

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE NO 55 OF 1978

REPUBLICAPPELLANT

VERSUS

KENNETH OLUOCH OLUNGA.....RESPONDENT

RULING

Objection has been taken on behalf of the accused to the admissibility in evidence of a conversation which took place between the accused and the Assistant Chief of Kochieng' sub-location on the evening of 22nd March 1978 and also of a conversation between them on the following day. The matter arises in this way: on the evening of 22nd March 1978, a clan elder by the name of Okech Owiti came to the home of the Assistant Chief escorting the accused, Kenneth Oluoch. The clan elder informed the assistant chief that the accused had killed someone by the name of Ochuodho Otieno (who is the deceased in this trial). The Assistant Chief makes it clear in his evidence that, in his capacity as Assistant Chief, he received the accused and then asked him why he had killed Ochuodho Otieno, to which the accused replied, "I killed him because he abused me by calling me a thief". He then took him to the Boro chief's camp some three miles away and handed him over to an administration police officer, Mr Owuor. On the following day, that is on 23rd March, the assistant chief went to the Boro chief's camp and, together with Owuor, they escorted the accused to the Siaya Police Post. On the way, the Assistant Chief talked to the accused again. He asked him why he had killed Ochuodho; and the accused gave him the same reply that he had given on the previous evening, ie that he had killed Ochuodho because Ochuodho abused him and called him a thief. He added that he had used a jembe or a hoe.

There is no doubt that the statements made by the accused to the Assistant Chief on the evening of 22nd March and on the following day (23rd March) are confessions within the meaning of section 25 of the Evidence Act. The question is whether they are inadmissible under section 29 of the Act in that, although not made to a police officer, were made to the Assistant Chief who was acting in the capacity of a police officer investigating the case. There have been many reported decisions in East Africa touching upon this question. But I would only refer to two. The first is *R v Surumba* (1940) cited in volume 19 of the *Law Reports of Kenya* at page 125 and the test that seemed to have been applied there was this: "was the person to whom a confession was made acting as a police officer in the investigation of a case?" The second case is *R v Jigungu s/o Tungu* (1943) 10 EACA 111. A strong Court consisting of the Chief Justices of Kenya, Uganda and Tanganyika put the test thus: in Kenya and Tanganyika a confession to a member of the regular police force is always inadmissible, but a confession to a person, such as an administrative officer, a Chief or a headman is admissible, provided that at the time it is made he is not performing functions of a police officer.

Applying these two tests to this case it is abundantly clear that the Assistant Chief in this case was acting as a police officer in the investigation of the case on both occasions, ie on the night of 22nd March and on 23rd March 1978. Although he was not a member of the regular police force he was in effect performing the functions of a police officer. In these circumstances, I rule that the confessions made by the accused to him on both occasions are inadmissible under section 29 of the Evidence Act.

Dated and delivered at Kisumu this 15th day of March 1979.

E. COTRAN

JUDGE

