REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

CRIMINAL CASE NO. 57 OF 2016

LESIIT, J

REPUBLIC .....PROSECUTOR

V E R S U S

FREDRICK OLE LELIMAN .....1ST ACCUSED

STEPHEN CHEBURET MOROGO .....2ND ACCUSED

SILVIA WANJIKU WANJOHI.....3RD ACCUSED

LEONARD MAINA MWANGI.....4TH ACCUSED

PETER NGUGI KAMAU .....5TH ACCUSED

RULING ON APPLICATION FOR REVIEW OF RULING ON ADMISSIBILITY OF THE 5TH ACCUSED STATEMENT

1. The 5th accused has moved this Court by way of a Notice of Motion dated 7th August, 2019 and supported by his affidavit seeking two orders:

a) That the court be pleased to review its ruling dated 16th May, 2019 finding that the statement of confession was admissible evidence.

b) That the court be pleased to issue any order it may deem necessary.

2. The application is premised on four grounds: That:-

a) Confessions are generally inadmissible in this jurisdiction

b) The court erred in finding that the provisions of section 26 of the Evidence Act applied to the question of admissibility of the statement of confession

c) Out of court confessions and all ancillary provisions of law were outlawed and repealed, respectively, by section 99 of the Criminal Law Amendment Act,2003

d) **The evidence (out of court confessions) rules, 2009 have no force in law.**

3. Mr. Michuki Learned Counsel for the 5th accused urged that the court has jurisdiction to hear the application by dint of Articles **50(1), 159(2)(a),(d), (e), 165(3)(a)** of the **Constitution**. Counsel further urged that **Section 26** of the **Evidence Act** which this court relied on in its ruling does not apply to out of court confessions as it was amended by **Section 99, 100, 101 and 102** of the **Criminal Law Amendment Act No.5 of 2003.**

4. Mr. Michuki submitted that further amendment that was carried out by **Criminal Amendment Act No. 7 of 2007** could not be deemed to have re-instated the force of law in **section 26** of the **Evidence Act** in regard to confessions. He urged that in the **Ev. Act (Out of Court confessions) Rules of 2009,** there was a critical requirement under **Rule 15** of the **Rules** which required the Rules be published in Kiswahili. Counsel urged that the requirement was never complied with and that that failure to publish the Rules in Kiswahili rendered them nugatory. He urged that therefore the Rules which the court relied upon in the impugned ruling have no force of law. Counsel urged that the court

should review its ruling and find the confession inadmissible.

5. Mr. Mutuku Learned Prosecution Counsel opposed the application. Counsel urged that the application was incompetent and based on misleading points of law. Counsel submitted that once the trial within trail was heard, the court had to rule on it while bearing in mind the provisions of **section 26** read together with **section 27**of the **Evidence Act.** Counsel urged that the contention that confessions were outlawed by the **Criminal Law Amendment No.5 of 2003** was misleading because the **Evidence Act (Out of Court Confession) Rules** of **2009** were actualized by a **Gazette Notice No. 41 of 2009** dated 27th of March of 2009.

6. Mr. Mutuku urged that the court was being asked to sit on appeal of its own decision. Counsel urged that no law or procedural law allows for such an avenue. Counsel relied on three cases, **Republic vs. Abolfathi Mohammed & another (2019) eKLR; Director of Public Prosecutions V Betty Njoki Mureithi (2016) eKLR and Bernard Ombuna V Republic (2016) eKLR** to buttress his argument.

7. Learned Senior Counsel Mr. Fred Ojiambo representing the victims filed grounds of opposition and submissions dated 26th August, 2019 and placed reliance on them fully. The gist of the grounds of opposition is that the application has no foundation in law particularly on the law governing criminal trial process in Kenya, since it seeks a review of a superior courts own decision. Counsel contended that the application was an appeal disguised as an application for review. Counsel urged that the court having delivered its ruling on 16th May, 2019 lacked jurisdiction to determine the alleged errors of law on which the application challenging the ruling was anchored.

8. Learned Counsel Prof. Sihanya for the Law Society of Kenya urged that the application was incompetent because the court was rendered *functus officio* once it made a ruling on the trial within trial. Counsel urged that no grounds were laid to justify the review urged. Counsel urged that by dint of **Section 2** of **The Interpretation and General Provisions Act,** once laws are gazetted and courts have used them, there is a presumption of legality. Counsel relied on the cases cited by the Prosecution Counsel. In addition he cited **Caroline Wanjiku Wanjiru & another v Republic** a Supreme Court Case which he failed to supply.

9. In a quick rejoinder, Mr. Michuki urged that the application was not brought under the revisionary jurisdiction of the High Court but rather under the inherent jurisdiction of the Court to control the court processes. Counsel urged that in light of the falling out of the 5th accused and his initial Counsel, the court should interfere in the interests of justice.

