



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 71 OF 2014

REPUBLIC RESPONDENT

VERSUS

DANIEL NGIGE WAITHERA
ACCUSED

RULING

The accused person **DANIEL NGIGE WAITHERA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

PW6 No. 234280 INSPECTOR PETER WALIMA who at the material time was the Officer Commanding Njoro Police Station told the court that on 6th June, 2014, he recorded a statement under enquiry from the accused person. In this statement it is alleged that the accused made a confession. Counsel for the accused **MR. NYARIBO** objected to the production of that statement as an exhibit on the grounds that the same was not voluntarily made by the accused and did not conform with the procedure set out by Section 25A of the Evidence Act.

The court on 21/7/2016 conducted a trial within a trial to determine the admissibility or otherwise of that statement. Section 25 A(1) of the Evidence Act provides as follows:

“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 choice”

Rule 4 of the **Evidence (Out of Court Confessions) Rules, 2009**, sets out the procedure to be followed in recording confessions from suspects. Rule 5 provides that the recording officer shall administer to accused a caution before proceeding to record his confession. Rule 4(3) provides that the recording officer must inform the accused by his right to nominate a third party to be present during the recording of the statement.

In this case **PW6** told the court that the accused voluntarily went to the Administration Police Camp and surrendered himself there. The accused was not arrested and brought to the police station.

PW6 further told the court that the accused volunteered to record a statement. He was not forced or coerced in any way to do so. **PW6** said that after cautioning the accused he informed the accused of his right to have a lawyer or a relative present. The accused opted to have his mother and uncle present.

PW2 (the 2nd witness in the trial-within-a trial) was **JOSEPH MUCHIRI** an uncle to the accused. He confirms that he was present when the accused recorded his statement. **PW2** confirms that accused made the statement voluntarily. He was not forced or coerced by police to do so. **PW2** further confirms that the accused (his nephew) is educated up to class 8 and can both read and write. **PW2** confirmed the testimony of **PW6** that the statement was recorded in Kiswahili a language which the accused understood well.

After the statement was recorded the accused signed it and **PW6** also signed it. **PW2** the witness also confirms that he signed the statement.

The accused opted not to make any statement during the trial-within-a-trial. Therefore the averments of both the recording officer **PW6** and his uncle **PW2** remain uncontroverted.

From the evidence I find that the accused voluntarily made his statement. There is no evidence that he was forced, coerced or threatened in any way to do so. A witness nominated by the accused was present at the time the statement was recorded. The same was done in a language which the accused well understood. I find that the statement under enquiry was recorded in compliance with Section 25A of the Evidence Act. The same is therefore admissible as evidence in this case.

Date in Nakuru this 7th day of November, 2016.

Mr. Nyamo holding brief for Mr. Nyaribo.

Maureen A. Odero

Judge

7/11/2016