



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 204 OF 2004**

CENTRAL BANK OF KENYA.....PLAINTIFF

VERSUS

GIRO COMMERCIAL BANK AND 2 OTHERS .....DEFENDANTS

**RULING**

1. This ruling arises from an issue raised by **Mr Billing** learned counsel or the 2<sup>nd</sup> Defendant regarding the admissibility of certain documents contained in the plaintiff's bundle of documents filed herein.
2. According to Mr Billing under sections 99, 100, 101 and 102 of the ***Criminal Law (Amendment) Act, 2003***, any confession obtained by police officers cannot be produced in Court as a confession. Relying on **Nakuru High Court Criminal Case No. 22 of 2003**, learned counsel submitted that section 25 of the ***Evidence Act*** was repealed. He further objected to the 4<sup>th</sup> witness, an Inspector of Police being called to give evidence in order to produce the confessions from the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants. Although the said confessions were obtained in a criminal investigation for the purposes of a criminal trial, **Mr Billing** contended that the said statements were inadmissible by virtue of the repeal of section 25 of the ***Evidence Act***. According to him, there is no exception to that rule which would permit the plaintiff to produce the said confessions against the said defendants.
3. While conceding that if the said statements had been part of the previous proceedings, they would be admissible as such proceedings, learned counsel submitted that in this case, they were neither part of the proceedings in the criminal trial nor did the said witness give any evidence in the said trial.
4. **Mr Nganga**, learned counsel for the 4<sup>th</sup> Defendant on his part associated himself with **Mr Billing's** submissions.
5. On the part of the plaintiff **Mr. Chacha Odera** submitted that the said amendment was brought about by ***Criminal Law Amendment Act*** and related to criminal proceedings. More importantly, learned counsel submitted, in considering the copies produced the date of assent of the said amendment was 18<sup>th</sup> July, 2003 and the date of commencement thereof was 26<sup>th</sup> July, 2003. The statements objected to on the other hand were taken on 5<sup>th</sup> July, 2003 which was 20 days before the commencement date. In **Mr Odera's** view, there is nothing either in the ***Evidence Act*** or in the said ***Amendment Act*** which suggest the said amendments were retrospective. In his view, nothing would have been easier than to state so.
6. To argue that the effect of the amendment was to make inadmissible all statements made prior thereto would be dangerous since we have to operate on the basis of what the law was. On the decision cited, learned counsel submitted that as at 5<sup>th</sup> July, 2003 that was not the law.

7. He further submitted that in civil proceedings admissibility is dealt with in sections 34, 35 and 36 of the **Evidence Act** and the test is that of relevance and probative value to be placed thereon irrespective of how the evidence was obtained. It was submitted that the preliminary objection was not based on a legal provision which existed at the time the statement was taken and cannot be the basis of exclusion of the statement hence the Court ought to disallow the objection.
8. In a rejoinder, **Mr Billing** reiterated that the said statement was not produced hence it was not a previous proceeding. According to him, at that time there was a procedure of trial within a trial before the said statement could be produced.
9. I have considered the submissions made by counsel in this matter. Section 25A(1) of the **Evidence Act** provides as follows:

***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 Chief Inspector of Police, and a third party of the person's choice.***

10. Section 25 of the said Act, on the other hand provides:

***A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.***

11. A confession is therefore geared towards proof of a commission of an offence.

12. Admission, on the other hand is dealt with in section 19 of the said Act wherein it is provided:

***An admission is a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned.***

13. An admission therefore does not necessarily prove the facts stated therein. It is simply a suggestion of an inference of a fact in issue or relevant fact. It is on this basis that section 25 of the **Evidence Act** provides that “Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.” Certain types of estoppel, however can only be used as a shield rather than as a sword hence cannot found a cause of action. Where that applies reliance by the plaintiff on an admission may well be of little if any assistance.
14. Although section 35 of the **Evidence Act** renders such statements admissible, section 36 qualifies the admissibility by providing that:

***In estimating the weight, if any, to be attached to a statement rendered admissible by section 35, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.*** [Underlining mine].

15. Therefore whereas a statement may be admissible in evidence due to the fact that it is relevant, it may not ipso facto be taken as proof of the matters contained therein. In other words admissibility ought not to be equated with proof. In civil matters a fact is said to be proved when its existence is established by a preponderance of probability and not merely by the fact of existence of admissible evidence. It is worth emphasizing that whether the admissible evidence will prove the facts in issue must at the end of the day depend on all the circumstances including in my view, the circumstances under which the same was given and its accuracy.
16. The Defendants have objected to the purported confessions being relied on by the plaintiff on the ground of admissibility. The general provision dealing with admissibility is section 5 of the **Evidence Act** which provides as hereunder:

***Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant.***

17. Having considered the relevant provisions of the ***Evidence Act*** it is my view and I so find that since a confession is meant to establish criminal guilt as opposed to civil liability the amendment introduced by section 25A of the Act did not necessarily render a statement improperly obtained inadmissible in civil proceedings. It is therefore my view that the introduction of the said amendment did not affect civil proceedings in so far as admissibility is concerned. The issue of what weight to attach to it, if any, will however be determined based on the totality of the evidence. The issue of improperly obtained evidence was dealt with by the Court of Appeal in **Kenya Breweries Ltd vs. Godfrey Oduyo Civil Appeal No. 127 of 2007**, where **Onyango-Otieno, JA** held that even if it had been proved that the report by the Bureau of Standards on the contamination of the beer, manufactured by the appellant was improperly obtained, that alone would have probably only affected its value and not its admissibility. It is noteworthy that this decision was rendered on 16<sup>th</sup> April, 2010 after the amendment in question.
18. It is therefore my view that the issue of retrospective operation of the said amendment does not fall for determination in this ruling since it is in my view irrelevant whether or not the statement was taken before or after the said amendment.
19. In the result the objection raised by the Defendants is disallowed. The costs are awarded to the plaintiff in any event.

**Dated at Nairobi this day 3<sup>rd</sup> day of July 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Odundo for Mr Chacha Odera for the plaintiff***

***Miss Thuo for Mr Billing for the 2<sup>nd</sup> Defendant***

***Cc Kevin***