THE ADMINISTRATION OF JUSTICE WITH REFERENCE TO CONFESSIONS.

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by

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TO MY HUSBAND AND DEAR SON

FOR THEIR LOVE AND CO-OPERATION DURING THE TASKING PERIOD THAT I WROTE THE PAPER, TO THEM, I AM GRATEFUL.

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ABBREVIATIONS

A - C	-	Appeal Cases
D.M.'s ct. at KSM	-	District Magistrates Court at Kisumu
E.A.	-	East Africa - Court of Appeal
K.L.R.	-	Kenya Law Reports
L.T.	-	Law Times
R.M.'s ct. at KSM	-	Resident Magistrate Court at Kisumu
QB	-	Queens Bench
U.S.	-	United States
U.L.R.	-	Uganda Law Reports
W.L.R.	-	Weekly Law Reports

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S.77 of the Kenyan Constitution

Civil procedure code order 4

Kenya Evidence Act. Cap 80 of the Laws of Kenya

Police Act. Cap [redacted] of the Laws of Kenya

PREFACE

The state has enacted certain forms of law both civil and criminal which it professes to be followed. The state has thereby enacted certain forms of machinery which are intended to enforce the law. These are the police and the courts of law whose main purpose is to punish those who offend against the criminal law. Where a conflict thereby arises between the state and the individual, there are certain processes that are to be followed. The law of confessions is one of these areas which is important in criminal law and evidence. It is therefore, against this background that this paper is based.

However, the author in writing of this paper will try to examine the law of confessions as it is and try to identify the loopholes that are embodied in it. It will be established in the course of the paper whether the courts in applying the law of confessions do admit some statements as voluntary even when they have not been made voluntarily.

Some writers have already attempted to write on the law of confessions in East Africa[1], the emphasis of these writers is on the law as laid down rather than the law in operation.

It is this higtus in legal knowledge that motivated the writer to embark on this research. A review of the work of English and American writers like Phipson[2] and Wigmore[3] could have helped to better illustrate how writers just concentrate on the law of confessions as laid down.

However, there are numerous difficulties in writing this kind of paper. There are obstacles in interviewing the prosecution officials to get their honest opinions of various convictions whereof they were leading the prosecution.

This paper is composed of four chapters. Chapter one has two parts. Part one is a look at what justice is. This study has been taken from a theoretical point of view. Reliance is mainly placed in the library.

Part two is also a theoretical study on the meaning of confessions. This one has been done through the library research.

Chapter two is a look at the role played by confessions in both criminal law and evidence. While part two of this chapter deals with the safeguards that are applied in ensuring that confessions are not improperly admitted. This has also been done through library research.

Chapter three is a look at the weaknesses related to the law of confessions. These weaknesses have been done through a theoretical research in the library as well as a practical study in the law courts at Makadara.

Chapter four consists of the conclusions to be drawn and the recommendations to be given.

CHAPTER 1

THE CONCEPT OF JUSTICE

The term justice is one that has posed a great problem due to the fact that there is no universal definition as to what it means. Its scope and use is vague. However, the author intends to look at it from the point of view of the prime purpose of law.

Justice may mean equality. This means that where members of a society enjoy equal benefits, there is justice. Liberty is another aspect of justice where individual freedom is delimited, to the point that it does not infringe the freedom of the other, that is also another meaning of justice. But one cannot talk about justice without looking at the nature and context of the law. For example, criminal justice implies certain rules both procedural and substantive, which were developed over a long period of time. The manner in which these rules are applied defines the content of justice.

The author will look at the meaning of justice as equality, liberty, and also look at justice and the law.

JUSTICE AS EQUALITY

Justice goes a long with equality. In a given society, the members should enjoy equal benefits so that no member enjoys more benefits than the other member. In this way, if one member of that society is to benefit from something, the others should also stand to benefit.

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There should also be equality as pertains to wealth in such a way that no member of that society should be wealthier than the others but instead, each person should enjoy wealth in the same manner as the other. The members of society should therefore, be equal in as far as wealth and enjoyment of basic rights are concerned. Where there is no equality as far as the two are concerned, justice, does not exist since such a society is one which renders hardships to some members of the society while the others benefit. Such a society is then unjust. This point is made clearer by John Rawls in his book "The Theorty of Justice". He says that

> "All social values, liberty and opportunity, income and wealth and the basis of self respect are to be distributed equally unless an unequal distribution of any or all, of these values is to everyone's advantage, injustice, then is simply inequalities that are not to the benefit of all". [1]

JUSTICE AS LIBERTY OR FREEDOM

A citizen should have his freedom in order to attain the ends of justice. This freedom could be the political freedom, freedom of speech, conscience, of right to hold property and freedom from any arbitrary arest and seizures as defined by the law. This kind of freedom is so fundamental that it should always be inherent in man, and any society that abides with the principles of justice, should guarantee this freedom. Freedom then becomes a fundamental element in the administration of justice.

