



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 70 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

WILSON MWANGI GITHINJI.....1ST ACCUSED

SIMON NDAMBARI GATUMU.....2ND ACCUSED

RULING

Background

Both Wilson Mwangi Githinji, hereinafter “1st accused”, and Simon Ndambari Gatumu, hereinafter “2nd accused”, are jointly charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 11th day of June 2013 at Ngong Township within Nairobi County (sic) murdered Grace Njeri Lepaso. Each accused person pleaded not guilty to the charge. The 1st accused is represented by Mrs. B. E. Nyamongo, advocate and the 2nd accused is represented by Mr. J. O. Ochako, advocate. Various prosecution counsels have handled the prosecution case with Ms Ikol prosecuting lastly.

Fifteen witnesses have testified for the prosecution. The 15th witness is Chief Inspector of Police (CIP) Mr. James Kariuki. This witness introduced into evidence a statement under inquiry purportedly recorded by the 1st accused. This statement contains a purported confession by the 1st accused. The defence raised an objection to the introduction into evidence of this statement justifying that objection by stating that the 1st accused did not record any statement nor was he accompanied by his aunt Kezia Wanjiru. Upon recording the objection by the defence, this court made a ruling that a trial within the trial be held to determine whether the 1st accused voluntarily made the statement in issue in line with the law and procedure. The reason for this is that a statement by accused persons is not admissible in evidence against him/her unless it is proved that he/she made it voluntarily. The Court of Appeal in **Musili Tulo v Republic, Criminal Appeal No. 30 of 2013 [2014] eKLR** stated that the determination of the voluntariness of a statement made by an accused person is a matter of law that is for the judge alone to decide upon hearing evidence as to the manner the statement was recorded. The enquiry to determine the voluntariness or otherwise of such a statement is done in a *trial within the trial*, a mini trial conducted within the main trial.

What amounts to a confession under the law is defined under Section 25 of the Evidence Act (Cap. 80 Laws of Kenya) in the following words:

“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.”

Confessions are, in my view, very enticing to a police officer investigating a case. If admitted in evidence, they can prove a case with little or no effort at all and can lead to a conviction. An otherwise floundering police case could find salvation in a confession by the accused person that he committed the offence. Confessions or extra-judicial statements have been a vexing issue for a long time recognized by the Court of Appeal in the **Musili Tulo** case (supra). Parliament stepped in to introduce a cure by providing procedure to guide the recording of such statements/confessions. But even so, the issue remains vexing to date either due to ignorance or outright disregard, by police and other investigative agencies, of the rules of procedure to be followed in recording confessional statements! The Legislature amended Section 25 of the Evidence Act by introducing **Act No. 5 of 2003** and **Act No. 7 of 2007** to **Section 25A** which now reads as follows:

“(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.”

This section is clear that for a confession or admission to be admitted in evidence without requiring proof, it must be made in court before a judge or magistrate. Where the confession or admission is not made in court as in this case, it must be made in accordance with the rules contemplated under Section 25A (2). Under this sub-section, the Attorney General in consultation with other stakeholders was mandated to make rules to govern the making of confessions in all instances where the confession is not made in court. On 27th March 2009, **The Evidence (Out of Court Confessions) Rules, 2009** (hereinafter “**Confession Rules**”) were published. These rules spell out elaborate procedure in taking down confessional statements from accused persons.

Because of the dangers posed by statements recorded outside the Confessions Rules, courts must exercise utmost caution in handling them to ensure the rights of an accused person to a fair trial are upheld. It is for this very reason, and against the background spelt out above, that this court conducted this trial within the trial.

Trial within the Trial

The prosecution called four (4) witnesses in this trial within the trial. Chief Inspector James Kariuki is PW1. He is the recording officer. His evidence is short and is captured fully as follows:

“On 26th/6/2013 at 9.00am I was in the office when the I.O in this case came to my office and informed me that one of the accused persons wanted to record a statement. I told him to bring the accused to me. I talked to him who intimated that he wanted to confess (sic). I asked the accused to nominate a person of his choice to attend the recording of the confession. I also cautioned him that whatever he said will be used as evidence. I inquired from him whether he had any other problems. He informed me that he did not have any other problem. I recorded statement in presence of the I.O.

The accused person informed me what he wanted recorded. The accused who was brought to me is William Mwangi. I am sorry the accused was Wilson Mwangi Githinji. One Kezia Wanjiru an aunt to accused was present. The I.O was also present. I used English language. The confession took about 40 minutes. We did not take breaks in between the confession. Accused was normal when recording statement. He had no complaints. He signed the statement. At the time I was a Chief Inspector of Police.”

