



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 67 OF 2015**

**REPUBLIC .....RESPONDENT**

**VERSUS**

**EZEKIEL MOMANYI ONSONGO .....1<sup>ST</sup> ACCUSED**

**DENNISON MOSE MAROKO .....2<sup>ND</sup> ACCUSED**

**PHILIP MANYURA MAROKO.....3<sup>RD</sup> ACCUSED**

**RULING**

1. The 2<sup>nd</sup> accused the subject of this Ruling is charged together with the 1<sup>st</sup> and 3<sup>rd</sup> accused of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** to which they all pleaded not guilty.

2. In the course of their trial, the State called as **PW22 JOSEPH TUKSHO** who allegedly recorded for the 2<sup>nd</sup> accused **DENNISON MOSE MAROKO** a confessionary statement to which he objected to through his Advocate on record, on the ground that the said statement was not voluntarily given. To that objection Miss Mwaniki for the State conceded that there was need to conduct trial within a trial.

**TRIAL WITHIN A TRIAL**

3. At the said trial within a trial, the State called and examined two witnesses while the 2<sup>nd</sup> accused testified on his own behalf without calling any witnesses. On behalf of the State, **CORP. ISAAC SANG** testified as **PW1** and stated that on 22/6/2015 he was on duty together with **PC CHEBOI**, **PC LUSENO** and **CP DRIVER MUREMI** when **Inspector Memusi** then of Spring Valley called him with information that he had a suspect in respect of this case. He therefore proceeded to the police station where he met the 2<sup>nd</sup> accused together with **DANIEL DAUDI NYONGO** who testified in the main trial as (**PW1**). He escorted them to Nairobi Area where he handed them over to **Inspector Tuksho** who was then in charge of Flying Squad. It was his evidence that the 2<sup>nd</sup> accused was physically fit when he handed him over to **Tuksho** and having told them that he knew the 1<sup>st</sup> accused who was a police officer attached to Spring Valley, whom he had accompanied to Mombasa Road the scene of the murder herein. He stated that he did not intimidate him or promised him anything in return.

4. In cross-examination he stated that he had not met the 2<sup>nd</sup> accused before the said date. He had received information from **Memusi** who testified in the main trial as **PW11** that he had two suspects whom they interrogated in the presence of their relatives at the police station and the 2<sup>nd</sup> accused mentioned the 1<sup>st</sup> accused and that he gave the information voluntarily. He stated that they were carrying guns AK 47 and that they took the accused to Loresho Police Station for interrogation. He stated that he interrogated the accused and then took him to **Inspector Tuksho** for his confession as required under the law. He later on learned that **PW1** knew the 1<sup>st</sup> accused who was his friend. He stated that he had been following the subject matter for two weeks and had through that obtained a lot of information. He stated that the accused voluntarily gave them the information.

5. **PW2 INSP. JOSEPH TUKSHO** stated that **CORP. SANG PW1** brought to him the accused with a request that he takes his confessionary statement. He talked with him at length before he recorded his statement. After recording the statement the accused countersigned it. He stated that he did not have any medical conditions and was physically fit. He confirmed under cross-examination that he gave the accused a standard form to sign, noting that the accused voluntarily went to the police station to report and was then arrested. It was his evidence that he asked the accused several questions for clarification. When **PW1** brought him he said he was ready to confess since he already had information that the 1<sup>st</sup> accused was from Keroka. He asked the 2<sup>nd</sup> accused for how long he had known him. It was his evidence that the accused was never threatened, intimidated or tortured.

6. The accused testified as **DW1** in unsworn statement and said that he used to carry goods at the market and on the material day met his

friend **PW1** in the main trial who told him that he was wanted by **Inspector Memusi** of Spring Valley in respect of a dispute between taxi drivers and *boda boda* operators. It was his evidence that he went with **PW1 DAUDI NYONGO** but did not find **Memusi**. They later on went back and met Memusi who introduced him to two guests which included **PW2** in the trial within trial, who told him that they had some information which they wanted him to clarify. At that point he removed his phone and showed him pictures of ten (10) men whom he did not know. He was then asked whether he knew Momanyi and he replied in the negative.