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JUSTICE AND THE LAW

Justice is tied up with the law. The laws of a given society should be made to suit the interests of the people in that society. There should not be some laws that favour one class while at the same time being unfair or oppressive to another class. This is especially the case in a capitalist state where there is invariably a stratum of classes. There is the bourgeois, the middle class and the peasants. In such a society, the laws should be made to suit the whole society and not merely to benefit any one class. For example, as in our country Kenya, in the making of our laws, each class is represented through the representatives in parliament. This is done when during the elections, each person is entitled to vote for the person one wants and in this way, justice can be said to be done to all the members and not some at the expense of the others.

Denning (as he then was) put more weight on this point where he said

> "..... there are two great things to be achieved, one is to see that the laws are just and the other that they are justly administered".[2]

However, even though the laws are to be administered justly, most of the lawyers we have do not concern themselves with the law. They mainly concern themselves with arguing out the client's case

so that the client wins in his case regardless of whether the client is the guilty party. Their main concern is not to attain the ends of justice, but instead, to win the client's case. They concern themselves with the enforcement of the law and not with the attainment of justice. Denning says this of them

> "Some lawyers care too much for law and too little for justice. They have become technicians spelling out the meaning of words instead of, as they should be, men of spirit and of vision, leading the people in the way they should go, making the law fit for the time they live".[3]

Denning is of the view that lawyers and judges should take a broader conception of the law in order to meet the ends of justice.

JUSTICE AND FAIR TRIAL

The concept of a fair trial is very fundamental in the administration of justice. This concept ordains that where an accused person is brought to court, the magistrate should try and conduct the trial as fairly as possible. Denning says that

> "..... it is no use having just laws if they are administered by bad judges or corrupt lawyers. A country can put up with the laws that are harsh or unjust so long as they are administered by just judges who can mitigate their harshness or alienate their unfairness, but a country cannot long tolerate a legal system that does not give a fair trial".[4]

Denning gave his view as to what he thought constituted a fair trial. He gave fine principles of what he thought constituted a fair trial. He gave his first principle as that "..... the judge should be completely independent of the government".[5] Here Denning implied that the judiciary should be a different entity from the state and each should work separately. Each of these organs should be independent of the other in order to attain the ends of justice. Justice will be seen to be done where there is a complete separation of powers so that each of the bodies works separately and independently of the other.

The second principle as ".... a judge should have no interest in any matter that he is to try".[6] This brings in the question of bias. Here a decision maker should be impartial and should not take sides. If bias is detected in a case, then in such a case, the trial is said to have been unfairly conducted thereby occasioning miscarriage of justice.

Denning lays down the third principle as that "before a judge comes to a fair decision against a party, he must hear and consider what he has to say".[7] Here no person is to be condemned unheard but that the trial magistrate should first listen to what he has to say before he convicts him. This point is supported by S.77(2)(d) of the constitution which embodies the requirement for a fair trial. It says that before a person is condemned, he should be afforded a chance to represent himself or by a representative of his own choice.

The fourth principle is that "a judge must act only on the evidence that is before him and not on any other information".[8] This implies that the judge or magistrate should not be influenced by other information that is not before him otherwise by so doing, he conducts the trial unfairly.

The last principle that Denning lays down is that "a judge should give reasons for his decision".[9] By so doing, he will be able to prove that he has considered the evidence and arguments that have been adduced before him by both sides and that he has not taken any extraneous considerations into account. The giving of reasons has been emphasized as one of the elements of natural justice and although it is not a general rule that reasons for the decision be given, if there is a statutory duty to give reasons, then reasons must be given. The giving of reasons is not mandatory in natural justice, but it is a good administrative element so that justice may be administered. This point is put forth in the civil procedure rules".[10]

The issue of fair trial and natural justice is one that is linked together such that where there is a fair trial, there is justice. Denning supports the view of fairness as linked with justice when he says

> "How does man know what is justice? It is not the product of his intellect, but of his spirit. The nearest that we can get to defining justice is to say that it is what the right minded members of the community believe to be fair".[11]

According to him, he is of the view that fair trial and justice are linked together and one cannot talk of justice without relating it to a fair trial.

