



**Republic v Wafula (Criminal Case E010 of 2023)
[2025] KEHC 272 (KLR) (24 January 2025) (Ruling)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E010 OF 2023
WM MUSYOKA, J
JANUARY 24, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

DENNIS PROTUS WAFULA ACCUSED

RULING

1. Number 232732, Chief Inspector of Police, Odhiambo Osoo, testified on 13th March 2024, as PW7. He had allegedly recorded a confession from the accused, on either 14th or 17th April 2023, and his testimony revolved around that. At the tail end of his testimony in chief, when he was due to produce the confession statement, an objection was raised by Ms. Nabalindo, Advocate for the accused, on grounds that the recording of the said confession statement was not voluntary, as at the time of its recording, the accused was forced to sign it, surrounded by armed police officers, and that he had been denied food the whole day prior to recording the same. She called for a trial-within-a-trial of that statement.
2. Section 25A of the *Evidence Act*, Cap 80, Laws of Kenya, allows recording or making of confession statements by senior police officers, of the rank of Chief Inspector of Police and above, so long as the senior police officers are not the ones investigating the matter. It was in that context that PW7 handled the matter. Such a confession is said to be made out of court, and its recording is regulated or governed by the Evidence (Out of Court Confessions) Rules, 2009.
3. Section 25A of the *Evidence Act* is to be read together with section 26, of the same Act, which provides for the inadmissibility of such confession statements, where it would appear, to the trial court, that the same had been caused by an inducement, threat or promise, with reference to the charge against the accused person, coming from a person in authority, giving the accused person a sense that he would gain some advantage, or making it to avoid some evil of a temporal nature. Section 27 adds that the



statement would be admissible, where the impression caused by such threat, inducement or promise had been fully removed.

4. I ordered for a trial-within-a-trial. One was conducted. The witnesses for the prosecution testified on 6th May 2024 and 14th May 2024, while those for the defence testified on 27th November 2024 and 4th December 2024.
5. PW7 was the first on the stand. He stated that he recorded the confession on 17th April 2023, at 2:00 PM. He testified that he followed all the procedures, inclusive of the nomination of PW2, Charles Simon Mutokaa, as the third party that he required to be present. The accused informed him that he was comfortable and did not require legal representation. PW7 took down the statement in confession and gave the accused an opportunity to read through it, after which he signed it. He stated that he was not under any threats or intimidation, and he had not made any complaint of being tortured. At the tail end, he said that the confession and the original proforma for confessions were written and signed on 14th April 2023, and not 17th April 2023. He said that the original date on the documents was 14th April 2023, and that the same had been crossed out, and replaced with 17th April 2023. He denied altering the document, saying that he did not know who made the alteration. He could not recall enquiring whether the accused had had lunch, before they embarked on the exercise of recording the confession.
6. Number 88450 Police Corporal Denisio Njeru followed. He was the investigating officer. He had re-arrested the accused at the Nambale Police Station, from the officers who had initially arrested him, after he had been brought to that police station by PW2, after he had made a confession to him. They removed him to the Busia Police Station, where they arrived at 5:00 PM. When the accused began to confess, he, the investigating officer, decided to escalate the matter to PW7. He handed the accused over to PW7 and left them together. At the time he left, PW2 was not present. The investigating officer testified that he was not present when the confession was being recorded. He said that he handed the accused over to PW7 at daytime. He said that by the time he re-arrested him at Nambale, the accused had had lunch there. He said that before he left the accused with PW7, he heard the accused say he wished that PW2 be present. He said that he had seen PW2 at the precincts of the police station earlier that day. He said that they had decided that the statement or confession be recorded between 2:00 PM and 5:00 PM. He stated that he did not alter the confession statement and the proforma, saying that he did not know how the alteration came about.
7. The accused testified next. He said that he was arrested on 14th April 2023, and was initially held at the Nambale Police Station, before he was removed to Busia, at 3:00 PM, by the investigating officer, and 3 other officers. He stated that 1 of the officers slapped him, as he sought to know from him what he knew about the matter. The investigating officer restrained him. They arrived at Busia between 5:00 PM and 6:00 PM, and the officers began to interrogate him. He was slapped by the same officer who had harassed him earlier. Eventually, they were given papers by the investigating officer, and he, the accused, recorded what they wanted. He stated that at that time, PW2 was not present. He signed the statement on 17th April 2023, and not on 14th April 2023 when it was recorded. He stated that PW2 was present when he signed the statement. He said that he signed the documents before PW7, explaining that PW7 was not present on 14th April 2023, when he made the statement. He stated that he found PW2 with PW7, adding that he did not request that PW2 be present. He denied that he had been asked to have a witness available. He said that when he made his statement, on 14th April 2023, it was well past mealtime, and that he had only been given 1 packet of milk. He said that he was taken before PW7, on 17th April 2023, at 11:00 AM, and PW7 did not come to the office until about 12:00 noon or sometime thereafter.



