



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 38 OF 2010**

**LESIT, J.**

**REPUBLIC .....PROSECUTION**

**VERSUS**

**PHILIP ONDARA ONYANCHA .....ACCUSED**

**RULING ON OBJECTION TO PRODUCTION OF A CONFESSION**

1. **Article 50(4)** of the **Constitution** provides:

**“(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.”**

2. The counsel for the accused has raised objection to the production of two DVD recordings and the Transcript thereof on several grounds. I will dwell on those objections which touch on the violation of accused rights under the Bill of Rights.

3. Mrs. Chepseba submitted that contrary to **Rule 4(1)(c)** of the **Evidence Act (Out of Court Confession) Rules**, PW14 did not ensure that the accused was not subjected to any form of threat, coercion, degrading or inhuman treatment. Counsel submitted that whereas the accused’s hands were free on the 12<sup>th</sup> June 2010 when he first appeared before PW14, his hands were handcuffed to the back on the 14<sup>th</sup> June 2010 when he next appeared to make his confession with PW14. Counsel urged that handcuffing the accused as they did meant that the environment under which he made his confession was not free and favourable, and was in violation of **Rule 4(1)(c)** of the **Evidence Act (Out of Court Confession) Rules** (hereinafter the **Rules**).

4. The second objection raised which related to the **Bill of Rights** was violation of the right to legal representation contrary to **Rule 4(1)(b)** of the **Rules**. Mrs. Chepseba for the accused urged that the accused was not given an opportunity to communicate with his brother whose name and phone number he supplied to PW14. Instead, counsel urged, PW14 delegated the responsibility to an officer to make the call to the accused brother, after which he was informed that the brother was not available.

5. Mr. Omirera for the State submitted that he had keenly listened to the defence counsel and concluded that Mrs. Chepseba had painted an ideal situation as the Rules provide. Counsel urged that there was no change in accused demeanour during the second day of his confession as her counsel urged. Mr. Omirera urged the court to re-call that the statement given by the accused was flowing, and further that what he stated was known only to himself.

6. Mr. Omirera urged the court to find that the **Rules** were substantially complied with. Counsel urged that in any event failure to comply with the **Rules** was mere technicalities and was not a ground for rejecting the statement. The Learned Prosecution Counsel invoked **Article 159** of the **Constitution** for that proposition.

7. Regarding the complaint that the accused was handcuffed as he made his confession, Mr. Omirera urged that the accused was handcuffed because of his status. He urged that the accused was a ‘*much sought after person*’ and that handcuffs went with that status.

8. On the issue of accused brother not being present during the interview, Mr. Omirera urged that the accused himself indicated that his brother was not available. Counsel urged that the accused chose to proceed and make his statement without him.

9. As I have indicated herein above, Mrs. Chepseba for the accused raised several objections to the production of the confession recorded on video from the accused by PW14 at CID Headquarters, Photographing and Imaging Section. However I have chosen to deal with the

objections which touch on the Bill of Rights and the resulting violations.

10. The first of the violations complained of was under **Rule 4(1)(c)** of the **Rules**. Mrs. Cheseba urged that recording accused statement with his hands handcuffed was a violation of his rights and the Rules. Mr. Omirera in his response urged that the reason the accused was handcuffed was because of his status of being '*a much sought after person.*'

11. **Rule 4(1)(c)** of the **Rules** prohibits an arrested person from being subjected to any form of threat, coercion, degrading or inhuman treatment.

12. Mr. Omurera's response did not refute that the use of handcuffs on the accused at the time he was recording his statement was a violation of **Rule 4(1)(c)**. He only urged that the accused deserved it due to '*his status*'.

13. The **Rule** prohibits any form of threat, coercion, degrading or inhuman treatment. Being handcuffed is not demeaning, degrading or inhuman treatment perse. The same cannot be said of threat and coercion. Once a person is handcuffed, the message being conveyed is that he is under subjection, that he is not free and the environment is not free.

14. Handcuffs are intimidating even before they are used on a person. To actually handcuff one is threatening, intimidating and coercive. In this case, it was obvious to the eye that the accused hands were handcuffed not to the front, but to the back. That was not only intimidating, threatening and coercive, but had an element of demeaning the accused.

15. The statement took more than an hour. The accused was not seated squarely on the seat. He was bent towards the left with the hands handcuffed towards the back right of his body. That was a most uncomfortable position. It was a reminder he was not free. I do find that the environment created as a consequence was not free and conducive for a confession recording.

16. **Article 19(3)(a)** of the **Constitution** restates that:

**“The rights and fundamental freedoms in the Bill of Rights –**

**(a) Belong to each individual and are not granted by the State.”**

17. **Article 20(1) (2)** of the **Constitution** provides that:

**“(1) The Bill of Rights applies to all law and binds all State organs and all persons.**

**(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.”**

18. **Article 27(1)** of the **Constitution** provides:

**“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.”**

19. **Article 47** of the **Constitution** gives every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

20. In this case the accused was treated according to '*his status*' according to the Prosecution Counsel. The Learned Prosecution Counsel referred to the accused as '*a much sought person*' who had to be handcuffed as befitting to his status. If such a decision to handcuff the accused before he made his statement was made based on some other information known to the investigating team, that had no force of law. It was discrimination against the accused in its very nature. No law or rule permits any person to subject a suspect or arrested person to inter alia any form of threat or coercion. It was a violation of **Rule 4(1)(c)** of the **Rules**.

