



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. E040 OF 2023

REPUBLIC

PROSECUTOR

VERSUS

KEVIN OYONDI Alias PETER **1ST**

ACCUSED

FRANKLIN ESAU KADIMMA **2ND**

ACCUSED

RULING

1. The two Accused persons are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The Accused persons denied committing the offence and at the commencement of the trial, the prosecution indicated that the 2nd Accused had made a confession before a Magistrate which they intended to produce and

this necessitated the trial-within-trial as both Accused persons were opposed to the production.

3. The Prosecution adduced evidence for the trial-within-trial through three witnesses. Honourable Marcella Onyango who testified as PW1 said that she was a Magistrate at Mumias Law Courts on 2nd and 3rd October 2023 when a suspect by name Kadima Franklin Esau was taken before her for purposes of recording his statement. She stated that she took the statement in the presence of the suspect's preferred witness which was his father, and in the Kiswahili language. The witness testified that she made the necessary inquiries and received responses from the suspect including the allegation by the suspect that police officers beat him but he still wished to give his side of the story. She then recorded the statement.
4. On cross-examination, PW1 said that the suspect expressed the allegation that he had been beaten and said that he would give some statements voluntarily and others because he was coerced. She further stated that at the time of the confession, there was no investigating officer in court and the only persons

present were her Court Assistant, the suspect's father, and court orderlies. The witness said that she did not ask the suspect who had beaten him. She conceded that nowhere in the statement did the suspect admit that he killed the deceased. According to her, the suspect told her that the police had advised him to tell the truth so that they could help him become a witness.

5. The suspect's father Johnstone Kadima testified as PW2. He stated that on 3rd October 2023, the 2nd Accused informed him that he had been beaten by the police but as he went to record the statement, he was mentally and physically well. PW2 said that he did not hear the 2nd Accused raise any complaint against the police. He further said that after the 2nd Accused gave his confession in Kiswahili, it was read over to him again and he and the 2nd Accused signed the statement.
6. When cross-examined, PW2 said that the 2nd Accused did not inform him why he was beaten and that to the best of his knowledge the confession was not recorded after threats and coercion but out of the 2nd Accused own free will. PW2 further stated that the 2nd Accused had informed him that a police officer by the name

Muriuki had advised him that the statement he would make in the court would assist him in plea bargain.

7. The 2nd Accused testified that on the date he recorded the statement, he had not been deprived of food, was not sick and had not been tortured although he had been beaten. He said that he was beaten at Mumias Police Station and as he was being beaten, he was ordered to concede that he was the one who murdered the deceased. At the court, no one tortured him but when asked whether he would give the statement voluntarily, he told the recording Magistrate that he would narrate some parts of the statement voluntarily and others because he was assaulted. He insisted that the entire confession statement was false as he recorded it after he had been tortured.
8. On cross-examination, the 2nd Accused reiterated that he had been beaten before he went to make the confession and that he gave the statement because he was tortured. He said that his private parts had been squeezed and his balls tied with a string but he was scared to ask for treatment.

9. At the end of the trial-within-trial, both parties filed written submissions which the court has duly considered.

10. The Evidence Act defines a confession as:-

“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 made before a Magistrate is generally admissible if made within the parameters set out in Section 25A(1) of the Evidence Act which states:-

“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."

12. Where an Accused person retracts a confession, the court's duty is to first establish whether it is admissible. One of the factors that renders a confession statement inadmissible is where the Accused claims that he did not make it voluntarily.
13. In determining whether or not a confession is admissible, the court must consider the circumstances under which it was made. In the case of a repudiated or retracted confession, the burden lays on the prosecution to prove that it is admissible.
14. Section 26 of the Evidence Act stipulates the conditions under which a confession or admission can be deemed inadmissible and states:-

"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person,

proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”

15. In **Kanini Muli v. Republic [2014] KECA 870 (KLR)**, the Court of Appeal held that whether a confession is recorded by a judicial officer or police officer, it is incumbent upon the trial court to satisfy itself that the confession was voluntary. The said holding was a reiteration of the position held by the Court of Appeal in **Shah v. Republic [1984] KLR 676** when it rendered itself thus:-

“The purpose of a trial-within-trial is to determine the voluntariness of the statement tendered for the prosecution, because a statement by an accused person is not admissible against him unless it is proved to have been voluntarily.”

16. Section 27 addresses confessions made under inducement, threat or promise and states:-

“If such a confession as is referred to in section 26 of this Act is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is admissible.”

17. The 2nd Accused person raised two pertinent issues during the trial. First, he said that he had been beaten by the police and secondly that he had been urged to tell the truth so that he could be turned into a state witness. The 2nd Accused without being explicit, seemed to imply that he was threatened and coerced into making the retracted confession.