8. PW2 was the witness for the accused. He testified that the accused was arrested on 14th April 2023, by police officers from Nambale Police Station, at 11:30 AM. He said that 17th April 2023 is when he got to learn that the accused had been moved to Busia. He, PW2, was summoned to the Busia Police Station, on 17th April 2023, where he found the accused and PW7 waiting for him. He was informed that he was required to write a statement, which he wrote. He explained that a statement was first taken from the accused, and then he made his. He was made to understand that the accused wanted to write a statement in his, PW2, presence. He said that at that session those present were PW7, the accused and himself, PW2. He signed his statement and left. He said that the meeting began at 16:48 Hours. He said that he was not clear whether the accused signed his own statement and the proforma, but he could recall hearing the accused being asked to sign the documents.
9. Narratives from the 4 witnesses present an extremely jumbled up picture of what exactly transpired around the time the impugned confession statement was recorded.
10. In the first place, it is not clear when that confession statement was made or recorded. PW7 initially indicated that he took the statement on 17th April 2023, then later revised that to 14th April 2023. According to the investigating officer, the statement was taken on 14th April 2023. The accused, from whom it was recorded, said it happened on 14th April 2023, but he did not sign it until 17th April 2023. According to his witness, PW2, the confession statement was recorded and signed on 17th April 2023. So, on which date was the said statement made?
11. Secondly, the time when it was recorded, whether on 14th April 2023 or 17th April 2023, was also unclear. According to PW7, he took the confession at 2:00 PM. The investigating officer testified that that statement was recorded after they had brought the accused to Busia from Nambale. They arrived at Busia, according to him, at 5:00 PM, and as the accused had begun to confess, he handed him over to PW7 at about that hour. He later said he could not tell the exact hour when the confession was recorded, but was sometime in the afternoon, for they had decided, between 2:00 PM and 5:00 PM, that the accused should record a confession. According to the accused, the statement was recorded after they arrived at Busia on 14th April 2023. He said that the time of their arrival was between 5:00 PM and 6:00 PM. Upon arrival, he was subjected to interrogation, and the recording of the statement did not start until 7:00 PM. He was emphatic that he did not sign the statement on 14th April 2023, but on 17th April 2023. He said that PW7 arrived at his office on 17th April 2023, between 12:00 noon and 1:00 PM, and it was after that that he signed the said statement. PW2 said that he was summoned to Busia on 17th April 2023, at 16:30 Hours, and he arrived at the office of PW7 at about 16:48 Hours, and it was after that that the statement was recorded. So, at what time was that statement recorded? At 2:00 PM, or 16:48 Hours, or at 7:00 PM?
12. Thirdly, the 2 documents bear 2 dates, when they were allegedly made, and executed. The initial date was 14th April 2023. The 14th was subsequently altered, by having 14th written over it, to read 17th April 2023. PW7 asserted that it was him who made the documents, in terms of writing them, based on what the accused narrated to him. He asserted that the dates he inserted in them were 14th April 2023, after which he handed the 2 documents to the investigating officer. He asserted that he did not know who or under what circumstances the 2 entries were altered. The investigating officer stated that the 2 documents were handed over to him by PW7, shortly after they were signed on 14th April 2023. They, according to him, did not have alterations, and he did not know who altered the dates. He appeared to be of the view that only the copies given to the defence were altered, yet the 2 documents placed on record, and marked, according to the order of 13th March 2024, as P. MFI-4A and P. MFI-4B, being originals, handwritten, bear those alterations. The alterations were not counter-signed, to authenticate the changes, and the question would then be, who made the alterations, when and why?



