



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 9 OF 2017**

**Lesiit, J.**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**FATMA MOHAMMED OKOTH.....ACCUSED**

**RULING ON OBJECTION.**

1. The defence counsel for the accused raised an objection to the admissibility of evidence of PW3 of phone conversations he had with the accused. PW3 said that he was an ex-boyfriend of the accused whereas the deceased was the boyfriend the accused was relating to at the time of the incident. The defence through Mr. Chacha Mwitia for the accused urged that the details of the conversation was not admissible on grounds the same was hearsay, and secondly on grounds of being privileged communication and a private conversation.
2. The defence counsel raised an objection against the admission of that evidence citing **Article 50** of the **Constitution** of Kenya, on fair trial. Counsel urged that if the details of the conversation was admitted in evidence the rights of the accused would be infringed. Counsel also cited **sections 24 to 26** of the **Evidence Act** on confessions.
3. **Article 50 (2)(1)** of the **Constitution** provides that *'every accused person has the right to a fair trial, which includes- the right to refuse to give self-incriminating evidence'*. **Article 50 (1)** provides *'Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.'* The Article (50) applies to the trial process. Sub-Article (2) (1) should therefore be interpreted in light of sub-Article 1. That means that it is during the trial before a 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.
4. Mr. Mwitia urged that the statements in question suggesting accused guilt should be expunged from the record. He relied on **section 24-26** of the **Evidence Act**. **Section 24** of the **Evidence Act** deals with effects of admissions and provides that they *'...are not conclusive proof of the matters admitted, but they may operate as estoppels.'* That section falls under section titled Admissions. They are relevant to suits. They are not applicable to the situation at hand.
5. **Section 25** defines a confession and provides:

**"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."**
6. **Section 25A** goes ahead to state that a confession is not admissible unless it is made in court before a judge, a magistrate or before a police officer.
7. **Section 26** qualifies admissibility further by providing that a confession and admission caused by inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority is not admissible in a criminal proceeding.
8. In regards to the statements in the conversation being a confession under, **section 25** of the **Evidence Act**, it is clearly enumerated when the statements by a suspect or an accused can be considered as confession. None of those circumstances apply to this case.

9. At the point the objection was raised PW3 was narrating to the court a conversation he had with the accused. It was made in a normal conversation between the two of them. There is no suggestion that the conversation was made before a person of authority. There is no suggestion that it was made in reference to a charge against the accused. She was not charged with any offence, neither was she under investigation by the time the conversation was made. I find that the conversation between PW3 and the accused does not qualify as confessions which would need to pass the test of admission set under **sections 26, 25A and 26 of the Evidence Act**.

10. The general rule on admissions applies that any statement allegedly made by the accused to PW3 tending towards an admission is not proof that the statement was correct or proof that the accused committed an offence. Such statement will be tested against the rest of the evidence adduced before the court. The prosecution will still have to prove the charge against the accused on the required standard of law.

11. I must add a rider that in case the accused wishes she still has a right to re-visit the admission of the evidence of PW3 in her case, if the court places her to her defence. This is well illustrated in the case of **Kanini Muli V. Republic, Cr. App. No. 238 of 2007**, where the court of appeal held that even after the trial court has ruled a confession is admissible, the accused person is still entitled to call evidence to show that the confession cannot be acted upon.

12. As to privilege, **section 130 – 137 of the Evidence Act** deals with privilege and provides for instances when communication between certain categories of persons can be inadmissible in proceedings for being privileged. These include communication during marriage, official communication to a public officer, communication between an advocate and his client and communications between advocates. Privilege under **section 130 – 137 of the Evidence Act** does not apply to this case for two reasons. The first one, the accused has not alleged any marital relationship with PW3. Secondly, there was no form of special relationship as recognised under the said sections between the accused and PW3. I find that there was no relationship between the accused and PW3 that would entitle the accused or PW3 to plead privilege to render the evidence in issue inadmissible.

13. **Section 6 of the Evidence Act** I find that the evidence of PW3 is admissible as Res Gestae under **section 6 of the Evidence Act**. The conversation between the accused and PW3 forms part of facts relevant in this case on the basis that they are so connected with the facts in issue as to form part of the same transaction. They are admissible as Res Gestae.

14. It is for these reasons that the objection raised by the defence against the evidence of PW3 in this case is hereby overruled.

**DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JULY, 2018**

**LESIT, J.**

**JUDGE**