



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL (MURDER) CASE NO. 46 OF 2013
REPUBLICPROSECUTOR
VERSUS
MUSA OLANDO.....ACCUSED
RULING NO. 2

Introduction

1. The accused herein, Musa Olando is before this court on a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars thereof being that on the 29th day of August, 2013 at Masingo Estate, Kakamega Municipality in Kakamega Central District within Kakamega County, unlawfully murdered ITUNDA MOI. He denied the charge.

2. The case has been ongoing and so far the prosecution has called 6 witnesses. During the testimony of PW7, No. 93569 PC Wangari Mithigi, who is the Investigating Officer in this case, an issue arose as to whether the Investigating Officer can produce a statement under enquiry when the witness is not the one who took the statement.

3. Counsel made their submissions on the issue. Prosecution counsel, Mr. Juma Ochieng submitted that since the witness was not only the investigating officer and thus privy to the statement but the fact that the statement was also made to her she is eligible to produce the same. He submitted that it was out of abundance of caution that the investigating officer referred the accused to her superiors. To support his proposition, counsel relied on the following authorities:-

1) Janet Muviti Kathuku – vs – Republic Nairobi CRA No. 23 of 1992 [1994] e KLR

2) Jacob Njuki Warui alias Wamwea Waruki – vs – Republic – Nyeri CRA NO. 112/2002[2002] e KLR

3) Bassan & Wathiobia S/O Kiambu – vs – R [1961] EA 531.

4. Counsel urged the court to allow PW7 to produce the statement for three reasons:-

(a) That an investigating Officer is allowed and authorized by law to record a statement under enquiry from a suspect during the course of investigations.

(b) It would be impractical for an investigating Officer in the course of his /her duty to always refer the task of recording a statement under enquiry to another police officer.

(c) The statements taken under enquiry are admissible in a court of law

5. Mr. Ondieki, counsel for the accused, vehemently opposed the application. His first argument was that the rules governing the taking of statements under enquiry have changed since the judgment in the **Janet Muviti Kathuka case (supra)** and that in 2010, a new constitutional dispensation came into force, thereby displacing the ratio decidendi in the **Jacob Njuki Warui case (Supra)**. Further, that in the absence of a trial within a trial a statement under enquiry cannot be produced. Counsel also submitted that the statement sought to be produced is a confession and that the procedure for producing such a statement is well set out under Sections 23-29 of the Evidence Act. Counsel made specific reference to Section 25A of the Evidence Act which reads:-

“25A Confessions generally inadmissible

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 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.”

6. Taking his submissions further, defence counsel contended that the least the prosecution can do is to avail the officer who recorded the statement to produce the statement instead of insisting on PW7 producing it.

7. In his reply, Mr. Juma submitted that each case must be considered on its own merit and that unless the defence can show in the instant case that the accused was coerced, induced or otherwise intimidated to make the statement, then the same should be admitted. Counsel submitted that the opportunity is still open for the court to conduct a trial within a trial in order to determine whether the statement sought to be produced is admissible in this case.

Analysis and Determination

8. I have now carefully considered the rival submissions and the law, and in particular Sections 25-29 of the Evidence Act Cap 80 Laws of Kenya (both sections inclusive). I have also carefully read though the cited authorities. In this regard, I refer to the case of **Jacob Njuki Warui (supra)** where at page 4 of the judgment, the learned JJA had the following to say with regard to the issue at hand:-

“The courts attention was not drawn to the famous case of Bassan and Wathioba –vs – Regina [1961] EA 521. The predecessor of this court said at 533:

“We certainly do not think that the court in Njuguna’s case (1954) 21 EACA 316 at 322), intended to lay down a rule of law that a statement recorded by an investigating officer upon charge and caution of a suspect is to be automatically excluded from evidence. Nor do we think that the court in Israel’s case (1956) 23 EACA 52 at p 521), can have intended to say that it is necessarily improper for an investigating officer to take any statement from a suspect. If it did, we must respectfully dissent. There may be many suspects in the early stages of an investigation into a case, and it is hardly a practicable proposition that a fresh and independent police officer should be procured to take a statement from each.”

9. What is clear from the above is that a confession or statement under enquiry is admissible in evidence

once the court is satisfied that he same was voluntarily given. This means then that the matter has to go through a trial within a trial for this court to establish whether or not the statement sought to be produced was voluntarily taken. This also means that the officer who took the statement, namely DCIO Paul Wambugu has to be availed to produce the statement and to allow for trial within a trial if the defence is objected to the production. The objection raised by defence counsel has to await the outcome of the trial within a trial. Meantime PW7 is not allowed to produce the statement.

Orders accordingly,

Ruling delivered dated and signed in open court here at Kakamega this 30th day of November 2017

RUTH N. SITATI

JUDGE

In the presence of

Mr. Juma.....for state

Mr. Aburili holding brief for Ondieki.....for accused

PolycapCourt Assistant