18. His claims were corroborated in part by his father, and the record of the proceedings before the recording Magistrate when on 2nd October 2023, he said:-

“I was beaten when I was arrested by the police and I told them what had happened. There is a part of my statement I will say of my own free will and others I will say because I was beaten. I was told if I say the truth, the police will help me

and I may be a witness and I will not be convicted the same as the person who committed the offence.”

19. Implicit in the above statement are the vitiating factors alluded by the Accused in retracting the confession;
- (a) That the 2nd Accused was beaten by the police prior to the making of the confession.
 - (b) That he was coerced and/or induced to make a confession with the promise that he would be turned into a state witness.
 - (c) That he was coerced and or induced to make a confession so that he could benefit from a plea bargain agreement with lighter penal consequences.
20. The Magistrate was enjoined by Article 49 of the Constitution of Kenya to ensure that the Accused’s rights to a fair trial were not violated. In **Kanini Muli v. Republic (Supra)**, the court considered the procedure to be taken by a Magistrate before taking a statement from an Accused person and rendered itself as follows:-
- “ In NAYINDA S/O BATUNGWA VS R (supra), the same court once again emphasized the**

importance of a magistrate to administer a caution before taking a statement from an accused person. In that case, as in the present appeal, the appellant was convicted of murder by setting fire to the house in which the deceased was sleeping. The main evidence against the appellant was an extra judicial statement made by him to a magistrate. That statement was recorded without the appellant being cautioned by the magistrate. The Court of Appeal stated as follows regarding the failure to caution the appellant:

“The Judges’ Rules are not applicable to the taking of statements by magistrates, since they are rules drawn up for guidance of police officers engaged in the actual investigation of criminal offences. There is nevertheless, an established procedure which is normally followed by magistrates and which is designed to the same end, namely, to ensure that a statement taken by the magistrate is a voluntary one. To this end, we certainly think it

advisable that a magistrate who is about to take a statement should administer a caution in the normal form as laid down in the Judges' Rules. If there was anything to suggest that the failure to administer a caution had resulted in the making of a statement which was not voluntary in the sense explained in R. VS VOISIN [(1918) 1 KB 531] a trial judge might well, in the exercise of his discretion, reject the statement. (Emphasis added).

21. Rule 4 (1) to (3) of the Evidence (Out of Court Confessions) Rules, 2009 sets out the rights of the Accused as follows:-

“(1)Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person

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(a)has stated his preferred language of communication;

(b)is provided with an interpreter free of charge where he does not speak either Kiswahili or English;

(c)is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;

(d)is informed of his right to have legal representation of his own choice;

(e)is not deprived of food, water or sleep;

(f)has his duration, including date and time of arrest and detention in police custody, established and recorded;

(g)has his medical complaint, if any, adequately addressed;

(h)is availed appropriate communication facilities; and

(i)communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under rule 5.

(2) The recording officer shall not record a confession from any accused person who

complains to him of being a victim of torture or whose physical appearance shows signs of physical injuries including open wounds, body swelling, or shows extraordinary fatigue or any other indicators that would suggest that the accused person has been tortured.

(3) The recording officer shall ask the accused person to nominate a third party who shall be present during the duration of the confession session, and upon the appearance of the third party, the recording officer shall record the third party's particulars and relationship to the accused person."

22. I have analysed the record of the confession proceedings and I am of the view that once the 2nd Accused claimed the he would make some portions of the statement voluntarily and others because he was beaten, the recording Magistrate should have not proceeded with the confession as there was a danger that what the 2nd Accused, who was unrepresented was alluding to was that he was under duress due to torture, to make the confession. Further, there was also a

certain portions of his statements were because of underlying threats, coercion, inducement or promise cannot be wished away.

23. It is also evident that the recording Magistrate did not fully comply with the Judges Rules before proceeding to record the statement. Notably, there is nothing on the record to indicate that the likelihood that the Accused was induced to make the statement.
24. The failure to fully comply with the Judges Rules could have caused prejudice to the 2nd Accused as his statement may truly not have been voluntarily made.
25. For the reasons given, I am not satisfied that the statement of confession by the 2nd Accused was taken in accordance with the rules and I decline to admit it.
26. Those are the orders of the court.

Dated, signed, and delivered at Kakamega, this 16th day of December 2025.

**A. C. BETT
JUDGE**

In the presence of:

Ms. Chala for the Prosecution

No appearance for Defence Counsel

Mr. Matunda for Victim's family

Court Assistant: Polycap

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