TOWARDS A DEFINITION OF JUSTICE

Justice then can be closely defined as a concept whereby members of the society live equally and in harmony, each member enjoying the same rights, opportunities, wealth as the other so that no member of that society gets more than the other.

The other meaning is where members of society enjoy their freedom equally. The citizen should have freedom to enjoy the rights accorded to him. This freedom should be equally enjoyed by all classes in any given society.

Justice could also be defined as where the laws are neither harsh nor discriminatory and lastly, justice is where the courts administer a fair trial. In other words, justice is linked with fairness and can therefore, be given a meaning close to fairness.

JUSTICE AND NATURAL JUSTICE

Justice may be viewed in many perspectives. It may be equated with natural justice which will be defined in this section. Natural justice is the name given to the fundamental rules deemed necessary for the proper exercise of power. It has two principles. The first one is that "No man shall be a judge in his own cause, summed up by the Latin maxim Nemo Judex in the Causa Sua."[12]

The second principle is the "right to hear the other side, in Latin, the Audi Alteram principle".[13] Both principles need further elaboration.

The first principle is the subject of discussion in the case of Dimes V. Ground Junction on Canal[14], where the argument in this case was that there was pecuniary bias. In this case, the Lord Chancellor had made some decrees in favour of a Canal company in which he held some shares worth of £3,000. These decrees were challenged on the grounds that the Lord Chancellor had pecuniary interests and the court annulled these decrees on the ground that they were tainted with bias.

There is also bias arising where a person is hostile to the other. The hostility must be shown to be strong one. In Cooper V. Wilson[15] a police sergeant had been dismissed by the chief constable of Liverpool. His appeal against dismissal was rejected by the watch committee. At the time the appeal was decided, the chief constable was present with the watch committee. This proved fatal to the watch committee's decision which thereby was nullified.

The second principle is that both sides should be heard. The reason behind this is that one who is heard is more likely to accept a decision against him since he has made his defence and is more likely to accept it if one is an impartial judge. A balanced and informed judgement is one based on presentations from both sides. Lastly, if a decision is acceptable it leads

to the public good. The citizen is more willing to have a say in a legal system manned by people not biased and thus enhancing the citizens fidelity to law. This principle if violated, will result in a decision being null and void.

In Cooper V. Wandsworth Board of Works[16], Cooper's house was demolished by the board of works in exercise of a statutory power giving the board authority to demolish houses, if they had no licenses. Without giving any notice, the board of works demolished Cooper's house and Cooper argued that before demolishing his house, the board should have given him an opportunity to argue his case. Lord Justice Wills[17] observed that "..... a tribunal which is by law invested with power to affect the property of one of her subjects is bound to give notice before it proceeds".

R V. Chancellor of Cambridge[18], is also a good authority for this principle. Here, Dr. Bently, a graduate of the University of Cambridge, was propagating ideas the university did not approve of. The university strapped him off his post. He went to court arguing that this was contrary to natural justice and that he had not been given an opportunity to be heard. The judge argued that the laws of God and man both give the party an opportunity to give his own defence if he has any and that even God himself gave Adam an opportunity to give his own defence even if he had eaten the fruit of Aden.

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Natural justice therefore, entails a situation where both the two principles are applied.

MACHINERY FOR ENSURING THAT JUSTICE IS DONE

The courts of law are the institutions that deal with the rights of the citizen. These institutions try to see that once an accused person is brought to court, he is not convicted merely on the ground that he has committed an offence. The courts of law will give him/her a chance to present his case and to defend himself before they can convict him. Failure to conduct a trial in this manner will amount to a miscarriage of justice. They have got to see that "justice is not just done, but is seen to be done".

S.77 has it that a person is innocent until proven guilty. The work of the courts is therefore, to try the accussed person in an attempt to establish whether he is a guilty party or not.

The law of confessions is one of the means by which an accused person can be proved guilty or not. This is done when the police officer asks the accused person to make a statement pertaining to the offence that he has committed. The accused person may make a statement confessing that he is guilty or alternatively he may make a statement stating that he committed the offence but through coercion. However, all this is subject to confirmation by the trial judge or magistrate who has to weigh the evidence that is before him.

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WHAT THEN ARE CONFESSIONS?

Confessions are statements made by suspects during the criminal trials. very vague and infact wrong. This is serious?

