1 said the accused chose to use the English language and that he was quite fluent in it. PW1 said they conversed interchangeably in Kikuyu and Kiswahili, and admitted that even though he spoke in English more, he did not note on the statement the portions spoken in the other two languages. What the accused claims is that apart from 'boy, girl', he did not know the English language at all.

47. The prosecution went out of its way and brought three independent witnesses who had come into contact with the accused after his arrest. All without exception were categorical that the accused was fluent In the English language, that he conversed in it without any difficulty and that they had no reason to doubt his ability to understand it.

48. The Documentation Officer at Naivasha Maximum Prison took down accused background from him and recorded at the back of the warrant. It shows accused level of education was secondary form four. PW3 Police Surgeon said accused claimed to have reached primary school.

49. The issue here is not the level of education he reached but accused ability to understand and express himself fluently in it. All who had contact with him, including PW1 were satisfied he was fluent in it. He could have lied about his level of education, but his speech did not betray him. In fact, during his testimony in court, I noted that the accused in few occasions answered questions put to him in English without asking for pardon. I am convinced that the accused understood the English language and could also speak fluently in it.

50. The use of the three languages interchangeably did not prejudice the accused. He knew those other languages well. I find he required no translation. Furthermore, the statement was read over to the accused having been informed of his right to alter, correct or change. He went ahead to sign a certificate confirming he was informed of those rights, and also signed another confirming he recorded the statement voluntarily.

51. Having considered the evidence adduced before me from both sides I am satisfied that the accused statement of confession was taken in accordance with the **Evidence (Out of Court Confession) Rules**. I am satisfied that the confession is admissible under **section 26 of the Evidence Act**.

52. Accordingly, the (5th) accused confession is admitted in evidence.

DATED AT NAIROBI THIS 16TH DAY OF MAY, 2019.

LESIT, J.

JUDGE