REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 57 OF 2016

LESIIT, J.

BETWEEN

PETER NGUGI KAMAU..APPLICANT

AND

REPUBLIC...RESPONDENT

IN

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 ON OBJECTION TO EVIDENCE ON SCENE RECONSTRUTION

1. Mr. Michuki, Learned Counsel for the 5th accused has opposed the production of a DVD and transcriptions of that evidence which was marked P.MF1 92A, 93B and 93C. The objection is grounded under **Article 50 (2) (l)** of the **Constitution**, **section 25A** of the **Evidence Act** and **Rule 6(2)** of the **Evidence (Out of Court Confession) Rules**.

2. The objection raised by Counsel for the 5th accused is four faceted. One that there was non-compliance with the **Evidence Act (Out of Court Confession) Rules**, hereinafter referred to as the **Rules**. Two that the involvement of the Investigating Officer violated the 5th accused rights against **section 25A** of the **Evidence Act**. Three that there was lack of basis of authority exercised by PW40 in this case. Four that there was lack of statutory power to compel the 5th accused give the evidence in question.

3. I will deal with the first two grounds together. Mr. Michuki argues that PW40 should have complied with **Section 25A** of the **Evidence Act** and the **Rules** while carrying out the Crime Reconstruction. In particular Mr. Michuki singled out **Rule 6(2)** and urged that apart from PW40's evidence in court that he cautioned the 5th accused (herein after the accused) there was nothing before court to show that any caution was given.

4. For that proposition, Counsel relied on a persuasive decision in **Republic vs. Mark Lloyd Steveson [2016] eKLR** where Ngugi Joel, J observed:

"I believe that this statement captures the position under the Kenyan Constitution. The right against self-incrimination covers both testimonial as well as documentary evidence. As long as the evidence sought to be adduced is or was compelled either in court or outside court by an investigating officer or some other person in authority, such evidence is given due to testimonial obligation and will be excluded from the criminal trial of the accused person who is so compelled.

It follows that any questioning of or eliciting of any documents or things from an accused person without the proper administration of caution or under circumstances in which the rules on confessions would apply is covered by the right against self-incrimination."

5. Mr. Mutuku, Learned Prosecution Counsel in response urged that the objection was premature, confusing, incompetent and based on the wrong provision of law. It was Mr. Mutuku's submission that the submission heading of **Article 50** was 'Fair Hearing' and that to him it meant the provision can only be invoked by the accused to refuse to give self-incriminating evidence during his trial. Counsel urged that **Article 50(2)(1)** applies in the future and not the past, meaning it cannot apply to events which took place before the trial.

6. Mr. Mutuku urged that what the prosecution was seeking to adduce in evidence was a recording which took place on 10th August 2016, documented under the provisions of **section 106(A)** and **(B)** of the **Evidence Act**. Counsel submitted that the accused was not being asked to give certain information documents or otherwise, which, if it were the case the accused would have a right to refuse to give such evidence.

7. Mr. Mutuku urged that the objection was premature because the content of PMFI 92A have not been played and further that the defence had not particularized what was self-incriminating in that evidence. Learned Prosecution Counsel urged that it was only during cross-examination of the witness, PW40, that any serious attack on the evidence can happen.

8. Counsel argued that **Rule 6** does not apply as PW40 was not recording a confession. He urged that PW40 cautioned the accused and explained his rights to him following which the accused agreed to take them to the scene.

9. Mr. Mutuku relied on the decision of this court in **Republic vs. Fatma Okoth Criminal Case No.9 of 2017** and in particular where I observed:

"The Article (50) applies to the trial process. Sub-Article (2)(1) should therefore be interpreted in light of sub-Article I. That means that it is during the trial before court (as appropriate in this case) that the accused can refuse to self-incriminate herself. That means that it is the accused herself who has the right not to give self-incriminating evidence directly and not through proxy. What is being challenged is the testimony of PW3. That evidence cannot be equated to accused evidence. I find that the Article quoted does not assist the accused and does not apply".

10. Mr. Mutuku also relied on the case of **Republic vs. Timothy Mwenda Gichuru and others Meru High Court Criminal Case No. 4 of 2017** where Gikonyo, J cited other cases in agreement thus:

"But suffice it to cite what Majanja, J stated when he encountered this question in the consolidated Petition of Richard Dickson Ogendo & 2 Others vs. Attorney General & 5 others [2014] eKLR that:

'To my mind, the privilege of an accused person not to incriminate himself, protects against compulsory oral examination for the purposes of extorting unwilling confessions or declarations implicating the accused in the commission of the crime.'

