REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

CRIMINAL CASE NO 54 OF 1988

REPUBLIC…….....…… PLAINTIFF

VERSUS

HUSSEN ……..…… DEFENDANT

RULING

The accused Mohammed Shiraz was arrested on 11th December, 1987 at about 3.30 pm by CI Mboshe, the investigating officer and detained upon suspicion of murder of his wife Zainab. He was in police custody and on 17th December, 1987, at about 10.30 am Chief Inspector Mboshe, who had received a tip off that the accused owned a private store along Baridi Road in Pangani, asked the accused about these keys. The accused told him that the keys were with someone at River Road but on the way he told the Chief Inspector that he had a confidential request to put to the Chief Inspector. Thereupon they returned to Kasarani Police Station where the accused was invited to the office of the Chief Inspector, after the Chief Inspector had dealt with some members of public. The Chief Inspector asked the accused what the confidential request was and the accused started confessing to murder of his wife and that everything was in the store.

Thereupon, the Chief Inspector interrupted the accused and cautioned him in the usual manner. The accused who understood the caution continued to plead with the Chief Inspector and offered to give him Shs 200,000/- which were in the store, and promised to later give to the Chief Inspector some more to make it Shs 500,000/-.

They then drove to Pangani to the house of a cousin of the accused, and from a bag, behind the door of a bedroom the accused removed the keys and at the store on Baridi Road the accused opened the door with these keys.

Inside the store, the accused pointed out various places and items used in connection with the murder of his wife and made oral statements, amounting to confessions, in respect of various such places and items in the store.

The defence has objected to admissibility of such statements on the grounds that:-

(a) these were obtained against the spirit of Judges Rules.

(b) these were obtained in breach of fundamental constitutional rights of the accused person

(c) there was lack of fair play as far as the rights of the accused were concerned.

(d) there was abuse of procedure

(e) that failure to imply strictly with the procedure tend to taint the voluntariness and legality of the said statements.

It is conceded on behalf of the defence that there is no allegation of torture but the gravamen is more civilized irregularities which tend to establish that such oral statements are not admissible.

During the trial within trial, the Chief Inspector gave evidence as to circumstances as above which led to the discovery of certain facts in the store and the oral statements of the accused with regard to such discovery.

It may be noted that during cross-examination of the CI in trial within trial, certain discrepancies and important omissions surfaced between his evidence in court and his police statement. I have carefully considered these. I do not consider any of these material or vital in so far as what transpired before the trip to the store and as to caution administered before the trip to the store.

The accused made a lengthy statutory statement in which he described the circumstances of this arrest, detention and how on 17th December, 1987, he was questioned about the store and how they proceeded to the store after he the accused obtained the keys to the store from his cousin's house. Although there are certain variations between the evidence of CI and the statutory statement of the accused with regard to conversation which took place, there is no dispute that the store was visited after the accused obtained the keys from his cousin's place. Of course, the accused has retracted the statements amounting to confession.

Both Mrs Njogu for the republic and Mr Ghalia for the defence made elaborate submissions with regard to the adminissibility of the oral statement made by the accused and where appropriate strengthened their submissions with decided cases.

Mrs Njogu relied on *Sarkar on Evidence*, 13th Ed as well as *Ochieng vs U* (1969) EACA P 1 and *Ngumba vs R* (1975) EACA P 282.

Mr Ghalia heavily relied on the well followed principles with regard to confessions in *Njuguna vs R* [1954] EA P 316 as well as cases cited in *Durand's Evidence for Magistrate* Part II at P 253 where *R vs Kaperere s/o Mwaya* (1948) EACA pp 57-58 was cited with regard to dangers of

relying on oral confessions as quoted in *Taylor on Evidence* (11th Ed) P 582 and at p 273 where CI Ainley in *Wambaa Musai vs R* High Court Cr App No 1086 /1966 (unreported) discusses the procedural difficulties under s 31 of the Evidence Act. Mr Ghalia also drew my attention to a passage in Court of Appeal Criminal Appeal No 115 of 1981 *Paul Nakwale Ekai vs R* where Law, Potter JJA and Simpson Ag JA suggested that consideration be given to amending the Evidence Act to provide that no statement in the nature of a confession made to a police officer of whatever rank be admissible in evidence against a person accused of a criminal offence.

The crux of Mr Ghalia's submissions is that the prolonged detention of the accused was unlawful and therefore whatever confessions the accused person made to police officer of whatever rank must be

excluded. In doing so, Mr Ghalia impounded on the provisions of the Constitution with regard to fundamental rights and s 36 of the Criminal Procedure Code. He also compared the enormous authority and power of the police to investigate the crime with the fundamental rights of the individual. He was of the view that if police crossed that line – the line of protection of the suspect – then the powers of the police are clipped by the law. He set out the stages of investigation by the police and said that police, at the stage of trying to find the author of a crime had enormous powers, but once the suspect was found, his rights were most vital. Although police were entitled to question the suspect after caution, the rights of suspects may not be disregarded, especially where the gravity of crime is enormous. The moment when the police have sufficient evidence, the law demands that the suspect be charged forthwith because it is the right of the accused person to know that he is in jeopardy of being charged. It is unfair and wrong to delay charging the accused because once he is charged with an offence, he cannot be interrogated. Mr Ghalia contended that it is only after the accused is charged, that he may be arrested as the rights if the accused are greater upon arrest than at the stage when he ought to be charged.

