



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 24 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ELLY WAGA OMONDI.....ACCUSED**

**RULING IN TRIAL WITHIN TRIAL**

**Background**

Elly Waga Omondi hereinafter referred to as the accused is facing a charge of murder contrary to section 203 read with section 204 of the Penal Code. It is alleged that on 25<sup>th</sup> March 2012 he murdered one Edinah Nyanchama Mogambi in House No. 11 Block F at Mbotela Teleposta Staff Quarters in Nairobi within Nairobi County. The prosecution in this case is led by Florence Magoma, prosecution counsel, while the defence is being conducted by Mr. Robert Paul Onyango, advocate.

In the course of this trial when taking down the evidence of Chief Inspector Robert Kyaa (PW7) who had recorded a charge and caution statement of the accused, the defence opposed the production of the statement citing the manner in which it was extracted from the accused as being objectionable. The court directed that a trial within a trial be conducted to determine the admissibility of the statement. A trial within a trial in our criminal justice system is an enquiry into the manner in which a statement by an accused person in respect to the case before the court was recorded. It seeks to determine the voluntariness of that statement.

In support of its case in the trial within trial, the prosecution called two witnesses and the defence called one witness, the accused, as the only witness. This ruling is in respect of that trial within trial.

**Trial within Trial**

Sergeant John Shegu PW1 in trial within trial testified first. He told court that he arrested the accused on 28<sup>th</sup> March 2012 after a tip off by an informer. He said he found the accused outside the office of the OCPD Makandara Police Station where he was addressing members of the press. SGT Shegu said that the accused was complaining that the police were not investigating the murder of the deceased. The accused is said to have been a boyfriend to a sister to the deceased. After consulting the OCPD and the DCIO and explaining to them of the need to interrogate the accused in respect of the murder, SGT Shegu took the accused to his office and started questioning him. SGT Shegu said the accused chose to speak in English after he informed him of his constitutional rights as a suspect. He said the accused did not call any relatives or advocate. He said he was aware of the rights of an arrested person and he informed the accused who said he did not wish to call a relative or an advocate. SGT Shegu said the confession had to be recorded that day and that he did not know that he could wait. He also said that he did not seek a pro

bono lawyer for the accused. SGT Shegu said that when the accused started confessing to him he decided to take him to Chief Inspector Kyaa to record a confession. He escorted the accused to the offices of CIP Kyaa at Milimani Commercial Courts where he is a prosecutor and handed the accused over to him.

The second witness for the prosecution was CIP Robert Kyaa (PW2). He told the court that he received the accused in his office at Milimani Commercial Courts on 28<sup>th</sup> March 2012 at 3.43pm. He said that SGT Shegu requested him to take the statement under inquiry from the accused. CIP Kyaa said the accused and SGT Shegu were the only people who went to his office. He said that he introduced himself to the accused and invited him to sit down; that SGT Shegu left the two of them together; that the accused was not handcuffed at the time and that he explained to the accused why he had been taken to his office. He said he did not use force towards the accused. He said he informed the accused of the need to have a relative or an advocate with him and the accused said he did not have any. CIP Kyaa said the accused looked comfortable and did not complain of anything and that he told him to choose the language he preferred and he chose English. He said the accused dictated the statement and he (CIP) recorded it.

On cross examination, the witness said he followed the law to the letter. He said there was no urgency that the statement had to be taken on that day and in not having the accused's relatives present. He said the accused said he had relatives but he was comfortable without them.

The accused on his part told the court that SGT Shegu tortured him in an office to coerce him to confess. He said that there were other police officers in that office. He said that SGT Shegu asked him repeatedly why he had killed the deceased which he denied; that SGT Shegu used a metal bar to hit him on the knee joint and also hit him on the chest and stomach with a fist causing him a lot of pain. He said that the officer became very angry when the accused denied having killed the deceased and placed a pistol in his (accused's) mouth threatening to kill him if he did not tell the truth. He said that because he was scared and was in shock he agreed to record a confession.

The accused testified further that he was taken to Makandara Law Courts to record the statement and denied the chance to talk to his parents. On failing to find a magistrate at Makandara he was brought to CIP Kyaa whom he thought was a magistrate where he recorded the confession. He said he had been threatened by SGT Shegu that he must record it admitting the offence or he would kill him when they returned to Industrial Area Police Station. He said CIP Kyaa was alone when he took his statement and he had asked him if he needed to call his relatives to which he had said he did not need to.

On cross examination the accused said he had no visible injuries but he suffered pain due to the torture he was subjected to. He said he did not complain to CIP Kyaa about the torture by SGT Shegu because of the threat of torture afterwards. He said SGT Shegu had told him to tell the story as if he was the one who had killed the deceased.

