



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 65 OF 2015

REPUBLIC.....STATE

VERSUS

KIBON KIBELION.....ACCUSED

RULING

1. Kibon Kibelion (“Accused Person”) is facing trial for the alleged murder of James Chirchir (“Deceased”). He was arraigned in Court on 16/11/2015. The case took off on 06/04/2016 before Justice Maureen Odero, and three witnesses testified before Chief Inspector Patrick Libole was called as PW4.
2. During his testimony, Chief Inspector Libole sought to produce a statement made by the Accused Person at the Police Station after he had turned himself in. The Chief Inspector said that the Accused Person was given the due caution but chose to give a confession. The Defence objection to the production of the statement and Justice Odero ordered a trial within a trial to determine the admissibility of the statement.
3. At the trial-within-a-trial, the Prosecution called three witnesses and the Accused Person testified for the Defence. Justice was Odero was transferred out of this station before she could give a ruling on the trial-within-a-trial. It therefore fell to me to give the ruling.
4. I have now considered the evidence adduced in favour of admissibility of the confession as well as the Accused Person’s testimony against its admissibility against the applicable law.
5. Chief Inspector Patrick Libole was the OCS Muchongoi Police Station when he recorded the statement. He testified that the Accused Person presented himself to Muchongoi Police Station on 14/11/2015 and allegedly said he had murdered the Deceased. CI Libole testified that the next day at 10.00am during his routine visit to the cells the Accused Person indicated to him that he wanted to record his confession. Co-incidentally, he said, three brothers of the Accused Person went to the Police Station to see the Accused Person. They included Julius Kibelion and Peter Kibelion. He asked the brothers if they wanted to witness the Accused Person record his confession and they apparently said yes. He then organized for them to be present as the Accused Person narrated his confession to him in Kiswahili.
6. CI Libole testified that the Accused Person recorded the statement willingly and did “not object to the presence of the brothers.” Afterwards, CI Libole said that he, the Accused Person and the two brothers all signed the certificate. He then wrote down the particulars of both brothers. He was categorical that he did not force, threaten or compel the Accused Person to record the statement.
7. When it was their turn to testify, both Julius Kibellion and Peter Kibellion, the two brothers who allegedly witnessed the recording of the statement, agreed that they went to see their brother at the Police Station on 15/11/2015. However, both were quite categorical that they did not witness the recording of any statement by the Accused Person. Instead, both said that when they arrived, the Police Officers took their National Identification Cards and recorded the details then gave them a piece of paper to sign. They were united in stating that they did not know what the piece of paper was for – and that it certainly did not signify that they had witnessed the formal recording of the confession.
8. Similarly, the Accused Person denied recording the statement. He says that he was only brought a piece of paper by the Police and asked to imprint his thumb impression since he can neither read or write. He denied that the statement was ever read back to him. He also denied giving permission to the Police to call his two brothers to witness the recording of the statement.
9. In Kenya, confessions are governed by the Constitution of Kenya 2010; the Evidence Act (Cap.80); the Evidence (Out of Court Confessions) Rules, 2009 and decisional law.
10. Article 49 of the Constitution guarantees each arrested person certain rights including the right to be informed promptly, in language that the person understands, of the reason for the arrest; the right to remain silent and the consequences of not remaining silent; to communicate with an advocate, and other persons whose assistance is necessary and not to be compelled to make any confession or admission that could be used in evidence against the person.

11. The same article (Article 49(4)) also excludes the admissibility of any evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

12. Similarly, Article 50 (2) (1) guarantees each Accused Person a right to refuse to give self-incriminating evidence.

13. As a general rule, confessions in Kenya are inadmissible in a criminal trial unless the confession passes muster under rigid rules provided in the Evidence Act and Rules promulgated thereunder. The statute as well as these rules is inspired by both our Constitution as well as our history where confessions extracted by torture and ill-treatment were widely used to obtain positive verdicts in politically-motivated criminal trials.

14. Section 25 of the Evidence Act defines a confession thus:

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.

15. 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.

16. The rules envisaged under (2) above are known as the Evidence (Out of Court Confessions) Rules, 2009 (hereinafter the "Confessions Rules".) The Confession Rules specify the rights of an Accused Person who wishes to record a confession.

17. Rule 4 provides that, among other things, the Recording Officer:

- a. Shall ask and record the Accused Person's preferred language of communication;
- b. Shall provide the Accused Person with an interpreter free of charge where he does not speak Kiswahili or English;
- c. Shall ensure that the Accused Person is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;
- d. Shall ensure that the Accused Person is informed of his right to have legal representation of his own choice among others;
- e. Shall 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.

18. In addition to this, the Confessions Rules require the Accused Person to be informed of the option to record his own statement in his preferred language or to have it recorded for him (Rule 7); the option to clarify or add anything in the statement after the same has been recorded (Rule 8) and the requirement to administer a caution before recording the statement (Rule 5). In addition to the legal provisions on this issue, there are numerous pronouncements by judges on the subject of extra-judicial confessions.

19. Looking at the Confession Rules and applying them directly to the case at hand, I note the following:

- a. The Recording Officer did not invite the Accused Person to select a third party of his choice whom he wanted to be present during the recording of the statement. By his own admission, the Recording Officer "chanced" on two brothers of the Accused Person who had come to visit the Accused Person in the Police Cells, and requested them to be present.
- b. The Recording Officer did not inform the Accused Person of his right to have an advocate of his choice present during the recording of the confession.

20. I also notice that the two brothers of the Accused Person who were allegedly present during the recording of the confession denied being present. In the circumstances, it behooved the Prosecution to do more to shore up its claims that the confession was voluntarily recorded. Given the standard of proof in criminal cases – which is the one applicable to the question of admissibility of confessions – on this point alone, I would have held that there were reasonable doubts as to the knowing voluntariness of the confession in this case: Two of the three witnesses presented by the Prosecution denied being present during the recording; and the cross-examination done (including the failure to declare them hostile witnesses) did not favourably dispose of this question in favour of the Prosecution.

21. In addition to these reasonable doubts as to the knowing voluntariness of the confession, as pointed out above, in paragraph 20 of this Ruling, the Recording Officer seems to have failed to adhere to at least two specific categorical due process rules to render the recorded confession admissible as evidence: there was no attempt to inform the Accused Person that he had the right to call any third party to be present during the recording of the confession (here, by his own account, the Recording Officer simply asked the Accused Person's two

brothers to be present); and there was no attempt to inform the Accused Person of the right to have a lawyer of his choice present.

22. These reasons render the Statement recorded by the Accused Person dated 15/11/2015 inadmissible in evidence in his own criminal trial. It is so ordered.

Dated and delivered at Nakuru this 4th day of October, 2018.

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JOEL NGUGI

JUDGE