13. Fourthly, it is not clear as to who exactly recorded the statement from the accused person. According to PW7, he, PW7, recorded that statement, and filled the proforma, in longhand, as the accused gave a narration. He said that happened on 14th April 2023. The investigating officer did not testify as to who wrote down the details in the 2 documents, as he stated that he was not present at the meeting between the accused and PW7, when and where the 2 documents were allegedly generated. He asserted that the 2 documents were made on 14th April 2023. The accused insisted that the 2 documents were made on 14th April 2023, not by PW7, but by 2 of the police officers who had re-arrested him at Nambale, together with the investigating officer. He named them as PC Shem and PC Duncan Owino. He stated that they began to interrogate him shortly after they arrived at Busia on 14th April 2023, at 5:00 PM or thereabouts, and they haggled and struggled with him, as they tried to force a certain story on him, until 7:00 PM, when the investigating officer produced writing material, which the 2 used to record whatever narrative that they wanted from him. He said that PC Shem slapped him during it. After the 2 documents were recorded, he did not sign them, as he was informed that their boss, PW7, was not available, ostensibly as he was to sign before him, and that exercise was not done until 17th April 2023, when he was produced before that officer, PW7, and he signed the documents in his presence. According to PW2, the 2 documents were prepared and signed on 17th April 2023, before PW7. So, the question would be who prepared or recorded the documents? Was it PW7 or was it his juniors?
14. Fifthly, section 25A of the Evidence Act requires that the confession statement be made, whether before a magistrate or a senior police officer, in the presence of “a third party of the person’s choice.” According to PW7, when he enquired from the accused person as to who he wanted to be present, the accused mentioned PW2, and PW2 was summoned, and he attended and was present when the 2 documents were generated, on 14th April 2023. The investigating officer was not present at the event, but he mentioned that he saw PW2, within the precincts of the police station on 14th April 2023. He could not tell whether PW2 was privy to the making of the confession statement. The accused stated that PW2 was not present on 14th April 2023 when, according to him, the statement was recorded, but he was present on 17th April 2017, when he, the accused, signed it. PW2 said that he came to the station on 17th April 2023, upon being summoned on that date, and he witnessed the accused record a statement in the presence of PW7. In the words of the accused, PW2 was not his witness, he never asked that he be called, and he did not even know him well. PW2 conceded that he and the accused were not well acquainted, and that he, PW2, did not know the circumstances under which he was summoned on 17th April 2023, but that he was called to write a statement, which he did, and a statement by the accused was also written in his presence. He made no mention that the accused person was confessing when that statement was recorded. The issue would be whether there was compliance with section 25A of the Evidence Act, with respect to a third party, of the accused person’s choice, being present when the statement is being recorded.
15. A duty is cast on the trial court, to try a confession statement, that has been objected to, to determine the circumstances under which it was made, for authenticity; to assess and determine whether it was recorded voluntarily; and to determine its admissibility. See *Musili Tulo vs. Republic* [2014] eKLR (Waki, Ouko & Mohammed, JJA) and *Sango Mohamed Sango & another vs. Republic* [2015] eKLR (Makhandia, Ouko & M’Inoti, JJA).
16. The facts that the statement was made, and the accused did sign it, are not disputed. The issue is about the circumstances of its making and execution. It is about its authenticity, based on the circumstances of its making and signing. The questions are around who recorded it, when was it recorded, who was present, and so on.