Fitzjanes Stephens defined confessions as "An admission made at any time by a person charged with a crime stating or suggesting the inference that he has committed that crime".[19] This is an admission not Confession Scrutinize the Law

Thus in a confession, the following meanings may be deduced that there must be either an express acknowledgement of guilt of the offence charged or an admission of substantially all the facts which constitute the offence. Absolutely not substantially

The term confession is now defined in the Evidence Act S.25. This section says that "..... a confession comprises of words and conduct 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". This definition, as it now reads, presents considerable difficulty in interpretation and application and the almost total absence of reported cases on the subject in the years since the enactment of the Kenya Evidence Act, is, "indicative of the hesitation of the courts and almost of counsel, to become too deeply involved in this legal thicket".[20]

The difficulty arises in deciding whether for example, all the rules governing confessions are applicable.

However, it is important to distinguish between a confession and an admission. One test would be whether the statement confessing guilt is alone sufficient to convict the person accused of committing the offence; if it is, then it is a confession. If, however, it falls short of a plenary acknowledgement of guilt but the statement is of some incriminating fact or facts which taken alone or with other evidence tends to prove his guilt, it is an admission. A statement or a declaration of an independent fact from which guilt may be inferred is not a confession, it is an admission of a particular fact pertinent to the issue and evidence of that fact but not a confession.

The distinction between both is that a confession involves a voluntary acknowledgement of guilt, and to make an admission or a declaration, a confession, it must amount to a clean acknowledgement of guilt. Sarkar makes this clear and states that the distinction between a confession and an admission as applied to criminal law is not a technical requirement but is based upon the substantive differences of the character of the evidence deduced from each.

> "A confession is a direct acknowledgement of guilt on the part of the accused, and by the very force of the definition, excludes an admission which itself, as applied in criminal law, is a statement by the accused direct or implied, of facts pertinent to the issue, and tending in connection with proof of other facts to prove his guilt, but of itself is insufficient to sustain a conviction".[21]

Thus the acid test is that,

> "Where the ~~admission~~ conviction can be based on the statement alone, it is a confession, but where some supplementary evidence is needed to lead to a conviction, then it is an admission".[22]

It therefore, appears that a confession is a species of which admission is the genuis. All admissions, are not confessions, but all confessions are admissions.

Under S.25 of the Kenya Evidence Act, there is no distinction between a confession and an admission. Philip Durand[23] gallantly observes that there is no distinction between a confession and an admission and if there is, it is too slight to be of any importance.

In England, this distinction seems to be in the process of elimination. This was stated in the case of Commissioner of Customs V. Harz[24] where Lord Reid stated

> "..... I see no justification in principle distinction. In similar circumstances, one man induced by the same threat makes one or more incriminating admissions and another induced by the same threat makes a full confession. Unless the law is to be reduced to make a more collection of unrelated rules, I see no distinction between these two cases".[25]

It is my submission that although confessions and admissions seem to be different, looked at carefully, the two could be one and the same thing.

However, confessions can be classified into two. There are judicial and extra-judicial confessions. Judicial confessions are confessions made before a magistrate or in court in the due course of legal proceedings and it is essential that they be made of the free will of the party, and with full knowledge of the nature and consequence of the confession.

The other group of confessions are the extra-judicial confessions. These are the kind of confessions that are made by persons not before a magistrate, or a court, but they embrace those admissions and acts of the accused from which guilt may be implied. All voluntary confessions of this kind are receivable in evidence on being proved like other facts.

These extra-judicial confessions are not considered to be of much value, since the person reporting can be depended upon from all points of view and the acknowledgement of guilt is clear and unequivocal. These kind of confessions should also be taken with great caution in order that there be no miscarriage of justice.

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CHAPTER TWO

ROLE OF CONFESSIONS IN THE ADMINISTRATION OF JUSTICE

Confessions play a great role in the administration of justice. If a confession is found to be involuntary in the sense that it has been obtained by improper means, it is inadmissible. If a confession has not been rightly admitted, then it is bound to cause a lot of injustice.

Taylor says that

> "Confessions are the most effectual proof in law, their value depending on sound presumptions that a rational being will not make an admission prejudicial to his interests and safety unless when urged by the promptings of truth and conscience".[1]

However, Phipson also says that it is due to the administration of justice that confessions must be taken with the greatest caution, "Not for fear of them being untrue, but for the due administration of justice".[2]

Our Kenyan law has adapted several procedures that have got to be followed to ensure that the confessions made are voluntary and do not cause any miscarriage of justice. These measures are embodied in the Kenya Evidence Act, S.26, which tries to check on any injustice by providing that "A confession is not admissible if obtained by

a person in authority, threat, violence or promise for gain for some advantage or avoidance of some temporal evil".