Kamau, J also dealt with this question in the case of Republic vs. John Kithyululu [2016] eKLR and stated the following:

'Having said so, it is clear from the aforesaid decided cases that an accused person's right against self-incrimination constitutes giving oral or documentary testimony against himself and does not extend to taking of blood samples to prove a particular fact. There is therefore only a bar of communications and testimony by an accused person. Article 50 (2) (1) of the Constitution of Kenya therefore relates to communication that may be obtained from an accused person through coercion, unfair or unconstitutional means.'

Odero, J similarly dealt with the question in the case of Republic vs. Amos Kipyegon Cheruiyot [201] eKLR and reached similar conclusion.

On my part, I agree with the postulation of the law in the foregoing cases and come to the same conclusion that the right of an accused not to incriminate himself, protects against compulsory oral examination for the purposes of extorting unwilling confessions or declarations implicating the accused in the commission of the crime."

11. Mr. Mutuku also relied on the case of **Republic vs John Kithyululu Voi High Court Criminal Case No. 12 of 2015** where Kamau, J observed:

"The question of self-incrimination has been dealt with in several cases. In the case of Richard Dickson Ogendo & 2 others vs. Attorney General & 5 others [2014] eKLR, Majanja, J stated as follows: -

'To my mind, the privilege of an accused person not to incriminate himself, protects against compulsory oral examination for the purposes of unwilling confessions and declarations implicating the accused in the commission of the crime. The purpose of protection against self-incrimination was summed up by the **US Supreme Court in Miranda vs. Arizona 384 US 436 [1996]** where

it was observed as follows**:**

> ‘All these policies point to one overriding thought; the Constitutional foundation underlying the privilege is the respect of a government, state or federal must accord to the dignity and integrity of its citizens. To maintain a ‘fair State – individual balance, to require the government to shoulder the entire load’ to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labours, rather than by the cruel, simple expedient of compelling it from his own mouth….’
>
> **In <u>Schmerber vs. California, 384 US 757 [1966]</u> the United States Supreme Court held that the compulsory talking of blood for analysis of its alcohol and its use in evidence did not violate the defendants’ privilege against self-incrimination.”**

12. The Learned Counsel for the LSK Prof. Sihanya adopted the submissions by the State. He urged that there was lack of specification and particularization regarding the violations alleged. He underscored the importance of precision in pleading violation and cited **<u>Okutoyi vs. Olaka Petition No. 457 of 2015</u>** where the court observed;

> **“It is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis of it. This was stated in the case of <u>Anarita Karimi Njeru vs. Republic (No.1) – (1979) KLR 154</u> where the court stated:**
>
> ‘if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable decree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are infringed.’ (see also Meme vs. Republic & Another [2004] eKLR 637).

13. This principle was emphasized by the Court of Appeal in **<u>Mumo Matemo vs. Trusted Society of Human Rights Alliance [2014] eKLR</u>** where court stated that:

> **‘The principle in <u>Anarita Karimi Njeru</u> (supra) underscores the importance of defining the dispute by the court. Procedure is also a hand maiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in <u>Anarita Karimi Njeru</u> (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.’**

14. Regarding the right against self-incrimination, Prof. Sihanya urged that the court had a duty to balance accused rights *vis a vis* those of victims, a matter this court counsel urged, held in a ruling which was upheld by the Court of Appeal. The ruling Counsel referred to was ruled by this court in this case and the matter in issue dealt with the scope of victim participation at a criminal trial.

15. Counsel urged that in **<u>Republic vs. Okoth</u>** a decision of this court, it is clear that self-incrimination claim by the accused does not apply here since, Counsel urged, the evidence adduced by PW40 was not being adduced by the accused. Prof. Sihanya urged that where the accused leads to recovery, such evidence is generally admissible for that proposition. Prof. Sihanya cited the case of **<u>Republic Vs. Ahmad Mohamed & Said Musaji Supreme Court Case No. 29 of 2019</u>** for the proposition that evidence from an accused leading to discovery is generally admissible in evidence. I will quote part of the paragraphs he relies on:

> **“… We agree with it that interviewing suspects is a standard operating procedure in criminal investigations… If it happens that the explanation the suspect gives is an admission of a material, ideally the police are required to invoke the provisions of section 25A of the Evidence Act. If they do not, bearing in mind the distinction between an admission and a confession as stated above, such admission is admissible in evidence but, unlike a confession, it cannot on its own found a conviction…It therefore follows that admissions, though not meeting the criteria set out in section 25A(1) of the Evidence Act, are admissible. In the circumstances, we find that in its holding that *“information from an accused person leading to discovery of evidence is not admissible outside a confession…”* , the Court of Appeal equated evidence proceeding from a suspect leading to a discovery to a confession.”**

16. Prof. Sihanya emphasized the need for the objection raised to prove that the evidence complained off was not just illegally obtained but that it was prejudicial to the accused. For that proposition counsel relied on the five-judge bench High Court decision in **<u>Hon. Philomena Mbete Mwilu vs. DPP & others Constitutional Petition No. 295 of 2018</u>**.