10. I have considered the application by counsel for the 5th accused and the responses by the prosecution and the counsels for the victims and LSK.

11. The jurisdiction of the court to hear or entertain a matter is everything. I have looked at the manner in which this application was crafted. On the Notice of Motion application, no law is cited. Instead the Applicant quotes several provisions of law which are cited below the citation of the case.

12. From the Constitution is cited **Art. 50 (1)** which gives courts the duty to accord parties appearing before it a fair hearing; **Art. 159 (2)** which sets out the principles that should guide the courts as they exercise judicial authority and **Art. 165 (3)** gives the High Court unlimited original jurisdiction in criminal and civil matters. The **High Court (Org. and Admin.) Act sections 3** and **25** are also cited. The two provisions provide that the court should be guided by the values and principles in the Constitution and also by the rules of practice and procedure prescribed by written law. Also relied on are various sections under the **Interpretation and General Provisions Act**, all which give guidance on interpretation generally.

13. These provisions of law do not confer on this court jurisdiction to entertain an application of review of its own orders. What the Applicant is seeking from this court is to review the ruling of 16th May, 2019 in which his statement was admitted to evidence. Mr. Michuki has urged that the Applicant is invoking, not the revisionary powers of the court, but the inherent jurisdiction.

14. The extent of inherent powers of the court was eloquently explained by the authors of the **Halsbury's Laws of England, 4th Edn. Vol. 37 Para. 14** as follows;

> ***"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process … In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."*** **See also Meshallum Waweru Wanguku (1982 -88) 1 KAR 780.**

15. The above definition is of persuasive authority to this court. I agree to be guided by it. It shows what the inherent jurisdiction of the court is, and how it can be used. This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process.

16. The inherent jurisdiction of the court is not applicable here and does not aid the Applicant. The court made its ruling on the admission of a statement made by the 5th accused to police during the investigations into this case. I have been informed that an error occurred in the

application of law and its interpretation and that various laws were cited which I was informed I misapplied or misconstrued. This court cannot be asked to check again how it interpreted or applied the law, for purposes of correcting its mistakes. Not even its inherent power can assist to do what I have been invited to do. There exists clear provisions of law that spells out to an aggrieved party how to approach the court to remedy its grievance.

17. **Section 354** of the **Criminal Procedure Court provides:**

> **"354….**
>
> **(3)The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—**
>
> **(d) in an appeal from any other order, alter or reverse the order,**
>
> **and in any case may make any amendment or any consequential or incidental order that may appear just and proper."**

18. The jurisdiction of the court of appeal is set out under **Art. 164** of the **Constitution** thus:

> **"164**.
>
> **Court of Appeal**
>
> **(1)…**
>
> **(2)…**
>
> **(3) The Court of Appeal has jurisdiction to hear appeals from—**
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> **(a) the High Court; and**
>
> **(b) any other court or tribunal as prescribed by an Act of Parliament."**

18. The **Appellate Jurisdiction Act** provides, at **section 3** as follows:

> **"Jurisdiction of Court of Appeal**
>
> **(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.**

(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

19. **(3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court."**

20. The Applicant has an option to appeal this court's decision to the court of appeal, or to apply for a review as the case may be. That is the avenue open to the Applicant. To ask the court to review its own ruling is akin to asking the court to sit on appeal from its own ruling, a power that it does not have.

21. Before I end this ruling I wish to sound a word of caution in this case. This case has taken long. Numerous applications have been made and rulings written. I do think that it is a very healthy thing and a great contribution to jurisprudence especially because the applications have been around new areas of law and procedure. However, this has dragged the matter for long. I just want to implore the parties in this case, and especially their lawyers to allow this case come to its logical conclusion. There is no better way of putting this than in the words of the Court of Appeal in **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, where the court held that:

> **"In ordinary criminal trials, there is generally no interlocutory appeals allowed. For section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; Muga Apondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal. But the basis of this appeal, as far as we are concerned is that the learned Judge made an order in the course of the trial which violated the appellant's fundamental rights guaranteed by section 77 of the Constitution. Whether that order was made pursuant to section 60 (1) of the Constitution, and we have found it could not have been made under that section, or whether it was made pursuant to the exercise of inherent jurisdiction as the learned Judge said he was doing, the effect of the order was to violate the appellant's rights under section 77. The appellant had two choices. He could have chosen to wait until after the determination of the charge against him and if he was convicted, he would be entitled to appeal on all aspects of the trial.**

Secondly, he had the option to appeal under section 84 (1) of the Constitution."

22. However the Court also expressed itself as follows:

> **"We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under *section 84 (7)* of the Constitution. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practicing at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court."**

23. Having so stated I find that the jurisdiction the Applicant has invited this court to exercise in his application does not exist, and that consequently the application is incompetent and accordingly struck out.

24. Those are my orders.

DATED AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2019.

LESIIT, J.

JUDGE