17. There is a cloud of uncertainty around when the statement was recorded. There are 2 dates, 14th April 2023 and 17th April 2023, reflected on the face of both documents. Those who seek to rely on the document are emphatic that the 2 documents were made on 14th April 2023. However, they have no explanation on how the date of 17th April 2023 found its way into the documents. The alteration of the date, from 14th April 2023 to 17th April 2023, was not counter-signed. Counter-signing would have meant that the alteration was owned by someone and was authenticated. That alteration ought to have been explained by PW7 and the investigating officer, as these are their documents, and the prosecution is hinged on them. It transpired, from the testimonies of PW2 and the accused, that there was a second narrative, that the 2 documents were signed on 17th April 2023, and that would suggest that that date was the effective date when the 2 documents became effective. With the cloud of uncertainty, around when the documents were made, still unclear, there would be questions around the authenticity of the of the confession, based on the circumstances of its making or recording.
18. For the law and effect of alterations on the authenticity of a document, see *C. Mwangi Gachichio vs. Murang'a Water and Sanitation Company Ltd* [2017] KEHC 2156 (KLR) (Waweru, J). In *Hassan Noor Hassan vs. Independent Electoral and Boundaries Commission [IEBC], Mandera County Returning Officer (David Maro Ade), Ali Ibrahim Roba & Mohamed Ahmed Arai* [2017] KEHC 2265 (KLR) (F. Ochieng, J), the court stated, with respect to alterations:
- “In my considered opinion any alteration or amendment which is made on a document, ought to be authenticated by the person who effected it. Such authentication ought to take the form of a signature or such other endorsement which would enable other persons to be able to ascertain the identity of the person who did so. Secondly, the person’s signature or other endorsement will constitute the fact that he or she was taking responsibility for had been done.”
19. Similar remarks were made in *Julius Makau Malombe vs. Charity Kaluki Ngilu, Independent Electoral and Boundaries Commission & Gogo Albert Nguma* [2018] KECA 460 (KLR) (Nambuye, Warsame & Otieno-Odek, JJA), where it was said:
- “... settled jurisprudence on documentary evidence is that alterations in any written instrument must be countersigned by the maker to authenticate the document. In *William Kabogo Gitau v George Thuo & 2 others* [2010] eKLR, it was stated that cancellations and alterations which are not countersigned ... may raise the questions regarding veracity and authenticity ... In *Ndolo v Mwangi & 2 others* [2010] 1 KLR 372, the trial court observed that where there are alterations, the same must be authenticated by countersigning. In *William Odhiambo Oduol v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR, the trial judge observed that it is desirable for each alteration, cancellation or over-writing to be counter-signed and stamped by the maker as a way of owning the same and saying the Form was authentic.”
20. Most of the decisions that I have cited above were made in electoral disputes, where the standard of proof is lower, than in criminal matters, and where the effect or consequence of the outcomes is less grave. In criminal matters there is a stricter application of the law of evidence and procedure, given the gravity of the consequence of the outcome, should the accused person be convicted, for it could mean loss of freedom for an extended period or even loss of life. It would mean that any alteration, to a document that the prosecution intends to rely on, which could have grave implications on the liberty or life of the accused, ought to be authenticated and explained, prior to any reliance being placed on such a document.