### **The law**

The law governing confessions in Kenya is the Constitution of Kenya 2010; the Evidence Act (Cap.80); the Evidence (out of Court Confessions) Rules, 2009 and case law. Article 49 of the Constitution guarantees an 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. The law is very clear that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice (see Article 49 (4)).

The right of an accused person to a fair trial is guaranteed under Article 50 (2) of the Constitution of Kenya 2010. Of particular relevance to us is Article 50 (2) (1) which guarantees him/her a right to refuse to give self-incriminating evidence.

Generally confessions made by an accused person are not admissible in Kenya unless when they are made

strictly under the law. But what is a confession? Section 25 of the Evidence Act defines a confession as follows:

**“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.”**

Section 25 of 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.**

The rules envisaged under (2) above are known as the Evidence (out of Court Confessions) Rules, 2009 hereinafter the Confessions Rules. Under these Rules, specifically under Rule 4 the rights of an accused are specified. This Rule requires the recording officer to ensure that the accused person chooses his preferred language of communication; is provided with an interpreter free of charge where he does not speak Kiswahili or English; is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment; is informed of his right to have legal representation of his own choice among others.

Rule 4 (2) requires the recording officer to ensure that the accused has not been subjected to any form of torture and Rule 4 (3) requires the recording officer to 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.

In addition to this, the Confessions Rules require the accused 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.

### **Analysis and determination**

I have carefully considered the evidence in this trial within trial. I note that both officers told the court that they gave the accused the option of the language of communication and invited him to call a relative or an advocate but he opted not to call anyone. I have noted that CIP Kyaa who is the recording officer told the court that he followed all the laid down procedures in recording the statement. I did not find evidence that CIP Kyaa sought to know whether the accused has been threatened, coerced or tortured before he was taken to his office. The accused told the court that he did not complain to CIP Kyaa or tell him that he had been threatened before he went to his office because of fear of threats by SGT Shegu.

Mr. Onyango for the accused took CIP Kyaa to task on the requirement to have a third party present when recording the statement. The witness admitted that section 25A of the Evidence Act did not give him an option to ask the accused to call a third party. Despite this the witness insisted that he followed the law in recording the statement.

It is without doubt that the statement allegedly recorded by the accused person and which the prosecution intends to tender in evidence against him has been retracted. This court ordered a trial within trial to be

conducted for the sole purpose of determining the voluntariness of that statement because a statement by an accused person is not admissible in evidence against him unless it is proved to have been voluntary. This is a matter of law for the judicial officer alone to decide upon hearing evidence (see **Criminal Appeal No. 30 of 2013 reported in 2014 eKLR**).

The onus of proving voluntariness of a retracted statement lies with the prosecution. The prosecution has to tender evidence to show that all the legal requirements in taking down a statement of this nature have been met. While the two prosecution witnesses in trial within trial told the court that they followed the law it is highly doubtful that this is the case. The recording officer, CIP Kyaa, may as well have followed the law to some extent in taking down the statement as he claims, but this court holds a contrary view. Care was not taken to ensure that the accused was not threatened before he went to CIP Kyaa's office and it is obvious that the requirements to have a third party present under section 25A Evidence Act were not followed. The section does not give the recording officer an option in the matter. It is a requirement that must be met. The law, from the Constitution which guarantees the accused certain rights to the Evidence Act and the Confessions Rules, is clear on how a statement of an accused person ought to be recorded.

In conclusion of this matter, it is my finding after carefully considering the evidence in the trial within trial and the law governing confessions that the prosecution has failed to discharge the burden of proof and show that the statement in issue was voluntarily made. It seems that the police who are the investigators in all criminal trials have not fully acquainted themselves with the law governing confessions especially after the Confessions Rules and the Constitution of Kenya 2010 came into effect. Because of this many criminal trials where police wish to rely on statements made by accused persons may suffer the consequences of such limitations. This may be so especially where there is no other evidence to corroborate retracted and repudiated statements. My considered view is that the voluntariness of the statement in question is questionable. All that the accused needs to do is to raise doubts in the court's mind about the voluntariness of such a statement which in my view has been done in this case. Consequently, I have no choice but to make a finding, which I hereby do, that the statement recorded by the accused on 28<sup>th</sup> March 2012 in respect of this trial is inadmissible in evidence. It is so ordered.

**S.N.Mutuku**

**Judge**

**Dated, signed and delivered this 11<sup>th</sup> day of May 2015 in the presence of:**

Ms Florence Magoma, prosecution counsel

Mr. Robert Onyango, defence counsel

Mr. Ally Waga Omondim the accused person

Mr. Daniel Ngumbi, Court Clerk