



**Republic v Mwangi alias Tonny & another (Criminal Case  
E047 of 2023) [2025] KEHC 1155 (KLR) (17 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1155 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE E047 OF 2023  
AC BETT, J  
FEBRUARY 17, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**NEWTON MUGATA MWANGE ALIAS TONNY ..... 1<sup>ST</sup> ACCUSED**

**ALLAN MWASAME ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. The 2<sup>nd</sup> Accused person ALLAN MWASAME objected to the production of an Out of Court Confession that he allegedly made before Chief Inspector Jogoo Wangatia an officer who is qualified within the meaning of Section 25A of the [Evidence Act](#) to record a confession. A trial within trial was then ordered.
2. Section 25A of the [Evidence Act](#) provides as follows:-
  - “(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.”



3. In recording a confession, a qualified police officer must ensure that he complies with the procedure laid down in the Evidence (Out of Court Rules, 2009 “the Rules” which were enacted to give effect to Section 25A (2) of the *Evidence Act*.
4. The officer who recorded the confession gave sworn evidence as PW1. He narrated how on 20<sup>th</sup> October 2023, at 17.00 hours, after completing Mashujaa day celebrations, he arrived at the office where PC. Charo informed him that a suspect had confessed to him about a murder. PC. Charo then referred the suspect, who is the 2<sup>nd</sup> Accused herein, to him.
5. According to PW1 when he established upon inquiry that the suspect had the intention of making a confession, he asked him whether he had a relative or a person that he would wish to be present during the confession and after explaining to the suspect the legal requirement for a witness, the suspect nominated his mother Caroline to be a witness.
6. PW1 stated that he ensured compliance with the Rules, as provided by the *Evidence Act*. He first made an inquiry to establish whether the suspect’s rights had been infringed. This he did after confirming from the suspect in the presence of Caroline and his sister, that the suspect preferred to proceed in the Kiswahili language and did not need an interpreter.
7. According to PW1, the suspect said he had not been subjected to any form of coercion, duress, threat, torture or any other form of cruel inhuman or degrading treatment or punishment.
8. The witness went further to state that the suspect said he had no need for a lawyer, had not been deprived of sleep, water or food. The suspect confirmed that he had been arrested on 20<sup>th</sup> October 2023 at 11.00 hours and had no medical complaint.
9. PW1 stated that he inquired whether the suspect had been facilitated to communicate to which he responded that he had been given a phone which he used to call his mother.
10. PW1 stated that he recorded the responses to each query and the suspect appended his signature to each response and he therefore concluded that the environment fitted the circumstances for confession.
11. The witness went further to state that he took down the personal details of the suspect’s mother Caroline Nafula whom the suspect had nominated to be his witness and who wrote down her name in her own handwriting with the 2<sup>nd</sup> Accused countersigning.
12. After that followed a cautionary statement in which PW1 stated that he informed the Accused of his right not to say anything against his wish and the fact that whatever he said would be taken down in writing and may be given in evidence and the Accused opted to proceed with the statement and signed and wrote his name after which he proceeded to make a confession which took one (1) hour to complete and therefore was not prolonged.
13. On cross-examination by Ms. Mburu for the Accused, he said that he did not know how many police officers had taken the 2<sup>nd</sup> Accused to the forest and that the Accused is the one who told him that he had been arrested at 1100 hours. According to PW1, the statement he took from the Accused amounted to a confession as the Accused had confessed that he killed the deceased together with the 1<sup>st</sup> Accused.
14. PW1 reiterated that he informed the Accused of his rights and that the 2<sup>nd</sup> Accused understood the caution.
15. PW1 said that he insisted that the 2<sup>nd</sup> Accused get a relative to be present but did not insist that he get a lawyer. According to him, mental assessment was done after the confession. He said that the