CIP Kariuki was cross-examined by the two defence counsels. Mr. Ochako told the court that the alleged confession implicated his client the 2nd accused person and therefore he wished to cross-examine

witnesses in trial within the trial. The highlights of the cross-examination are that CIP Kariuki did not know how the 1st accused was arrested, whether he had been beaten or intimidated or his level of education. He spoke to the 1st accused in Kiswahili and recorded the statement in English and did not translate that statement from Kiswahili to English. CIP Kariuki admitted all the above. The witness further in cross-examination admitted the presence of the Investigating Officer during recording of the statement.

CPL Ruth Wangechi testified as PW2 in trial within the trial. She is one of the arresting officers. She confirmed to the court that in company of other officers they travelled to Karatina on 24th June 2013 and that they were accompanied by police officers from Karatina Police Station. She testified that an informer contacted the 1st accused person who met them at a petrol station in Karatina. She said that after reporting the arrest at Karatina Police Station they travelled back to Nairobi where they handed the 1st accused over to the Investigation Officer. CPL Wangechi told the court that she did not know what the Judges Rules on confessions are and that the 1st accused confessed to them while in the vehicle travelling back to Nairobi but this was not recorded.

PC Bernard Marete, PW3, is the Investigating Officer. He told the court that he saw the 1st accused first on 24th June 2013 at Ngong Police Station. He temporarily removed the 1st accused from the cells and sat with him at the Crime Office where he questioned him about this case. He stated that the 1st accused confessed to him. PC Marete informed the DCIO about the confession. He was referred to CIP Kariuki. He said that the 1st accused did not complain of any intimidation. He said that the 1st accused was not denied water, food, sleep or anything else. PC Marete told the court that he took the 1st accused to CIP Kariuki at 6.00pm and left him there.

On cross-examination PC Marete told the court that he took five minutes with the 1st accused and that the 1st accused asked for his aunt Kezia Wanjiru to be present; that PC Marete called Kezia who arrived at the station the following day. He denied he was present with CIP Kariuki when the confession was recorded. He told the court that he was not aware that the 1st accused had not eaten since the time of his arrest but he did not complain that he had not eaten.

Kezia Wanjiru, PW4, told the court that she was called to the Ngong Police Station on 26th June 2013. She went to the station and met her nephew the 1st accused. She said that the 1st accused explained to CIP Kariuki what had happened. She said she was with CIP Kariuki and the 1st accused. She said she was given some papers to sign and she did so. Kezia could not remember if what the 1st accused stated was recorded or not.

On his part, the 1st accused told the court that he was arrested in Kiserian and taken to Ngong Police Station; that on 26th June 2013 he was removed from the cells and taken to an office with one police officer whose name he did not know and that the officer told him to sign some papers whose contents he did not know. He said that the officer forced him to sign the papers and aimed a gun at his head. He said he did not know what he was signing or the language used in those papers. He said his level of education is Standard Three. He said he was not cautioned or told to call an advocate. He denied seeing Kezia Wanjiru at during the time he was told to sign the papers and that he had not eaten. He denied recording the statement.

I have considered this evidence. It is expected that an accused person would deny recording any confession. They get wiser with time and after being counseled by their legal counsels. This is not out of the ordinary. The law does not require the accused to prove that he did not record a confession. All he/she is required to do is to raise an objection that he did not volunteer that statement for the court to order an inquiry on the manner the statement was recorded. On the other hand, it is the police through the prosecution who must satisfy the court that the statement was recorded in accordance with the law and procedure.

The Law

The law requires the police to follow procedure in taking down confessions. The rights of an arrested person are guaranteed under Article 49 of the Constitution. They include the right to be informed promptly, in language that the person understands, of the right to remain silent and the consequences of not remaining silent; the right to communicate with an advocate, and other persons whose assistance is necessary and the right not to be compelled to make any confession or admission that could be used in evidence against him. All these rights are aimed at guarding against self-incrimination. The reasoning behind taking down confessions of an accused person by the book is to ensure that an accused person only gives a confession willing, freely and on his own volition.

Section 25A of the Evidence Act is specific that unless a confession or admission is made in court before a judge or a magistrate it is not admissible in evidence and shall not be proved against the accused unless it is made according to law and procedure. Where the confession or admission is made outside the court, it must be to a police officer, and not investigating officer, of the rank of Chief Inspector of Police and above. Even then it must follow other procedural dictates.