According to Mr Ghalia, the police jumped to the last stage of arresting him. He was never charged and his right to know the reason for arrest was jeopardized. Moreover, he could not be questioned after being charged and should have been taken to court within 24 hours. To suggest that it was impracticable to take the accused to court within 24 hours from a distance of 3 km was an eyewash and an excuse to detain him longer than the police were entitled. Mr Ghalia deplored the practice of prolonged detention of suspects in police custody which provoked frequent complaints of torture and even resulted in a murder as in Mombasa case. It is Mr Ghalia's contention that the police have no right to arrest a person on suspicion as there is no provision for arrest of a suspect. It is Mr Ghalia's submission that the accused ought to have been charged and it was the duty of CI Mboshe to charge the accused, the moment CI saw blood on the floor of the store and the accused made some incriminatory statement about it.

Relying on *Njuguna vs R* (*supra*), Mr Ghalia asserted that the detention of the accused for 6 to 7 days was a long time, there was improper or unlawful questioning or improper methods were used, there was no right to interrogate when in police custody and in the instant case the interrogation was consistent.

Mr Ghalia argues that the prolonged detention of the accused without charging amounted to fundamental breaches of his rights to be charged, his rights not to be interrogated and his rights to be taken to court within 24 hours.

Quoting from *Wambua Musai v R*, he suggests that CJ Ainley properly suggests severance of discovery of fact from confession, when considering the procedure under s 31 of the Evidence Act.

He urges the court to rule that the incriminatory statements accompanying the discovery of facts be held inadmissible.

With regard to fundamental rights and freedom of the individual, in Chapter V of the Constitution, it must be emphasized that these rights and freedoms are subject to respect for the rights and freedoms of others and for the public interest and the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

In the instant case, a gruesome and revolting murder was perpetrated. As observed in *Njuguna's* case, the awfulness of the crime is irrelevant to the standard of proof required of the prosecution. It is a matter of grave concern that the courts should administer justice according to law. CI Mboshe had reasonable suspicions since he was briefed on 8th December, 1987, that the accused may be connected with the crime. He took the accused in police custody on 11th December, 1987 on such suspicion and the police were looking for a break. The break did not come until the police received a tip off about the private store

of the accused. It is the discovery of the facts in that store which founded the basis of evidence to charge the accused with the offence. Until then, there was no sufficient evidence for the police to bring the accused person to the court.

In these circumstances, would it have been wise to let the accused go scot free whilst the cloud of suspicion was hovering over the accused. What would be the consequences of the fundamental rights of the accused were to be respected to the latter. One must not lose sight of the fact that the accused offered a very substantial sum of money to CI Mboshe in the store which was in the store in order to give him (the accused) opportunity to clean up the place. Must not these circumstances be weighted in the scale of public interest as against fundamental rights of the accused person. Be that as it may, it may be useful to examine Mr Ghalia's contention that police have no right to arrest a suspect, that an arrested person must be charged forthwith and that such person must be brought to court within 24 hours and that the prolonged detention of the accused was unlawful. Under s 29 (a) of the Criminal Procedure Code, a police officer is empowered to arrest any person whom he suspects upon reasonable grounds of having committed a cognizable offence. Murder is a cognizable offence.

Under s 72(1) of the Constitution under Chapter V dealing with protection of fundamental rights and freedoms of the individual, no person shall be deprived of his personal liberty save as may be authorized upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law of Kenya.

Reading these two provisions together, especially the phrases used in either provisions with regard to suspicion upon reasonable grounds or upon reasonable suspicion, can it be said that the police have no right to arrest a suspect until they are in a position to charge the suspect forthwith with the offence. If so, the provisions of s 36 of the Criminal Procedure Code with regard to detention of persons arrested without warrant will seem to be redundant and of no application. Section 36 as it was in December, 1987 before the amending Act 13 of 1988 read:-

"When a person has been taken into custody without a warrant for an offence other than murder or treason the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty four hours after he has been so taken into custody, inquire into the case, and unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable.

Provided that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge."

It would appear from the above, that a person arrested upon suspicion may be taken into custody and unless the offence appears to be of a serious nature, shall be released on bond if it does not appear practicable to bring that person to court within twenty four hours. It is to be noted that the officer in charge of the police station is required to inquire into the case before he exercises his discretion to release the person on bail. It would appear that where the offence appears to be of a serious nature the person may be detained in custody and shall be brought before a court as soon as practicable. The officer in charge also has discretion after due police inquiry to release a person if in his opinion insufficient evidence is disclosed on which to proceed with the charge.