17. I will deal first with the first two facets of the objection by the accused (5th). The guiding principles discussed by Prof. Sihanya in his submissions are correct. There can be no argument against the principle that a person seeking relief for violations of a right or fundamental freedom must plead his case with precision the constitutional right infringed, the nature or manner of the infringement and the jurisdictional basis for his claim. That is the principle discussed in the cases he cited, **<u>Okutoyi Vs Olaka</u>**, supra and **<u>Mumo Vs Trusted Society of Human Rights Alliance</u>**, supra. Prof Sihanya was of the view that the accused failed to comply with this principle, and Mr. Michuki in response urged that all the accused wanted the court to do is note the violations and declare the DVD recording inadmissible.

18. I think that the accused was clear enough in his complaint and has gone ahead to even quote the sections of the law he believes have been ignored thus leading to violation of his right.

19. The accused is seeking to have the DVD and the transcripts made in its regard avoided in evidence and his grounds for so seeking are set

out in this ruling. What constitutes self-incrimination has been discussed in various cases, some of which have been cited by the parties, and which I have done my best to set out sufficiently for our purpose, in the body of this ruling. Among such was **Rep Vs Steveson**, supra, **Rep Vs Gichuru and others**, supra, **Rep Vs Kithyululu**, supra, and **Kihato Vs DPP**, supra.

20. The law on the right to refuse to give self-incriminating evidence is clear, and the test of admissibility applicable is clear. An accused person's right against self-incrimination constitutes giving compulsory oral or documentary testimony, and covers evidence recorded, whether by hand or electronically, obtained from an accused person through coercion, unfair or unconstitutional means for purposes of implicating the accused to the commission of crime. In order to guide the process of testing whether the evidence complained of should not be admitted, one needs to answer the following questions, that is, was the evidence:

a) Testimonial or documentary;

b) Solicited from the accused;

c) By the investigating officer or person in a position of authority;

d) Without proper administration of caution;

e) Obtained in circumstances where the Confession Rules apply?

21. PW40 in his evidence told the court that his duties entailed analyzing of photographic imaging, writing reports and presenting them to court. He testified that on the 10th August, 2016, CIP Clement Mwangi, the Investigating Officer of this case, asked him to assist him in Crime Scene Reconstruction. He said that he was introduced to the 5th accused who was to assist in the process. PW40 said that he read the charge to the accused and explained to him his role in the reconstruction, which was to take him (PW40) and the Investigating Officer through all the events at the various scene areas, from first to last, of what happened. He said that the accused understood the charge and agreed to take them to the various scenes. He said that his role was to record in video assisted by a colleague, as the Investigating Officer, who was in company of three other investigators of the same case, interviewed the accused. The exercise entailed going from one scene to another as all of them played their different roles.

22. What was PW40 and the Investigating Officer doing in this case on the 12th August, 2016? I have heard of the so-called Crime Scene Reconstruction of a scene of crime, usually by a Crime Scene Officer assisted to identify the scene by the investigating officer or police officer who visited the scene when the body of the deceased in the case being investigated was in situ. In this case, the murder incident had taken place about a month and a half before the Scene Reconstruction, and from the evidence, none of the Investigating Officers had personal knowledge of where the crime scene was. It is therefore quite clear from PW40's evidence that it was the accused who was to help them identify the various scenes, as PW40 describes them in his evidence.

23. Was this a case of the Investigating Officer or other person in authority, soliciting from the accused, testimonial or documentary evidence, in circumstances where the Confession Rules apply? The answer to all these questions is in the positive. The test as to whether there was proper administration of caution is not challenged by the defence. The point is that PW40 and all the other officers he was with, including the Investigating Officer were soliciting evidence from the accused with which they hoped to identify the various scenes of interest in the case they were investigating, in order to achieve reconstruction of the crime scene.

24. **Section 25A** of the **Evidence Act** provides as follows:

> "**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.**

25. The cardinal rule is that once the investigating officer decides to have a confession taken from a suspect, he has to get another officer qualified to take such statement to take it from the suspect. And, as **Section 25A** provides boldly, the investigating officer cannot be involved in that process. The Investigating Officer made a mortal blunder when he designed the scene reconstruction, not only with him included in the process but being the one interviewing and therefore soliciting the evidence from the accused.