- Accused confirmed that he had not been tortured before being taken to record the confession and he was physically fine at the time. The witness said that the statement was in his handwriting.
16. On cross-examination by Ms. Wanyonyi for the 1<sup>st</sup> Accused, PW1 stated he did not confirm what happened between the time the 2<sup>nd</sup> Accused was arrested and the time of confession at 5 p.m. and that the Accused did not complain that he had been tortured by Mr. Hassan, the Investigating Officer and Ms. Awiti Naomi. He pleaded ignorance to any injury on the 2<sup>nd</sup> Accused's arm and stated that when the Accused was brought to him, he was fine.
  17. In response to re-examination, the witness reiterated that he informed the Accused of his right to legal representation and the Accused said that he did not require any and signed to confirm his position. PW1 further reiterated that he complied with the rules and said that he had not been shown any medical report indicating that the suspect's mental status was not good.
  18. The other witness was Carolyne Nafula who testified as PW2 in the trial-within-trial. She said that she is the mother of the Accused. She said that in the morning of 20<sup>th</sup> October 2023, the police had arrested the 2<sup>nd</sup> Accused and later that day, she was summoned to Lumakanda Police Station where she arrived around noon. She recalled that she was present when the Accused was interrogated by Mr. Wangatia. She stated that she heard the Accused being questioned severally as to whether he had been fed, whether he had any ailment or physical complaint and whether he was being threatened. According to her, the 2<sup>nd</sup> Accused responded that he was well taken care of and was giving the statement voluntarily. She said that the Accused stated that she would be his witness. The witness then proceeded to narrate what she heard the Accused state in his statement to the police. She said that after the statement had been recorded, she saw the 2<sup>nd</sup> Accused signing the document which she also countersigned.
  19. Cross-examined by Ms. Mburu, PW2 said that the Accused was arrested at 9.00 a.m. by Police Officer Hassan, Murure and about 5 others and he had not suffered any injuries then. She said that since she was not present, she would not know what transpired at the forest. She further stated that at the time the Accused recorded the statement at 5 p.m., he had no visible injuries. She said that she used to visit the Accused and every time he would say that he was fine and never complained that his hand was injured.
  20. In response to Ms. Wanyonyi, PW2 said that the Accused used to tell her what was going on in his life but had not disclosed to her anything before his arrest. He also did not inform her that his hand was broken while in custody or that he had been threatened.
  21. On re-examination, PW2 said that the Accused has never told her that he was beaten and his hand injured.
  22. When placed on oath, the 2<sup>nd</sup> Accused stated that on 20<sup>th</sup> October 2023, he was arrested and taken to Lumakanda Police Station where he was taken to an office to record a statement before Jogoo Wangatia between 5 p.m. and 6 p.m. He confirmed that his mother Carolyne and the DCI were present and before he recorded the statement, he was asked whether he had been threatened, tortured or forced to record the statement and he responded in the negative. He further stated that he was informed of his right to have an advocate. He said that he responded that he was making the statement voluntarily because of fear. He averred that he signed the statement as asked. He stated that the confession is what he stated on that date but he did not give it voluntarily. He said that Hassan told him to narrate the statement in that manner so that he would connect the 1<sup>st</sup> Accused with the hardball. He further stated that Hassan asked for the clothes that he had given Bernard and he informed him that he had sold them to his friend who had liked them. The Accused said that as he recorded the statement, he did not complain that he had been beaten.



23. In response to cross-examination by Ms. Mburu, he said that the 1<sup>st</sup> Accused was arrested earlier than him. He denied saying that he was feeling guilty and wanted to confess but admitted that he was with the 1<sup>st</sup> Accused at the Petrol Station on 7<sup>th</sup> October 2023. He said that he was given food at 3 p.m. and was taken to hospital while in prison. He said that Hassan had hurt him.
24. On being cross-examined further, the 2<sup>nd</sup> Accused said that he was not told that he was confessing. He claimed that he was assaulted by three officers and named Hassan and Afande Awiti. He said that as they assaulted him, they urged him to agree with what they would state so that they could help him. As to why he did not inform his mother about the assault by the officers, he said he knew she would get stressed.
25. In response to a question by the court, the Accused said that he requested for treatment but did not file a report of the assault with the police.
26. At the close of the trial-within-trial, the parties filed their written submissions.

