



**Republic v Eyangan & 2 others (Criminal Case E003 of 2022)  
[2024] KEHC 1040 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1040 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL CASE E003 OF 2022  
RN NYAKUNDI, J  
FEBRUARY 8, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**LOKENO IMAL EYANGAN ..... 1<sup>ST</sup> RESPONDENT**

**ESEKON LOLEMU ALIAS EKITENDE ..... 2<sup>ND</sup> RESPONDENT**

**NAKANELO LOKARAN ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The three accused person’s face a charge of murder contrary to Section 203 as read with 204 of the [Penal Code](#) the brief particulars being that on the 1<sup>st</sup> February 2022 at Ngakapuk village in Turkana East Sub-County you murdered Hassan Ekuwom. Each of the accused person pleaded not guilty to the charge and vesting the duty in the prosecution to prove the allegations beyond reasonable doubt under Art. 50(2) (a) of the [Constitution](#). As at 31<sup>st</sup> January, 2024 seven witnesses had testified in support of prosecution case to establish the key elements of murder contrary to section 203 of the Penal Code. On the material day the Assistant Director Mr. Kakoi on behalf of the state moved a motion for admission of a confession statement recorded by the accused persons. Mr. Lele for the defence raised an objection on grounds the he was not served with the instrument purported to be a confession and therefore it should be struck out from the proceedings. That is the borne of contention in this matter.



## Decision

2. The law of *Evidence Act* cap 80 of the Laws of Kenya remains the cornerstone in the administration of Justice in our legal system. The law of evidence serves many functions. First and foremost, one has to appreciate the definition in section 3 (1) of the Act which expressly states as follows;

“evidence denotes the means by which an alleged matter or fact, the truth of which is submitted to investigation is proved or disproved and without prejudice to the foregoing generality, included statements by accused persons, admissions and observation by the court in its judicial capacity.”

3. Secondly, the legitimacy of a verdict is always based on evidence. That is when a dispute is presented to a court there will always be a number of issues which one party will have to prove in order to persuade the court to find in his or her favour. It is indeed the reason the law sets out certain guidelines to ensure the integrity of the process. For example, in the adversarial system to begin with a witness is led in examination in chief, followed with cross-examination and finally re-examination. Contextually either in civil or criminal administration of Justice the following provisions regulate the state of affairs on admissibility or non-admissibility of evidence to prove facts in issue;

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability depend on the existence of fact which the asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

107. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

108. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The gist of the grievance by the defence counsel is resoundingly found in Art. 50 of the *Constitution* on the right to a fair trial. This Article embraces both procedural and substantive justice. It connotes the presumption of innocence;

1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
2. Every accused person has the right to a fair trial which included the right-
  - a. To be presumed innocent until the contrary is proved.
  - b. To be informed of the charge, with sufficient detail to answer it.
  - c. To have adequate time and facilities to prepare defence.
  - d. To a public trial before a court established under this Constitution.
  - e. To have the trial begin and conclude without unreasonable delay.



- f. To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.
  - g. To choose, and be represented by, an advocate, and to be informed of this right promptly.
  - h. To have an advocate assigned to the accused person by the state and at state expense if substantial injustice would otherwise result, and to be informed of this right promptly.
  - i. To remain silent, and not to testify during the proceedings.
  - j. To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.
  - k. To adduce and challenge evidence.
  - l. To refuse to give self-incriminating evidence.
4. An accused persons right to a fair trial under Art.50 of the *Constitution* is a comprehensive right and as I said earlier it embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the *Constitution* 2010 came into force.
  5. The elements of this comprehensive rights are as captured above and even the specifications cannot be said to be exhaustive of what the right to fair trial comprises in criminal proceedings. In terms of this case neither the defence counsel nor the accused persons had been served in advance with the confession statement set to be produced by the prosecution witness who recorded it at the time of investigation. According to the Assistant Director Mr. Kakoi he joined the proceedings much later in the queue and was not aware that the statement had not been furnished to the defence for fair administration of justice or the maintenance of law and order. The defence counsel contended that if the prosecution is allowed to proceed to adduce evidence with regard to the confession statement the trial may run into a risk of infringement of Art.50 of the *Constitution*.
  6. The vexed question is whether fair trial rights kick-in might be answered in terms of having the questionable document shared with the defence in advance to enable them participate on matters arising on admissibility of the confession. Although, the reasonable standard is to have the information and material evidence to be adduced by the prosecution shared in advance with the defence, largely any blunder, lapse or mistake made by the prosecution counsel ought not to be visited upon the higher calling of fair administration of Justice. In this case the court is told that the mistake occurred mainly because of a change of prosecution counsel seized of the matter at the initial stages. It is trite that a confession made to a police officer of the rank of an inspector and above in relation to the commission of any offence requires the prosecution if it wishes to put it in evidence must take the liberty to prove that it was freely and voluntarily made and was not unduly influenced. This means at this stage the defence counsel has not demonstrated any compelling evidence or rational to exclude the confession purported to have been made by the accused persons.
  7. The attack on the confession set to be introduced by the prosecution cannot be merely struck out for reason of non service in advance to the defence.
  8. I add by way of completeness under Art.50 (2) (k) of the *Constitution* the defence may lead evidence in rebuttal of evidence on the confession advanced by the prosecution. In the case before me therefore, the Assistant Director Prosecution Mr. Kakoi has leave of this court to supply and serve the confession statement upon the defence counsel who will in turn take instructions on the issues to be ventilated



in a trial within a trial which shall be scheduled on 28/2/2024. It is quite clear from what I have said at least in so far as the admissibility of this evidence in concerned. It is also the effect of the hearing of matters of this nature in a separate trial within a trial the evidence of which is not admissible can be decided on the merits.

**DATED SIGNED AND DELIVERED AT LODWAR THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2024**

.....

**R. NYAKUNDI**

**JUDGE**

Mr. Kakoi for State