The Confessions Rules lay down the procedure to be followed. Rule 4 of the Confessions Rules whose marginal notes reads “Rights of accused person” lists the procedure to be followed as shown below:

Rule 4 (1)

(1)Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person (a) has stated his preferred language of communication; (b) is provided with an interpreter free of charge where he does not speak either Kiswahili or English; (c) is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment; (d) is informed of his right to have legal representation of his own choice; (e) is not deprived of food, water or sleep; (f) has his duration, including date and time of arrest and detention in police custody, established and recorded; (g) has his medical complaint, if any, adequately addressed; (h) is availed appropriate communication facilities; and (i) communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under Rule 5.

By his own admission CIP Kariuki told the court that he did not know how the 1st accused was arrested, whether he had been intimidated or his level of education. This was contrary to what the procedure laid down under Rule 4 requires. Evidence shows that the 1st accused was arrested in Karatina on 24th June 2013. He was brought to Ngong Police Station on the same day. CIP Kariuki recorded his statement under inquiry two days later on 26th June 2013 at 9.00am. Although CIP Kariuki administered caution, he did not record what the accused stated in response. It was imperative that CIP Kariuki makes enquiries as to the circumstances of the arrest and the the duration taken from the time of arrest to the time of recording the statement. This is aimed at ensuring that the accused was giving the statement of his own free will and that he had not be coerced, intimidated, denied food or sleep or in any other manner interfered with to force him to confess or admit the offence.

The second anomaly in the manner the statement was recorded is that procedure requires a caution under Rule 5 to be administered in the presence of the third party. There is no evidence that this was done. Kezia denied hearing the recording officer cautioning the accused. Thirdly, there is evidence by the recording officer that he took down the statement in the presence of the Investigating Officer. PC Marete denied he was present when the statement was taken. This evidence from the two officers is contradictory. The fact that the confession/admission by an accused person is required to be recorded by an officer other than the investigating officer is to ensure that the investigating officer is not to be present during that confession lest he influence the same in any way. His presence is intimidating to the accused and may influence him to incriminate himself.

Further as stated above the recording officer did not enquire into 1st accused’s level of education or find

out from him his preferred language. He told the court that he recorded the statement in English but the accused communicated in Kiswahili. There is no Kiswahili version of the statement displayed in court with its translation into English language.

The recording officer also did not comply with Rule 9 of the Confessions Rules which states that:

The recording officer shall ensure that the written confession or electronic recording media contains the following certificate at the end of the confession, in the original language of the accused person:

“I have read the above statement and I have been told that I can correct, alter or add anything I wish. The statement is true. I have made it of my own free will.”

Since the 1st accused is said to have communicated in Kiswahili, the certificate under Rule 9 ought to have been in Kiswahili.

CPL Wangechi and PC Marete both testified that the 1st accused confessed to them. CPL Wangechi said that the 1st accused confessed to them while in the vehicle travelling from Karatina to Nairobi but this was not recorded. PC Marete told the court that he confessed to him as well. This was before the recording officer took over the accused. All this evidence shows that the two officers, as admitted by CPL Wangechi, had not idea of the procedure in taking down a confession.

CIP Kariuki failed to follow the law in recording the statement of the 1st accused. Being the recording officer, he is the most crucial witness for the prosecution to ensure that all procedure was followed. Rule 13 of the Confessions Rules states that:

“The recording officer, having informed himself of section 26 the Act, shall be the proper prosecution witness to prove to the court beyond reasonable doubt that the Rules were complied with.”

The proof required of the recording officer that the Confessions Rules were complied with is proof beyond reasonable doubt. When the evidence of CIP Kariuki, who is the recording officer, is subjected to this standard, it falls short of proofing that the law and procedure was followed in taking down the statement under inquiry of the 1st accused person. Failure to prove this leads to this court disqualifying the statement in issue from being voluntary. Law and procedure were not followed in recording the statement and admitting it in evidence would be against the law and an infringement of the right of the 1st accused to a fair trial.

In conclusion, this court finds that the statement of the 1st accused person recorded by CIP Kariuki under inquiry was not made voluntarily and shall not be admitted in evidence. The case will proceed to full hearing of the main trial. It is so ordered.

Dated, signed and delivered in open court this 10th day of April 2017.

S. N. Mutuku

Judge