21. I have indicated above that there is an element of uncertainty around the exact time when the 2 documents were recorded or made. PW7 claimed that he recorded it at 2:00 PM, on 17th April 2023, then he later revised that date to 14th April 2023. That time appears to tally with the time mentioned by the accused, that PW7 arrived at his office sometime between 12.00 noon and 1.00 PM, but the difference is that was on 17th April 2023, and not on 14th April 2023. According to the investigating officer, he and his colleagues brought the accused to Busia Police Station at 5:00 PM or sometime thereafter, on 14th April 2023, which would suggest that he could not have been available at 2:00 PM the same day, at Busia, for his statement to be taken by PW7. PW2 talked of the recording being done at 16:48 Hours on 17th April 2023. All these contradictions are key, for all these individuals were talking about the same meeting. The discrepancies can only raise issues around the integrity and authenticity of the entire exercise.
22. What I have discussed above could tie up with the claim by the accused, that, indeed, a statement was taken from him on 14th April 2023, after he had been brought to Busia, where they arrived at about 5:00 PM. His claim is that PW7 was not present when the statement was recorded, for it was recorded by his juniors, and that PW7 was present on 17th April 2023, when the 2 documents were signed. That would appear to explain the date of 14th April 2023, on both documents, as the date when the recording was done, and the write-over, to replace 14th with 17th, to make 17th April 2023 the date of execution. PW2 was present at that execution on 17th April 2023. That alteration is consequential, for it would tally with the narrative by the accused, that he made the statement on 14th April 2023, in the absence of PW7, but signed it on 17th April 2023, in the presence of PW7. It is consequential, for it suggests that the confession was recorded before persons who were not qualified, under section 25A of the *Evidence Act*, for the 2 junior police officers were not Chief Inspectors of Police. That then required that PW7 and the investigating officer ought to have been candid with the court, as to who exactly made the alterations, in the 2 documents that they are inviting the court to place reliance on, and why, and possibly produce in court the maker of the alterations, for ownership and authentication.
23. I am alive to the law on contradictions and inconsistencies. The principle is that not every inconsistency or contradiction should be taken to be of consequence. The courts have interpreted section 382 of the Criminal Procedure Code, Cap 75, Laws of Kenya, which covers the subject, to say that whether inconsistencies or contradictions are to be of consequence will depend on whether they are so fundamental as to cause prejudice to the accused, or they are so inconsequential as to have no effect. See *Joseph Maina Mwangi vs. Republic* [2000] eKLR (Tunoi, Lakha & Bosire, JJA), *Twehangane Alfred vs. Uganda* [2003] UGCA, 6, (Mukasa-Kikonyogo DCJ, Engwau & Byamugisha, JJA), *Dickson Elia Nsamba Shapwata & Another vs. The Republic*, Cr. App. No. 92 of 2007 (unreported), *John Cancio De SA vs. VN Amin* [1934] 1 EACA 13 (Abrahams CJ & Ag P, Sir Joseph Sheridan CJ & Lucie-Smith Ag CJ) and *Philip Nzaka Watu vs. Republic* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA). I am persuaded that the inconsistencies or contradictions in this case are so grave as to go to the heart of the matter.
24. The accused, at the oral hearing, appeared to raise the issue that PW2 was not his witness. He was emphatic that he did not ask that he be called, and that he was not even asked to avail a witness. PW7 testified that he contacted PW2, at the request of the accused. PW2 was not clear on whether it was the accused who wanted his presence at the exercise on 17th April 2023. It is not disputed that PW2 was present when the accused signed the confession statement. However, the question would be, at whose behest was he there, for the accused person says that he was not his witness. PW2 had already testified as a prosecution witness, as at the time the objection to the confession was being raised. It is curious that the accused would call him as his witness, for the purpose of impugning the confession. It



is equally curious that the prosecution did not seek to call him, as its witness, given that he had testified already on their behalf, and his testimony was that the accused had initially confessed to him, and that it was him who in fact escorted him to the police. The alleged recording of the confession, before PW7, was meant to be a follow-up of the alleged confession earlier to PW2.

