



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 11 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK MAINA NJERI.....ACCUSED

RULING

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code; he is accused of having murdered **Martha Wanjiru Kimunyi** on the 15th day of March, 2010 at Gatiki Village within Nyeri County;
2. At the hearing hereof the accused was represented by Learned Counsel Mr. Ndirangu whereas Mrs. Gicheha was the Prosecuting Counsel for the State; Inspector Jackson Kiema (**PW11**) was the police officer who recorded the cautionary statement and the defence strongly opposed its production citing that **PW11** was not its maker; this court then directed a trial within a trial be conducted to determine the admissibility of the cautionary statement;
3. To support its case the prosecution called only **PW11** and the defence called the accused as its only witness;
4. The prosecution witness testified first followed by the defence witness; hereunder is a summary of their respective evidence;

PROSECUTION CASE

(a) **PW11** told the court that he had been based in Othaya and was the Officer in Charge of Station (OCS) from September, 2009 upto 2013; that on the 17/03/2010 at about 4.00pm he was approached by the DCIO Chief Inspector Mutua to take a Charge and a Cautionary Statement from the accused person; the accused was then brought from the cells by the DCIO; he told the accused that he had a right of representation and that he could also invite a friend to be present during the process; but he declined the invitation; he asked him his preferred language to which the accused answered that he wanted to use Kiswahili;

(b) After introducing himself to the accused he told him that he was investigating a case of murder and then proceeded to caution him that he was not obligated to say anything unless he so wished; and that anything he would say would be used against him in evidence; having understood the caution the accused then voluntarily narrated his statement in Kiswahili; and that this was without threats, promise or intimidation

(c) That the accused then proceeded to give a brief history of himself and admitted to having murdered the deceased Martha Wanjiru Kiminyi who was his grandmother and he confessed to having had an intention to kill her and he had done this on the 15/03/2010 at about 12.00 noon; that after committing the offence he then made several attempts to commit suicide the first by drinking rat poison mixed with alcohol, when it failed to work he bought another sachet of the poison and the last attempt he tried to hang himself but abandoned it as it proved to be too painful; upon being unsuccessful on the third attempt he decided to head to Othaya Police Station with the intention of reporting the incident and surrendering to the police; but unfortunately he was arrested before he got there;

(d) After taking the statement **PW11** stated that he made a Certificate to the effect that the statement was obtained voluntarily from the accused and without force, threats or promise or intimidation of any kind; that he read back the statement to the accused in the Kiswahili language and invited him to make corrections; it is not true that the accused told him that he was only conversant with his mother tongue that is Kikuyu; the contents were exactly the same as the accused had been narrated; and that every single page both of them appended their signatures on each and every page of the statement; the signing was done voluntarily and the accused was not forced to sign the statement in the presence of several officers; he was never harassed at the police station; and he knew what he was signing; **PW11** then certified that the statement was narrated to the accused in the Kiswahili language which he had translated into English to the best of his knowledge, skills and ability;

(e) During cross-examination **PW11** confirmed that the typed version was not generated by **PW11** and that it was headed **Statement of Inquiry by Patrick Maina Njeru**; the only difference between the typed copy and the hand written one was the heading; that a

statement under inquiry is made when investigations are ongoing; whereas a cautionary statement is made when a decision has been made to charge a person;

(f) He confirmed using the word “*investigations*” but attributed it to a slip of the tongue; otherwise in this instant case **PW11** was not the investigating officer and that his duty had been limited to only taking the statement; after which he then handed the accused back to the DCIO;

DEFENCE CASE

5. The accused testified under oath that he had been arrested and taken to Othaya Police Station and placed in the cells; he could not recall the name of the officer who escorted him from the cells to go and record the statement nor could he recall where he was taken because at the time of his arrest he was confused; that before he was taken to record his statement he had been beaten whilst he was in the cells;

6. Before taking down his statement he was never told that he could have a relative or friend present or a lawyer; that there were three officers in the room he had been taken to write the statement; that before he started talking he was never cautioned that whatever he said would be used against him in evidence; that he never signed the statement because he did not know how to sign; but he confirmed that the name ‘*Maina*’ appearing on the statement was in reference to him and confirmed having written the name on the statement even though he insists that he did not know how to sign;

7. That he was beaten then taken to write the statement; that he didn’t write the statement he narrated both in Kiswahili and Kikuyu mixing the two languages and it was written for him; he reiterated that at the time he was really confused and even when the statement was read back to him he didn’t understand the contents; when taken back to the cells he was beaten four times; but admitted that when he took his plea he never told the court that he had been beaten nor did he ask the court for an order to be taken to hospital for treatment;

ISSUES FOR DETERMINATION

8. After taking into consideration the forgoing evidence this court has framed the issues as set out hereunder for determination;

- (i) Who wrote the statement;
- (ii) Whether it was dictated;
- (iii) Whether the statement was made voluntarily; with no coercion or promise;
- (iv) Whether it was a cautionary statement or a statement under inquiry;

ANALYSIS

9. In addressing the issues herein this court will make reference to the Evidence (Out of Court Confession) Rules 2009 because any confession taken from an accused person must adhere to these rules; Rule 5(1) provides the requirements of a caution that the recording officer must comply with; which are; information on legal rights to counsel of his choice before recording the statement; preferred language of communication and if not conversant with Kiswahili or English the accused must be provided with an interpreter free of charge; and there must be no coercion duress torture or promise;

10. **PW11** stated that he complied with these rules as he first cautioned the accused; he then asked the accused his preferred language; and the accused confirmed that he had opted for Kiswahili which he mixed with Kikuyu as he did his narration; the officer told the court that he had informed the accused of his right to legal right to have a lawyer or a friend present; the accused denied that he had been informed of this right;

11. The accused evidence throughout was that he was in some kind of stupor therefore this court is inclined to believe **PW11** and is satisfied that he complied with these introductory requirements.