7. It was his evidence that at that stage **PW2** told him that they had information that they used to carry out murder and that he had carried Momanyi to go kill along Mombasa road to which he replied on the negative. At that stage one of the officers slapped him, hit him on the ribs and handcuffed him. He denied having any information and at that stage they called **DAUDI NYONGO (PW1)** who came and explained to the officers what had happened and since he did not respond, he was warned of being defiant and the consequences thereof. They were then taken to a field and **PW1** asked to go get a knife from the house which he did in which he used to cut a cane which the officers used to attack him for ten (10) minutes. He was then taken to Kangemi where the officers bought a cellotape and polythene paper which they used to cover his mouth and face as they continued to assault him. He declined to give any information. He was then told that if he wanted to be alive and return back to his family he should confirm what Daudi had said or else they will kill him. He declined to confirm but since he had seen the possibility of death he told the officers that what Daudi had said was true.

8. He stated that he was tortured by the police using pliers on his left hand until the skin came out. He was then put together with **Daudi Nyongo** and **Memusi** to Nairobi area where he was given a statement to sign. He was in a state of confusion at the time having not eaten and was never treated. He was later on referred to Kenyatta National Hospital. He denied giving the statement voluntarily and that what he told the police officers was what **Daudi Nyongo** had said.

## SUBMISSIONS

9. On behalf of the prosecution it was submitted that in determining whether any statement is to be admitted, the voluntariness in making the statement is the main test as was stated in the case of **CAROLINE WANJIKU WANJIRU & ANOTHER v REPUBLIC [2015] eKLR** where the court held that the statement was made voluntarily in compliance with **Rule 4 (1) of the Evidence (out of Court Confessions) Rules**. It was submitted that the position was restated by Meoli J. in **REPUBLIC v PATRICK MWANGI GITAU & 3 OTHERS [2018] eKLR** where the Judge stated:-

*“The administration of the caution is the safeguard for ensuring the voluntary nature of a statement recorded in an extra judicial setting.”*

It was submitted that as long as the statement was made voluntarily it is admissible as evidence.

10. On behalf of the 2<sup>nd</sup> accused Mr. Ogada submitted that what is contained in the statement intended to be produced does not amount to confession since the accused only narrated what happened on 7<sup>th</sup> May 2015 without admitting to anything criminal on his part. It was contended that there was no evidence that he had knowledge of the planning or intention to commit an offence. He was a mere driver whose life was equally in danger since there is evidence that the 1<sup>st</sup> accused allegedly later attempted to buy his silence, but when he gained courage, he voluntarily went to the police and told them his story. It was contended that the accused should have been used as a witness in the main trial. It was submitted that the rules for taking confessions were not complied with in taking the statement as **PW2 JOSEPH TUKSHO** told the court that he used a standard form in taking the confession. The accused was not accorded the option to write the statement himself neither was he given legal aid or the presence of a third party. In support of the submissions reliance was placed on the case of **REPUBLIC v KIBON KIBELION [2018] eKLR**.

11. It was submitted that the accused was interrogated in a police station, then interrogated in a field and on the way to Nairobi Area Police Headquarters. The accused it was stated had testified that he was interrogated in a coffee plantation. It was submitted that there was no evidence or clear evidence that the accused was informed of his right to presence of a third party neither was he offered opportunity or means of communication with a third party and therefore his alleged confession does not qualify as a confession, which is a mandatory requirement of the law for which the case of **REPUBLIC v ELLY WAGA OMONDI [2015] eKLR** was tendered in support.

## DETERMINATION

12. As stated by Justice Mutuku in the case of **REPUBLIC v ELLY WAGA OMONDI (supra)**, the law governing confessions in Kenya is the Constitution of Kenya 2010, the Evidence Act, the Evidence (out of Court Confessions) Rules, 2009 and case law. She goes on to define confession as follows:-

*“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.”