25. Could PW2 have been a witness for the accused? I note that the accused, when he testified, was very careful not to mention the circumstances of his arrest, and the possible involvement of PW2 in that arrest. When he needed PW2 to come and testify on his behalf, I note that PW2 readily agreed. I would not be inclined to hold that the accused did not ask that PW2 be availed as his witness, for the purposes of the recording of the confession, in the circumstances.
26. Was the confession taken voluntarily? The accused alluded to intimidation from 1 of the officers amongst those who arrested and brought him to Busia. I would not buy his claim that he was starved and famished, as at the time he made the confession, given the timings when he was removed from Nambale, and when the statement was allegedly recorded upon arrival at Busia. The possibility of being roughed up cannot be dismissed off-hand, or ruled out, for why would he have picked on PC Shem, out of the 4 officers who had re-arrested him. However, whether the confession was made voluntarily or not may be of little consequence, for it would be overshadowed by the cloud of uncertainty, around when and how the statement was recorded, which raise serious questions on the authenticity of the said recording.
27. These are criminal proceedings. The standard of proof is beyond reasonable doubt. The authenticity of the confession is the subject of the trial-within-a-trial. That confession could form the basis upon which the accused is convicted, and, therefore, the authenticity of the confession statement ought to be established beyond reasonable doubt, in terms of when it was recorded and before whom. It is uncertain when the recording was done, as between 14th April 2023 and 17th April 2023. The timings are also uncertain, as to whether it happened at 2:00 PM or after 5:00 PM, on either date. More crucially, there is uncertainty as to whether the confession was made before PW7 or his juniors, PC Shem and PC Owino, who were not qualified, under section 25A of the *Evidence Act*, to receive or record such confessions.
28. The accused person had been arrested with respect to an accusation of having committed a murder. Under the Penal Code, Cap 63, Laws of Kenya, murder is still a capital offence, whose penalty is mandatory death, despite the pronouncement, in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), that the mandatory death sentence is unconstitutional. Given the gravity of the penalty, and the complexity around murder trials, it is conventional, in Kenya, for murder suspects to be provided with an Advocate, paid for by the State. Indeed, no murder trial in Kenya would proceed, inclusive of taking plea, before an Advocate is appointed for the accused, and the Advocate is in fact present in court. That practice pre-dates *the Constitution* of Kenya, 2010, which has made the right to legal representation a critical matter in criminal trials, and has imposed a duty and burden, at Article 50(2)(g)(h), on trial courts, to ensure that the information, that an accused person has a right to an Advocate of his own choice, and to one to be made available to him at State expense, if he cannot afford one, is communicated to the accused at the earliest possible time. Trials have been imperilled for non-compliance with Article 50(2)(g)(h) of *the Constitution*. See Ann Wairimu Kimani vs. Republic [2011] KEHC 1287 (KLR) (Sergon, J), Chacha Mwita vs. Republic [2020] eKLR (Mrima, J) AOJ vs. Republic [2021] KEHC 8076 (KLR) (Ong'injo, J), Gitonga vs. Republic [2023] KEHC 2624 (KLR) (Gitari, J), KO vs. Republic [2023] KEHC 18310 (KLR)(Musyoka, J), Marete & another vs. Republic [2024] KEHC 14744 (KLR) (Gitari, J) and Opiyo vs. Republic [2024] KEHC 7732 (KLR)(Aburili, J).



29. Article 50(2)(g)(h) of *the Constitution* is meant to ensure that an accused person, who is poor or indigent or ignorant, is facilitated to access the advantages of a fair trial, by being informed of his fair trial rights. The right to legal representation in criminal matters, particularly the more serious ones like a murder trial, cannot be gainsaid. Knowledge of the law and legal processes is limited for most people and being able to navigate around the complexities of a trial, where knowledge of the substance of the offence charged, the procedures to be applied during the trial, and the substance of and process of presentation of evidence, are critical. An ordinary person is usually not adequately armed with such knowledge when he or she find themselves dragged into court over some offence or other. Hence the need for legal representation, and where they cannot afford to appoint Advocates of their own choice, the same being provided on their behalf by the State.
30. In *Pett vs. Greyhound Racing Association* [1968] 2 All ER 545 (Master of the Rolls, Lord Justice Davies & Lord Justice Russel), it was said:
- “It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: “you can ask any questions you like;” whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?”
31. In *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) vs. Burundi - 231/99* (2000), it was stated:
- “Legal assistance is a fundamental element of the right to a fair trial, more so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case. The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words be able to argue their cases on equal footing.”
32. Article 50(2)(g)(h) of *the Constitution* is about what happens in court during trial, and not at the police station during investigations and interrogations. However, the same should provide a mirror to investigators on the standards that they ought to uphold when dealing with suspects, particularly of serious offences such as murder. Article 49 of *the Constitution* states the rights of arrested persons. In there is stated the right to access and communicate with an Advocate. In addition, it states the rights “to remain silent,” and “not to be compelled to make any confession or admission that could be used in evidence against the person.” The matter of the arrested person having a right to remain silent would emphasise the need for any confession from him to be voluntary.
33. Since it is mandatory in Kenya for murder trials to be conducted in the presence of an Advocate for the accused, and for those who cannot afford their own, Advocates paid for by the State, it should follow that whatever happens at the police station, with respect to a murder suspect who is allegedly confessing, should be done in the presence of an Advocate, and one should be appointed for him by the State, if he cannot afford to hire one himself, for the failure to apply the standard applied in court, at the police station, would have the effect of undermining the right to access justice, through provision of legal representation to the accused persons in such cases as murder. The rights of an accused person to fair trial are not, and should not, be limited to what happens in court. The entitlement to