The judges rules also check on the voluntariness of the confession by providing that caution must be given to any accused person before he makes any statement that whatever he says, will be written down and may be used by the magistrate as evidence.

S77(7)

There is also the Kenya Constitution S.77(7) provides that no person will be compelled to give any evidence against himself while being tried for a criminal offence. The law of confessions therefore, tries to play a great role in the administration of justice by ensuring that there is no miscarriage of justice.

SAFEGUARDS FOR CONFESSIONS

THE KENYA EVIDENCE ACT

S.26 - 32

Confessions have been safeguarded in the Kenya Evidence Act. By so doing, the Kenya Evidence Act tries to guard against any justice being infringed.

S.26 of the Act reads

> "A confession or any other 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 advantage or avoid evil of a temporal nature in reference to the proceedings against him".

This section seeks to ensure that a confession has been made voluntarily. A confession to be admissible, has got to satisfy the court that, while the accused made it, he had not been induced. There was no threat of any kind or promise. ~~and that the person to whom the accused made the confession was not a person in authority.~~ Where the prosecution fails to establish the voluntariness of the confession beyond reasonable doubt, that confession is inadmissible.

In Tuwamoi V. Uganda[3], the accused person made a statement admitting that he had killed the deceased. The following morning, he retracted it on the grounds that he had been beaten by the police officer. The accused in other words was trying to show that he made the confession involuntarily. The prosecution failed to prove the voluntariness of the confession beyond reasonable doubt and the confession was held to be inadmissible.

As the section reads, the confession is inadmissible if made to a person in authority. The reason behind this is that such a person can animate the hopes of the accused or inspire him with awe. A person in authority has been defined as "A person who at the time of taking of the confession has the power to influence *the proceedings or prosecutions*". *This includes magistrates as* was held in Gopa s/o Gidamabanya[4]. In this case, the accused persons were charged with murder. They were convicted on their confessions which they had made to the magistrate. This confession could have been held inadmissible had it not been corroborated by other evidence from other witnesses, merely on the ground that it was made to a person in authority. However, due to the fact that it was corroborated by other evidence, it was held admissible.

A police officer is also a person in authority. In Ochau s/o Osigai V. R[5] the appellant had made a statement to a sub-inspector but through a police constable interpreter. This statement was translated by the interpreter into Swahili to the sub-inspector who recorded it in Swahili and subsequently into English. It was revealed that the sub-inspector had questioned the accused in custody until he finally made a confession. The court here held that this statement was inadmissible since it was made to a senior officer who was a person in authority.

Chiefs are also persons in authority. In R V. Maganda[6], the appellants and three other persons were convicted of murder and sentenced to death. At the trial, a chief deposed that acting under statutory powers, he discussed the matter with the appellants after arrest and that the appellants had admitted the commission of the offence to him.

The fact that the accused had confessed to a chief, a person in authority, rendered the confession inadmissible.*

In some instances, District Commissioners may be regarded as persons in authority. In R V. Shagenda s/o Gingili[7], the appellant was convicted of murder. The conviction was based mainly on the statement made to a District Commissioner who had also investigated the case in his capacity as a police officer. This confession was held to be inadmissible mainly because it was made to a person in authority under S.25 of the Indian Evidence Act.

A manager of a firm may in some instances be held to be a person in authority. This was stated in R V. Alikisi Semuli and Godiosi[8], where a manager of a firm from which money had been stolen promised the accused that he would not be prosecuted if the missing money was returned. Consequently, the accused said that he had stolen the money. This confession was held to be inadmissible being made to a person in authority.

At this juncture, it is essential to distinguish between a friend and a person in authority. A confession made to a friend is not regarded as a person in authority. A confession made to a friend is not inadmissible since a friend is not regarded as a person in authority. This was stated in Deokinan V. R[9], where the accused made a statement to his trusted friend admitting he had stolen money from his employer. He later retracted the statement on the grounds that he had made it to a person in authority.

This argument was rejected by the court holding that his trusted friend was not a person in authority, and that the statement that the accused made to his friend was only in his capacity as a friend, and was voluntary, and therefore, admissible.