13. Our courts are called upon to be vigilant and cautious in instances where the State relies for conviction of an accused solely on statements in form of admission or confession made to police officers. The duty placed upon the prosecution and then finally the court is to ensure that an accused person's constitutional right to fair trial is protected. In the South African case of **R v GEARN - GEARN 2015 (2) SACR 501 (SCA)** Cachalia JA. stated as follows:-

*“When confronted with confessions made by suspects to police officers while in custody, even when those officers are said to be performing their duties independently of the investigating team, a court must be especially vigilant . For such people are subject to the authority of the police, are vulnerable to the abuse of such authority and are often not able to exercise their constitutional rights before implicating themselves in crimes. Experience of courts with police investigations of serious crimes has shown that police officers are sometimes known to succumb to the temptation to extract confessions from suspects through physical violence or threats of violence rather than engage in the painstaking task of thoroughly investigating a case. This is why the law provides safeguards against compelling an accused to make admissions and confessions that can be used against him in a trial.”*

14. With the above legal position in mind I now turn to look at the twin issues of whether the statement by the 2<sup>nd</sup> accused amounted to confession and whether it was voluntarily given and therefore admissible. For record purposes, the said statement has not been produced in court and therefore the court is not privy to its contents. Mr. Ogada has submitted that it is not a confession since the accused has not admitted in taking part in the planning and execution of the offence herein but only confirmed that he took the 1<sup>st</sup> accused to the scene. Without going in detail thereof as I have not seen the same save for the submissions by Mr. Ogada on behalf of the 2<sup>nd</sup> accused, it is clear that he confessed having been with the 1<sup>st</sup> accused at the scene whatever his role was and based on the broader definition of confession, I am of the considered opinion and hold that the same amount to confession within the law. Should I be wrong in this holding, then as submitted by Mr. Ogada if the same was not a confession or admission, I take the view that the 2<sup>nd</sup> accused will suffer no prejudice by its production.

15. On whether the same was voluntarily recorded, I have looked at the prosecution evidence and the evidence of the accused person. It is clear that the accused took himself to the police station in the company of **Daudi Nyongo** who was known to **Inspector Memusi** and the 1<sup>st</sup> accused as per his evidence in chief and under cross-examination. The accused went to the station so as to put his side of the story as stated by Mr. Ogada in his submissions. The police already had the statement of **DAUDI NYONGO (PW1)** who was with the 2<sup>nd</sup> accused and therefore I do not see any reason why they would go to great lengths to subject him to torture. All throughout the period of his interrogation he has admitted that his friend **PW1** was within the vicinity. There is evidence on record that he was informed of his right under the confession rules and he made an election.

16. I had the opportunity of seeing **Mr. Sanga** and **Mr. Tuksho**, whereas looks can deceive I am not persuaded that the accused's account of what happened before he recorded his statement is true. Though there may have been some lapse in compliance with the confession rules, I am persuaded that the statement whether it amounts to confession or not which the court will have to decide upon when produced, was voluntarily given by the 2<sup>nd</sup> accused to **Chief Inspector Joseph Tuksho. PW1 DAUDI NYONGO** corroborated the content of the alleged confessionary statement in his evidence in chief and under cross-examination during the main trial and without commenting on its evidential value, I find that it is admissible in evidence.

17. I would therefore allow the prosecution to tender in the said statement in evidence as the same was obtained in conformity to the general set rules under the Evidence Act and it is hereby ordered.

Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of July, 2019.

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**J. WAKIAGA**

JUDGE

In the presence of:-

*Ms Mwaniki & Mr. Naulikha for the State*

*Mr. Ogada for Mochere for the 1<sup>st</sup> accused*

*Mr. Ogada for the 2<sup>nd</sup> and 3<sup>rd</sup> accused*

*All 3 Accused persons - present*

*Court assistant Karwitha*