these rights should apply equally to what happens at the police station, for what happens there often fundamentally affects what would happen at trial, often to the detriment of the accused person, as it may have the effect of pre-determining the outcome of the trial before the matter is even brought to or placed before the trial court. The application of different standards, about these matters, at the police station and at the trial court, could have serious ramifications, for the damage done at the police station may not be curable or remediable later at the trial.

34. One gets the sense that there is a lower standard with respect to what happens at the police station, yet what happens to the suspect at that stage is the most critical aspect of the judicial process. In court, the presiding judicial officer will not proceed, even to take plea, until an Advocate has been placed on record for the accused person in a murder case. For the process in court, the right to and the presence of an Advocate at trial is critical. However, at the confession stage, before a police officer, where the suspect is literally forfeiting his right to a trial, and pleading guilty ahead of being taken to court, going by the proforma before me, marked as MFI-4B, the exercise of recording a confession to a capital offence can be carried out without the benefit of legal advice or representation, for the suspect, at that stage is allowed to forgo his right as such. What would be the purpose of being rigorous at trial, instead of at the stage of confession before a police officer, where the suspect may well incriminate himself, if the exercise is carried out without the benefit of legal aid or representation.
35. The *Legal Aid Act*, Cap 16A, Laws of Kenya, was passed, to give effect to or to operationalise Articles 49 and 50(2)(g)(h) of *the Constitution*, and it commenced on 10th May 2016. Section 43 of the *Legal Aid Act* imposes duties on the trial court, faced with an accused person, with respect to implementation of Article 50(2)(g)(h) of *the Constitution*. The duty is to inform the accused person of his right to legal representation of his own choice, and, if substantial injustice is likely to result, and if he cannot afford an Advocate of his own choice, of his right to legal representation paid for by the State, and to inform the State to provide the same. There is a statutory obligation on the State, through the courts and the agency established under the *Legal Aid Act*, to ensure that the fair trial principles, stated in *the Constitution*, come alive through accused persons being informed of their rights, and where substantial injustice is likely to result, to facilitate them, by getting the State to get them Advocates paid by the State.
36. That principle, in section 43 of the *Legal Aid Act*, should also apply to what happens at the police station, where a suspect is arrested and charged with serious offences. Section 42 spells out what should happen at the police station. The officer in charge of the police station has a duty to do the following, which I hereby lift verbatim from the text:
 - a. ensure that every person held in custody, is informed, in language that the person understands, of the availability of legal aid on being admitted to custody and is asked whether he or she desires to seek legal aid;
 - b. maintain a register in which shall be entered the name of every person held there and the response of each such person when asked if he or she desires to seek legal aid; and
 - c. ensure that a legal aid application form is made by a person in their custody wishing to apply for legal aid and shall inform the Service of the application within twenty-four hours of the making of the application.”
37. The provision is geared to ensure that an accused person, who is unable to afford the legal services of an Advocate of his own choice, has access to legal aid. The objective is to ensure fair trial, through access of legal services to the indigent, the marginalised and the ignorant. Such legal services would be critical for suspects in murder cases, more so those that are confessing. Before the exercise of recording a confession is undertaken, for such a confession would, for all practical purposes, seal the fate of the



accused person before or ahead of his trial in court, because a confession is a forfeiture of the right to a trial, all precautions ought to be taken, including invoking section 42 of the [Legal Aid Act](#).