Who wrote the statement; whether it was dictated;

12. **PW11** stated that he was the officer who took the statement from the accused; he gave his rank as Chief Inspector and this was in conformity with the Rules which provides that the recording officer must not be below the rank of an Inspector of Police;

13. Rule 7 is on the choice of who should record the statement; that it must be either the accused or the recording officer; in this instance it is noted that the accused was given the option by **PW11** to write the statement but told him that he was a Standard 4 dropout and did not know how to write; the accused being unable to write therefore **PW11** had to step in and proceed to record it; the accused stated that he narrated his story in both Kiswahili and whilst mixing the two languages;

14. Rule 8 provides that at the conclusion of the recording the accused must be offered the opportunity to clarify what was recorded; it was **PW11**’s evidence that he read back to the accused the contents of the statement page by page and that each page was signed by the accused; the accused did not deny that this rule was complied with; but his contention was that he was confused at the time of the reading and was thus unable to understand what had been read back to him; he also did not deny having signed the pages by writing his name on each and every page of the statement;

15. This court found the accused to be untruthful as he had first stated in his evidence that he did not know how to write but later in the same breath confirmed that he had signed the statement by appending his name “**Maina**” on each page of the statement;

16. This court is satisfied that **PW11** complied with the above rules and that the accused narrated whereas **PW11** was the recording officer and had written the statement;

Whether the statement was made voluntarily; with no coercion or promise;

17. The statement recorded by the accused has been retracted as he claims that it was not made voluntarily; that before he went to record the statement he had been beaten in the cells; and when he was in the room where the statement was recorded there were three police officers present;

18. It is trite law that the onus of proving voluntariness lies with the prosecution; that the statement cannot be admissible in evidence unless it is proved that it was voluntary;

19. In this instance this court ordered that a trial within a trial be conducted for it to decide on the admissibility of the statement; and it proceeded to hear the evidence of both **PW11** and the accused; **PW11** told the court that he followed the law when recording the statement; and that before he took the statement he had informed the accused of his legal right of representation or to have a friend present; the witness also stated that during the recording it was the accused and himself were the only ones in the room;

20. All the accused has to do is to raise doubts in the manner the statement was extracted; he stated that he was beaten before being taken to the recording room; that he was not told of his legal rights and that there were three intimidating police officers present in the recording room; in this instance the issue of beatings is highly doubtful as in his evidence the accuse stated that he could not remember the officer who escorted him from the cells to the recording room; he did not even indicate to court whether this officer remained in the room during the recording; his testimony did not give any particulars as to who assaulted him; there were no details as which part of his body bore the brunt of the beatings or the manner in which the beatings were inflicted; it was left to this court to speculate; he also confirmed that he made no complaint to the court concerning these beatings when taking his plea and also never raised the issue of being taken for treatment;

21. This court reiterates that the accused kept on using his mental state of confusion as a means to retract his statement; but there was no mention of coercion; the court finds his evidence on the threats or beatings before he went to **PW11’s** office to record the statement to be scanty and devoid of any details; on the requirement to have a third party to be present the accused told the officer he had no friends to invite; as he was suspected to have murdered his grandmother it is quite obvious why he would have had no friends or relatives to stand by him at that particular point in time;

22. It was **PW11’s** evidence that as the recording officer he then proceeded to prepare a Certificate of Confession confirming “**that the statement was made of the accused’s own free will**”;

23. This court is satisfied that the recording officer was fully acquainted with the provisions of the Evidence (Out of Court Confession) Rules and that the requirements of recording the statement of the accused were followed; the prosecution is found to have discharged its burden of proof and this court is satisfied that the statement was made voluntarily.

Whether it was a cautionary statement or a statement under inquiry;

24. The heading of the typed statement uses the words “**Statement under Inquiry**”; this would then mean that the officer was an investigator and not a recording officer; the rules provide that the recording officer must be a police officer other than the investigating officer; in his evidence **PW11** stated that he was not the investigating officer but had been requested by the DCIO to take the accused’s confession; the witness went on to state that his copy was handwritten and didn’t contain those words; that if he had used the word investigation when cautioning the accused it amounted to a slip of the tongue; that his role was only to record the statement and thereafter he handed the accused back to the DCIO;

FINDINGS AND DETERMINATION

25. Upon considering the evidence given within the trial within a trial this court makes the following findings and determinations;

- (i) The prosecution is found to have discharged its burden of proof;
- (ii) The statement recorded by the accused was taken in accordance with the Evidence (Out of Court Confession) Rules;
- (iii) The statement is found to have been made voluntarily;
- (iv) The statement is admissible in evidence;

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 8th day of November, 2018.

HON.A.MSHILA

JUDGE