21. Handcuffing the accused person as PW14 did, before recording his confession denied the accused fair Administrative Action for reason that action was not lawful, reasonable and procedurally fair. As I stated, having watched the recording on video, the accused was seated at an angle with his hands handcuffed to one side, and for a lengthy period of time. That was not reasonable, lawful or fair.

22. The State submitted that the accused was handcuffed because of his status. Having made such an admission, I find that by so doing, the investigating team, including PW14 denied accused an enjoyment of his rights which, under **Article 19** and **20** of the **Constitution** belong to each individual. The rights should be upheld by all persons and organs of the State and are binding on all persons to ensure that every person enjoys the rights to the greatest extent consistent with the nature of the right. PW14 denied the accused the enjoyment of his Constitutional rights.

23. The second issue raised concerns accused rights to communicate with an advocate or other person whose assistance is necessary. That is a right provided under **Article 49(1)(c)** of the **Constitution** and falls under the Bill of Rights. The provision provides:

**“(c) to communicate with an advocate, and other persons whose assistance is necessary.”**

24. The court watched the video and witnessed how the enjoyment of that right was curtailed. On the 12<sup>th</sup> when the accused was taken to

PW14, he was asked if he required to have an advocate or any other person present as he made his statement. The accused promptly gave out his brother's phone number. PW14 gave out the number to one of the officers who had escorted the accused to him. The person did not bring back the report.

25. The sitting was deferred. On the 14<sup>th</sup> the accused was taken again to PW14. On the resumed date, the accused informed PW14 that he was informed that his brother was not available and could not be present for the statement recording.

26. The recording leaves doubts lingering whether the accused enjoyed the right to 'communicate' with his brother. The constitution is clear that it is the accused to 'communicate with' which makes it clear that in order to actualize that right, PW14 should have facilitated the accused to communicate with his brother. What PW14 appears to have done is to send his officers to communicate with the accused brother and bring back that information.

27. That delegation does not meet the requirements of **Rule 4(1)(j)** of the **Rules** and **Article 49(1)(c)** of the **Constitution**, and was a violation of the **Rules** and the **Constitution**.

28. Before I close I must make reference to Mr. Omirera's submission. After I made this ruling allowing the objection by the defence. It was the learned prosecutor's view that the objection should have been followed by a 'trial within a trial' before the court ruled on it.

29. That expectation was misplaced in my view because the video recording was played in court before the objection was raised. The court observed for itself the manner in which PW14 conducted the preliminary processes upto the point he took the confession. The court saw for itself how PW14 conducted the interview leading to the statement by the accused. The court was therefore privy to the manner the various applicable rules of confession were interpreted and implemented by PW14.

30. There was no need to conduct a 'trial within a trial' to determine whether the accused hands were handcuffed because it was very clear from the video that they were. There was no need to conduct the 'trial within a trial' to determine whether the accused was given the opportunity to communicate with his brother as he requested because from the video itself, it is clear PW14 sent an officer to call the brother of the accused on the first day. The video records PW14 giving the phone number to an officer who ran out to make a call.

31. On the resumed day of recording, it is on record that what the accused reported to PW14 was what he had been informed regarding by an officer regarding his brother's availability to attend during the recording.

32. Quite apart from the above, the court was uncomfortable that PW14 took a video in one sitting and in one recording as the accused gave details of various violent acts he committed against various women leading to their death. By the time the recording was halted, by consent of all parties, we were on the eighth (8) murder victim.

33. I am of the view that taking a single recording to various acts of offences committed by the perpetrator of the acts violates the person's right to a fair trial. This is because the entire recording has to be played in order to see the recording that is relevant to the case. This cannot be procedurally right or evidentially correct.

34. What the investigating officer was doing was to portray the accused as a serial killer. That violates his right to a fair trial because he was not charged with the murders he allegedly confessed to in that video recording. The information before the court charged the accused with one murder only.

35. The prosecution already submitted that this court was bound to admit the video on the grounds a court of parallel jurisdiction had admitted it in a different trial against the accused. That precisely demonstrates that by talking many confessions in one video, the accused right to a fair trial under **Article 50**, and against self-incrimination under **Article 49** of the **Constitution** and the **Evidence Act** were trampled on.

36. It is my view that once it is decided to record a video confession, it should be restricted to the respective charge or information facing the arrested or accused person. It cannot be an omnibus confession as that is against the rights to fair trial, among others rights. Furthermore, such a person should be allowed to enjoy all the rights and fundamental freedom provided under the Bill of Rights subject to limitations prescribed therein.

37. It is my view that the accused rights not to be discriminated against and to have his confession taken without being subjected to any form of threat or coercion was violated contrary to **Rule(4)(1)(c)** of the **Rules**. I also find that the accused right to communicate to his brother as he requested under **Rule 4 (1)(j)** was equally violated.

38. Contrary to Mr. Omirera's submissions, these violations cannot be cured by **Article 159** of the **Constitution**. The violations touch on accused rights under the Bill of Rights. It is therefore not enough to say that the Rules were substantially complied with. There is no two way about it.

39. The **Rules** under the **Evidence Act (Out of Court Confessions) Rules** are there to be complied with. I find that the **Rules**, complained of were not complied with and that the accused suffered prejudice as a result of non-compliance.

40. I have come to the conclusion that the confession in the form of the video recording in the DVD and in the Transcript are both inadmissible in this trial for the reasons given in this ruling.

41. Those are my orders.

DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2019.

LESIT, J

JUDGE