REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL CASE (MURDER) NO. 64 OF 2015

(Formerly Nakuru HC.CR.C. 101 OF 2014)

REPUBLIC...PROSECUTOR

-VERSUS-

PATRICK MWANGI GITAU...................................1ST ACCUSED

JOSEPH MAINA NJUGUNA..................................2ND ACCUSED

AGNES NJERI HINGA..3RD ACCUSED

ROSE WAMBUI MWERI..4TH ACCUSED

R U L I N G

1. The four Accused herein were charged before the High Court of Kenya at Nakuru with the Murder of **Lucy Wambui Ngei**, a sister in law to the 3rd and 4th Accused persons. The offence allegedly occurred on 18th September, 2014 along Maai Mahiu Naivasha Highway. A trial within trial was held upon the defence objection to the production of a confession, allegedly recorded by the 3rd Accused before Hon. Kimilu, PM at Naivasha Law Courts on 29th September, 2014.

2. During the trial within trial, the learned magistrate testified, as did the 3rd and 4th Accused. From the testimony, on both sides, there is no dispute that the two Accused had been arrested about seven days prior to the 29th September, 2014 and held by police in Dagoretti before being handed over to Naivasha Police on 29th September, 2014, and on the same date taken before the learned magistrate. After a session lasting about one hour with the magistrate, the two Accused women appended their signature to a document whose contents they now dispute. That document is the confession in dispute.

3. As I understood, it the defence position is that the statement in question was not lawfully taken, as no caution was administered to the 3rd Accused, the suspect whose statement the **DPP** desires to produce. Secondly, that the said Accused was intimidated by the OCS Naivasha **CIP Owuoth** who allegedly remained present during the session.

4. In submissions, Mr. Owuor for the 3rd Accused cited non-compliance with Rule 5 (1) and (9) of the Evidence (Out of Court Confession) Rules (the Rules). Three Court of Appeal decisions were cited by the defence in support of their submission that the confession was inadmissible. These are **Tulo -Vs- Republic [2013]eKLR**, **Sango Mohammed -Vs- Republic [2013] eKLR** and **Kanini Muli -Vs- Republic [2014] eKLR**.

5. For his part, the DPP relied on the decision in **Alexander Kusimba -Vs- Republic [2014] eKLR** in support of the evidence by the learned magistrate that the statement was voluntary and lawfully obtained. The DPP argued that part 1 of the confession in dispute comprises a caution.

6. Having considered the evidence tendered in the course of the trial within trial (TWT), and the submissions, I take the following view of the matter. Section 25 of the Evidence Act defines a confession and states who may record a confession from a suspect.

7. Section 26 of the Evidence Act states that:-

> **"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 <u>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</u>**

<u>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.”</u> (Emphasis added)

8. These provisions are consistent with the right against self-incrimination as guaranteed in Article 49 (b) and (d) of the Constitution. The Rules stipulate the manner in which confessions may be obtained from Accused persons. Rule 5 (1) of the Rules provide that:-

> **“(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.**
>
> **(2) ………..;**
>
> **(3) ………..”**

9. In the instant case, **PW1** (in TWT) emphasized that she indeed orally cautioned the 3rd Accused before recording her statement. She admitted however that the words used in the first part of the disputed statement may not be the exact words in Rule 5 (1), but that nevertheless she did everything possible to assure herself that the 3rd Accused’s statement was voluntary.

10. As the Court of Appeal stated in **Kanini’s** case, the Rules bind judicial officers who record confessions in the same manner they bind police officers who act as recording officers. This is what **PW1** (TWT stated):

> **“I explained to her regulation (Rule) 4 of the Out of Court Confessions Rules. She said she could communicate in Kiswahili…….she said she was arrested on 24th September, 2014 and had no complaints…….I was satisfied that she understood the charge as I explained and that she had accepted to record the confession without being forced….. I told her what she stated might be used in the Murder case if she recorded one……I recorded what she said to me in English although she spoke in Kiswahili.”**

11. During cross-examination by Mr. Owuor the witness admitted that she did not include the caution in the proceedings but stated that:-

> **“I did ask the Accused if she was willing to make a statement. She and her sister (4th Accused) confirmed.”**

In further cross-examination by Mr. Gatonye the learned magistrate stated:

> **“I explained to the Accused orally that she was not obligated to say anything but what she said would be recorded.”**

In re-examination the witness said she treated the first paragraph of the proceedings as a caution.

12. In **Kanini Muli -Vs- Republic [2014] eKLR** the Court of Appeal stated that:-

> **“There are myriad authorities in this jurisdiction that attest to the necessity of such caution by magistrates and judges who take extra-judicial confessions. Way back in 1935 in *<u>REX -Vs- KINGURU S/O KABUTI</u> (1934-1936) EA 60,* the Court of Appeal for Eastern Africa held that where a prisoner is questioned by a magistrate without any warning the confession cannot be regarded as voluntary, and all the more so if he is questioned on an inadmissible confession. Later in 1944, in *<u>REX -Vs- NANTA S/O MDIMI</u> (supra),* the same Court reiterated the need to caution an accused person before his confession was recorded by a magistrate. In that case a confession had been recorded by a magistrate before the accused was subsequently tried for murder in the High Court. The Court of Appeal approved the reasoning in *<u>Republic -Vs- O’DONOGHUE</u> (1927) 20 Cr. App. R. 132* that <u>such an accused person has to be cautioned by the magistrate that he need not say anything unless he wished, and the record should show that in spite of the caution, the accused still wanted to make a voluntary statement. The Court further emphasized that the magistrate must *“satisfy himself by all reasonably possible means that the statement about to be made to him is entirely voluntary*</u>”.** *(Emphasis added)*

13. The administration of the caution is the safeguard for ensuring the voluntary nature of a statement recorded in an extra judicial setting. In this case **PW1** (TWT) has severally confirmed that she did administer the caution, albeit in words other than stated in the Rules and further did not record in the statement the words therein.