### **SUBMISSIONS BY THE PROSECUTION**

27. The ODPP submits that based on the evidence of the recording officer and the Accused's witness Carolyne Nafula, the recording officer followed all the rules regarding recording of confessions to the letter.
28. It is the prosecution's submission that since the defence claim that the statement was not voluntarily made because the Accused was first tortured then presented to record the confession statement, then the interpretation by the prosecution is that the statement should be treated as a retracted statement in that the Accused admits to have made the statement under coercion as he had been tortured or beaten to make it. The prosecution submits that the allegations of coercion through beating or torture is the only ground of objection raised by the defence.
29. According the Prosecution, all the witnesses testified to the fact that all the rules as to the recording of a confession by an accused were complied with. Further, PW2, who is the Accused's mother and was his witness during the confession testified that the Accused looked fine during the confession and did not complain of any beating nor did she see any signs of injuries on him.
30. The prosecution submits that the allegations of torture have been raised as an afterthought to defeat the production of the confession statement.

### **SUBMISSIONS BY THE ACCUSED**

31. On his part, the Accused submits that the confession is not admissible on two grounds:
  - (i) That the confession was extracted out of him through threats and violence and promises by persons in authority that if he collaborated with them he would be treated with mercy.
  - (ii) That the same is not a confession as it points to the guilt of a co-Accused which in itself would be considered inadmissible in some instances.
32. On the first ground, the Accused submits that he confessed after he had been taken to the forest by at least seven (7) police officers, during which time he was coerced and beaten to the extent that he need medical attention afterwards. The Accused contends that he was literally arm-twisted into a confession.



33. The Accused asserts that the onus is on the prosecution to prove affirmatively that a confession was made voluntarily.
34. On the second ground, the Accused asserts that the confession before court is not actually a confession as it does not comprise an admission by the Accused that he committed the offence. According to the Accused, since the confession points to the guilt of his co-Accused while exonerating him, then the same should be treated with caution.

### **Analysis and Determination**

35. It is not in dispute that on 20<sup>th</sup> October 2023, the Accused recorded a statement in the presence of his mother as his witness, under a Chief Inspector. The Accused does not dispute the manner in which the recording officer took the statement, nor the contents of the statement. He seeks to retract the same on the ground that he was coerced into writing it.
36. I have carefully analysed the statement and find that the recording officer failed to comply with Rules 8 and 9 of the Evidence (Out of Court Confession) Rules, 2009 which stipulate that:-

- “ 8. At the conclusion of the recording, the accused person shall be offered the opportunity to clarify anything he has said and to add anything he may wish.
9. The recording officer shall ensure that the written confession or electronic recording media contains the following certificate at the end of the confession, in the original language of the accused person: “I have read the above statement and I have been told that I can correct, alter or add anything I wish. The statement is true. I have made it of my own free will.””

37. In the case of Republic -vs- Edwin Otieno Wanyara [2019] eKLR, Mrima J held that the failure to comply with Rules 8 and 9 of the Rules rendered the confession statement of no probative value and stated:-

“I will now consider the effect of failure to comply with Rules 8 and 9? To me, the failure renders the statement of no probative value at all. Such a statement has no force of law. Even if the statement is admitted into the Court’s evidential record still it cannot be relied upon to be a basis of any finding. The foregone is fortified by the following finding by the Court of Appeal in Sango Mohammed Sango & Another vs. Republic (supra): -

Other than stating that the appellants had confessed to killing the deceased, the trial court did not consider the circumstances under which the confessions were made. Nor did it address the question of a trial within trial after the appellants, in their defences, repudiated the confessions. The trial court too did not warn itself of the danger of relying on repudiated the confessions. The trial court too did not warn itself of the danger of relying on repudiated confessions or even address its mind to the reliability of the repudiated confessions. We are satisfied that the confessions were not safe and ought not to have been relied upon in this case.”

38. It is apparent that although the recording officer tried to follow the Rules, he did not fully comply with the same. The Rules that the recording officer failed to comply with are couched in mandatory terms. Failure to follow them renders the confession inadmissible.
39. The onus of proving that a confession statement is admissible strictly lies with the prosecution. In absence of a Certificate under Rule 9, and in view of the claims of coercion proffered by the 2<sup>nd</sup> Accused



who says that he was arm twisted into recording the confession, I hold that the confession statement is inadmissible.

40. That being so, the confession statement is not admitted as part of the record.

41. Those are the orders of the court.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF FEBRUARY 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Ms. Chala for the Prosecution

Ms. Mburu for the 2<sup>nd</sup> Accused and holding brief for Ms. Wanyonyi for the 1<sup>st</sup> Accused

Court Assistant: Polycap