It is therefore evident that it is not correct to say that the police have no right to arrest a suspect until they are in a position to charge the suspect forthwith.

Moreover, with regard to bringing the person so arrested upon suspicion, the obligation to bring such person to court within twenty four hours, in my view, is imposed for an offence which does not appear to be of a serious nature. As regards the offence of murder and treason, it would seem that the requirement to bring the person suspected of such offence within twenty four hours does not apply. It would be ideal to bring all persons suspected of having committed an offence to court within twenty four hours but from experience it is well known that it is not practicable to do so. This does not mean that the court approves or condemns the failure of the police to bring such persons to court within twenty four hours. Each case must be looked at from its own circumstances. It cannot be said that a person who is detained in police custody for more than twenty four hours is so detained unlawfully unless after considering all the circumstances of the case, the court comes to conclusion that the police acted in unjustified disregard of the provisions of the Criminal Procedure Code.

It may be argued that the provisions of s 36 of the Criminal Procedure Code offends the provisions of s 72(3) of the Constitution which imposes the burden of proving that he arrested or detained person has been brought before a court as soon as reasonably practicable rest upon the person who alleges such compliance unless such arrested or detained person is brought before a court within twenty four hours. If the two provisions are read together, it may seem that they are not in conflict with each other. As said earlier, each case must be considered or looked at from its own circumstances. In doing so, the phrase “as soon as reasonably practicable” must be considered in its wider connotations. It would be unreasonable to give too strict or narrow an interpretation to the phrase, especially when analyzing the same with regard to detention of a person reasonably suspected of murder or treason pending due police inquiry as to sufficiency or otherwise of the evidence. Regard must also be had, as earlier said to particularity of each individual case. It is to be noted that by amending Act 4 of 1988, the burden of proving compliance with s 72 (3) of the

Constitution in the case of person arrested or reasonable suspicion of having committed an offence punishable by death is imposed if the person is not brought before the court within fourteen days. It is my considered view that having regard to all the circumstances of this case, the detention of the accused person for six or seven days was neither unlawful nor was the same infringement of the fundamental rights of the accused under the Constitution nor does it impinge the Judges Rules.

Although in *Ngumbao and another vs R* (1975) EACA 282, where Mr Ghalia argued the appeal on behalf of the appellants, the Court of Appeal strongly deprecated the practice of rounding up all and sundry who may be connected, however with a criminal investigation, and detaining them unlawfully in police custody for questioning. It held that “confession made or an exhibit discovered, whilst a person is in unlawful custody, is not in itself a bar to the production and admission or such confession or evidence”, citing with approval the decision in *Bassan vs R* [1961] EA 521 and *Karuma vs R* (1955) EACA 364.

As regards the procedure applicable under s 31 of the Evidence Act, when any fact is deposed to as discovered in consequence of information received from a person accused of an offence, I find it difficult to grasp the reasoning of CJ Ainley in *Wambua Musa’s* case that a stringent limitation may be imposed on what a witness is giving an account of the information may say and that the fact discovered may be severed from the incriminatory statement made by the accused person with regard to discovery of such fact. This is so because s 31 allows such information to be not only proved but it may be so whether it amounts to a confession or not. If the information were to be severed from the statement amount to confession the discovery of fact could be rendered meaning less such as,

"This is the board" without adding " to conceal the body in the pick up" or "These are the knives" without adding "with which I cut the string to tie the feet and hands of the deceased".

It is true from CJ Ainley in 1966 when he described Part III of Evidence Act dealing with confessions as highly artificial approach to evidence adopted by the legislature in Part III of Evidence Act to the suggestion of Court of Appeal in *Ekai vs R* (*supra*) in 1981 that Evidence Act needs to be amended to exclude statement in the nature of confession made to a police officer whatever rank. The judges are not of evidence of confessions. Nevertheless, such laws of evidence on confession still stands and is in force. Justice must be administered according to the law.

Upon consideration of all the circumstances, I am of the view that the detention of the accused person in police custody for 6 to 7 days had not in any way tainted the voluntary nature of the oral statement made by the accused to CI Mboshe on 17th December, 1987 outside and inside the store on Baridi Road.

As regards the compliance with Judges Rules, I rule that there was substantial compliance with the same. In any event, the following comment in *Ekai's case* its to rest any apprehension that the Judges Rules were not strictly complied with:-

"The Judges Rules, as was made clear in *Anyangui* case (*Anyangu & Others vs R* [1968] EA 239), are only rules of practice and it is always in the discretion of the trial judge to admit in evidence statement made by the accused persons although they are not obtained strictly in accordance with the Rules, provided of course (as was the case here) that the judge is satisfied that the statements were made voluntarily and were substantially true."

I rule that such statements amounting to confession are admissible in evidence.

Dated and Delivered at Nairobi this 15th Day of August, 1990

M. ABDULLA

……..……

JUDGE