14. I do not doubt the assertion by **PW1,** and the 3rd Accused herself said nothing on this aspect. The question to be determined is whether the failure in form on the face of the statement vitiates the entire proceeding before the learned magistrate. This is what the first page of the disputed statement indicates:-

> **“<u>29/9/2014</u>**
>
> **Coram: E. K. Kimilu (Ag. PM)**

CC : Adah]

CIP : John Owuoth

CPL : Audrey Cherono

TIME : 2.00PM

CONFESSION STATEMENT

AGNES NJERI HINGA

I am a holder of ID Card No. [partuculars withheld]. I have come with my sister Rose Wambui Mweri holder of ID Card No. [particulars withheld] (witness present). I have no objection to making this confession in presence of officers mentioned above. I have not been forced, coerced or threatened to make this statement. I am making this statement voluntarily."

15. The 3rd Accused's words imply that the learned magistrate had inquired into the voluntariness of the statement, and although the words used in Rule 5 (1) may not appear in the said portion, it must be recalled that the rationale behind Rule 5 is not so much formal compliance by use of precise words therein, which could be inserted without a caution being actually administered. Rather, the rationale behind Rule 5 and indeed the entire Rules is the assurance by the recording officer that the statement is voluntary. The same can be said of the requirement of Rule 9 of the Rules which calls for a certificate of voluntariness to be completed by the recording officer.

16. Looking through the evidence for **PW1** (TWT) it is clear that though the learned magistrate did not comply with these formal requirements, she was at pains to confirm that the 3rd Accused statement was not forced. It is difficult to believe the defence version of events that transpired during the session, to the effect, that the 3rd Accused merely narrated events of her arrest while the remainder of the session involved a dialogue between the **CIP Owuoth** and the learned magistrate. Implicit in this is the suggestion that the two made up the contents of the statements. What interest would the learned magistrate have to behave in such a manner? Besides the two Accused signed the disputed statement. There is no evidence that they were forced to do so.

17. Rule 9 of the Rules also relates to voluntariness of the confession. The record shows that **CIP Owuoth** was present during the recording of statement. The trial magistrate denies this. However the 3rd Accused's opening statement suggests otherwise. There was also **CPL Cherono** and the court clerk. What the 3rd Accused claimed **CIP Owuoth** had told her on the way to court cannot amount to a threat: to **"go tell the truth which will set you free"** – a common statement which may not necessarily refer to temporal freedom.

18. She revised this statement in cross-examination by stating that she was promised that she would **"gain freedom"** if she recorded a statement. This is irreconcilable with her opening words as recorded by the magistrate. Her sister the 4th Accused who accompanied her throughout made no reference to such words nor that **CIP Owuoth** threatened the 3rd Accused while in the magistrate's chamber. **PW1** (TWT) denied that **CIP Owuoth** participated in the recording session and intimidated the 3rd Accused. She also stated that after the statement was ready, the sisters got a copy which they read, even after she had read it over to them both. Thereafter they appended their signatures to the statement.

19. It was not put to **PW1** (TWT) that she and CIP **Owuoth** invented the contents of the statement as the two Accused sat watching a verbal exchange between them. **PW1** stated in re-examination:

> **"(CIP Owuoth) did not in my presence say more than introduce her (3rd Accused) to me and purpose for bringing her. I did give English version of the statement to 3rd Accused. She read English version and she was satisfied. She signed in my presence and Rose W. Mweri (Accused 4). The Accused did not complain in any way concerning torture or intimidation. So far I am concerned the statement was made voluntarily without threat promise or inducement. I did not know of the 4th Accused would become a suspect."**

20. The mere presence of a person in authority such as **CIP Owuoth** if true does not necessarily mean that the 3rd Accused was intimidated. Indeed in her own evidence, the 3rd Accused was unable to state precisely how **CIP Owuoth** threatened her before and during recording of the statement, regarding the latter only stating that she was "somehow" intimidated.

21. Besides, the recording officer for purposes of the impugned statement was the learned magistrate, who had taken steps to assure herself of the voluntary nature of the statement. That is the crux of the matter. Other issues raised regarding language used in the statement appear to be an afterthought as clearly, the two Accused understood English and read the statement on their own after it had been read to them, before signing.

22. In **Kanini Muli -Vs- Republic [2014] eKLR** Court of Appeal stated at page 7 that:-

> **"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." (**Emphasis added).**

23. Notwithstanding the lapse occasioned by formal non-compliance with Rules 5 and 9, the magistrate took the necessary steps to ensure that the statement by the 3rd Accused was voluntary. Further, in my view, the failure to administer the formal caution in certain words or to prepare a certificate cannot, without more, be evidence that the making of the statement was not voluntary. Using the test in **Kanini**, I have not seen anything in the session described to suggest that the statement by the 3rd Accused was not voluntary. In the circumstances, I find and hold that the impugned statement was voluntarily made and is admissible. In my view the Accused made and signed the statement voluntarily and their present denials are an afterthought which is incapable of belief.

Delivered and signed in Naivasha this 6th day of March, 2018.

In the presence of:-

Mr. Mutinda for the DPP

Mr. Owuor for the 1st, 2nd and 3rd the Accused and holding brief for Mr. Gatonye for the 4th Accused

Accused – present

Court Assistant – Quinter

C. MEOLI

JUDGE