38. I should also advert to procedure at trial, where the accused pleads guilty. It is cautioned that, whereas the trial court should have no reason to accept a plea of not guilty from an accused person, the consequence of a plea of guilty is that the accused person forfeits his right to a trial, which would have given an opportunity to him to confront his accusers and challenge the evidence against him, and, therefore, there ought to be circumspection in the manner the guilty plea is taken. See Patrick Kiage, *Essentials of Criminal Procedure in Kenya*, LawAfrica, Nairobi, 2010, 90. The courts have distilled the essentials of taking a plea of guilty, in such cases as *Adan vs. Republic* [1973] EA 445 (Sir William Duffus P, Spry VP & Mustafa JA) and *Paul Nakua Eyan vs. Republic* [2008] KECA 118 (KLR) (Omolo, Githinji & Aluoch, JJA).
39. One of the essentials critical for the purposes of the instant case is to the effect that where the offence is punishable by death, the court recording the plea of guilty must show, in its record, that the person pleading guilty understands the consequences of his plea. In *Boit vs. Republic* [2002] 1 KLR 815 (Omolo, Lakha & O’Kubasu, JJA), it was stated that the trial court must record that the person pleading guilty understands that because of his plea he would face a sentence of death. In *Chacha vs. Republic* [1953] 20 EACA 339 and *Mangwera vs. Republic* [1952] 18 EACA 150, it was said that it was generally inadvisable, where the accused faced a capital offence, for the trial court to accept a plea of guilty.
40. Why am I pointing out all these? To bring out the critical importance of ensuring scrupulous prudence and caution, on the part of, not just the court, but investigators or detectives, to ensure that, before it is recorded that the suspect has confessed to have committed the capital offence alleged, he benefits from legal representation, in much the same way he would be expected to at trial. There ought to be strict compliance with all the applicable laws, rules and guidelines, as set out in [the Constitution](#), the relevant statutes and caselaw. I am of the conviction, that the way the investigators, herein, handled the recording of the alleged confession from the accused person, did not satisfy the tests above, more so that which required legal representation be availed before the accused allegedly made the confession to the crime, which was then allegedly recorded by PW7.
41. At a policy level, it would appear, in view of the caselaw that I have cited above, investigators ought to be generally wary of recording confessions from suspects in capital offence cases, and others where the penalties upon conviction are stiff or hefty. The extra care that trial courts must exercise with the recording of pleas of guilty, in such cases, should be equally exercised by the investigators, where confessions have to be recorded. Where a recording of a confession must be done, it would, perhaps, be preferable, to have it done before a magistrate, for neutrality, given that the investigation and prosecution would be driven by the police, and it may not matter much that the officer taking the confession is not the investigator, for he would, in most cases, invariably be the immediate superior or supervisor of the investigator, no doubt with an interest in the outcome of the investigation and prosecution. By confessing, a suspect would be giving up on his rights to a trial, and a judicial officer, whose mandate it is usually to conduct trials, would be the proper person, in my humble view, to receive and record such a confession.
42. Recording of confessions, by police officers, for capital offences, often present a dilemma. Given that caselaw points to trial courts being discouraged from accepting guilty pleas outrightly, where such a confession is not challenged, the trial, on a plea of not guilty, would be pretty much a formality. On the other hand, discouraging a guilty plea could be a signal or an enticement to the accused person to recant or challenge the confession, even where the same was recorded in full compliance with the law and process, and the accused could very well get away on a technicality. I believe that, to eliminate that



sort of dilemma, the confessions ought to be recorded before a judicial officer, in the presence of an Advocate, briefed by the suspect, or appointed to represent the suspect based on sections 42 and 43 of the *Legal Aid Act* and Article 50(2)(g)(h) of *the Constitution*.

43. Based on what I have discussed above, it is my conclusion that the authenticity of the confession statement, signed by the accused, has not been established, and, in the circumstances, the same ought not be admitted, and I hereby decline to have it produced as an exhibit.

DELIVERED, DATED AND SIGNED, IN OPEN COURT, AT BUSIA, ON THIS 24TH DAY OF JANUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Nabulindo, Advocate for the accused person.

Mr. Onanda, instructed by the Director of Public Prosecutions, for the Republic.