26. Before I end on this facet of the objection, I wish to put the record straight. The case of **R. Vs. Fatma**, supra, does not apply to this case because the evidence objected to was not evidence solicited from the accused, neither was it obtained by a person in position of authority or investigating officer. The accused herself called a friend and made admissions relevant to the case.

27. The case of **R.Vs. Gichuru,** supra, and **R. Vs. Kithyululu**, both dealt with whether the taking of blood samples from an accused violated accused right against self-incriminating. The principle on the right against self-incrimination applies to this case but the facts do not. The courts in both cases ruled '*that the right of an accused not to incriminate himself, protects against compulsory oral examination for the purposes of extorting unwilling confessions or declarations implicating the accused in the commission of the crime and does not extend to taking of blood samples to prove a particular fact*.'

28. Mr. Michuki for the accused challenged the authority of PW40 to carry out recordings in question in this objection for reason the Gazette Notice No. 407 of 18th January 2010 he gave as the one donating authority to him to act does not exist.

29. Mr. Mutuku in response submitted that the error which occurred in PW40's testimony was in the date of the Gazette Notice which was 22nd January, 2010 not 18th January as PW40 stated in his evidence. The point is that the Gazette Notice No. that PW40 gave was inaccurate and if there is a correct one is a matter for the prosecution to address.

30. The fourth facet of the accused objection was regarding scene reconstruction. Mr. Michuki submitted that the scene reconstruction and the evidence sought to be produced was not independent of the will of the accused. Counsel urged that there was no statutory power under which the accused could have been compelled or required to give evidence sought. For that proposition, Counsel relied on **James Njenga Kihato vs. DPP & 4 others Kiambu Petition No. 3 of 2016** where J. Ngugi, J held:

> **"The right to refuse to self-incriminating evidence is predominately applied to protect an accused person against testimonial evidence; it does not apply to use of State's compulsory powers to obtain evidence of crime where the evidence sought to be so obtained exists independently of the will of the suspect as is the case here."**

31. Prof. Sihanya in apparent response to Mr. Michuki's submission urged that the case of **Rep. Vs. Kihato**, supra, did not assist the accused. Learned counsel for LSK cited that the Supreme Court in **Rep. Vs. Ahmad Mohammed**, supra, and urged that the evidence of PW40 was evidence leading to discovery and is admissible.

32. I have already set out the holding of the Supreme Court in the **R. Vs. Mohammed**, supra. The Supreme Court was considering admissibility of information leading to discovery of material evidence. The Court discussed when such evidence can be considered as an admission, and when it is a confession, and the implications of either in terms of the law applicable and to which effect in terms of evidence.

33. In that case, the accused had given information which led to the discovery of explosives material. The Court found that information leading to the discovery of evidence was an admission, not a confession, and was admissible. The Court held that where evidence is found to be a confession, it will be admissible subject to invocation of **section 25A** of the **Evidence Act**. The Court further held that such evidence cannot found a conviction unless it is corroborated by other evidence.

34. The point is that PW40 and all the other officers he was with, including the Investigating Officer were soliciting evidence from the accused with which they hoped to identify the various scenes of interest in the case they were investigating, in order to achieve reconstruction of the crime scene. That action put in the proper language was the compulsory oral examination of the accused, in total disregard of the law on confessions and the Rules, for the purposes of extracting declarations implicating the accused in the commission of crime. It was an action that required to be subjected to the statutory and procedural law and rules on taking of confessions. It was therefore an action which required compliance with **section 25A** of the **Evidence Act** and the **Evidence (Out of Court Confession) Rules**. There was no such compliance.

35. Before I conclude, Mr. Mutuku learned counsel for the state urged that the objection was raised prematurely, and ought to have been raised after the DVD was played. The objection raised concerned flouting of constitutional rights of the accused, and legal and procedural Rules on confessions in the evidence of PW40. The evidence adduced by PW40 was sufficient for the court to determine the objection raised. It was not even necessary to declare a trial within trial. In my considered view, the objection was not premature.

36. I think I have said enough in this ruling.

37. In conclusion, I uphold the objection by the 5th accused. Consequently, I hold that the evidence of Crime Scene Reconstruction recorded by PW40 in the DVD, P. MFI 92A, and transcriptions P. MFI 93B and P. MFI 93C inadmissible for reason they violated statutory provisions of law and the Rules of Evidence, and consequently violated the right of the 5th accused against self-incrimination.

DATED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2019.Objection

LESIIT, J.

JUDGE