S.26 also states that the threat or inducement must be sufficient in the eyes of the accused to make him assume that he will gain some advantage or avoid some harm of a temporal nature. The harm must be of a temporal nature but not spiritual. If physical force is applied, then this will invalidate a confession. For example, where an accused person has been harassed or tortured as in Njuguna and others V. R[10], in that case, the accused persons had been locked up in prison from March to June. In the course of this period, they made some confessions to police officers. They argued that they made these confessions involuntarily and that these confessions were of a temporal nature. The court held that these confessions were inadmissible by virtue of the fact that the accused had been in police custody for a couple of months and that they may have been induced to make these confessions. However, where a person has made an exhortation, the confession is voluntary and admissible. This was stated in R V. Noronho[11] where the respondent went to one Captain Wood, who was an adjutant The Captain on seeing the respondent remarked "I understand you wish to make a statement to me", and the respondent replied "yes, I wish to confess everthing". The adjutant said "if you wish to confess, you must tell the truth and no lies". The respondent then made the statement to the adjutant which the adjutant wrote down. This statement by the adjutant was said to be a mere

exhortation to the respondent to speak the truth and did not amount to a promise or threat. It was thus admissible. If there are any inducements made to the accused, the statement of the accused is said to be inadmissible. The section seeks to ensure that the statement has not been obtained by any inducement and any inducement invalidates the confession.

In R V. Okello[12], the accused had confessed to the commission of an offence. This was the only evidence that could have been relied on in convicting the accused. At the trial, the accused retracted this confession and he pleaded not guilty. He admitted that he had made the confession but alleged that he had at first denied his guilt before the chiefs but they said "confess, confess and your punishment will be small, we will not send you before the bwana if you confess". He then confessed. It is clear from the above that if the accused's statement is true, the confession was caused by an inducement having reference to the charge against him and also proceeding from a person in authority and was therefore, inadmissible. If the court convicted on such a statement, it would have been unsafe. The court should make a strict enquiry into the circumstances in which it was made before convicting the accused person. Also in the case of R V, Alikisi Semuli and Godiosi[13], here the court found that the confession was inadmissible in view of the fact that it had been obtained through an inducement from the firm manager. The manager of the firm had promised the accused that he would not be prosecuted if the missing money was returned. This was said to be an inducement and the confession was said to be

This should be admissible by the rule of discovery and admissibility of illegally obtained evidence in Kenya

inadmissible.

However, it can be argued that it is the duty of a magistrate before recording a statement to satisfy himself that the statement is voluntary and has not been obtained by any inducement, promise or threat as it is in the interests of justice that if an accused person genuinely wishes to make a statement, he should be allowed to do so and not dissuaded.

In some instances, the accused may deny that he never made a statement at all. Alternatively, he may agree that he made the statement, but involuntarily. In these situations, he is said to have repudiated the confession or to have retracted the confession respectively. In such instances, it is a rule of practice that there should be corroboration. However, it is not a rule of law.

In the unreported case of John Kimani Wangunyuka V. R [14], the appellants were convicted of murder mainly on their own confessions which they had retracted on trial. They appealed on the grounds that their convictions were based on uncorroborated evidence. The court of appeal observed that "when a confession is retracted or repudiated, it is both desirable and wise to look for corroboration. But if the court is satisfied that it is safe to act on that confession without corroboration, then it may do so. It appears from the above that corroboration is necessary where the accused has retracted or repudiated a confession. The use of corroboration helps the trial judge or magistrate to add more weight to the evidence before him and this helps the danger

of convicting an accused person where he is innocent.

Where a confession is denied as in retracted and repudiated confessions, the trial judge or magistrate must make a thorough inquiry. (Trial judge or magistrate) must hold a trial within a trial to prove the voluntariness of the confession. This is a rule of practice not of law. It has been developed to determine the admissibility of an extra-judicial statements made by an accused when such admissibility has been challenged either by retraction or repudiation or through allegations of coercion or failure to comply with the judges rules. The trial within a trial is usually held in the absence of assessors since they are untrained and what they hear during the inquiry might affect them but the trained mind of the judge will find it easy to discard a matter which has become irrelevant.

The procedure to be followed during the trial-within-a-trial enables an accused person to establish whether or not the confession was voluntary. When the trial within a trial is conducted, the officer who took the statement is put in the witness box and is examined. The defence in turn gives its evidence and the trial judge makes a ruling. If the statement is taken to be voluntary, then, that ends the case as part of the exhibit. The trial within a trial is an important safeguard since in most cases, it turns out that the accused persons while in custody are forced to make statements that are not voluntary mainly due to the fear they have of police officers or the tortures that they undergo.

My submissions are that though this is a useful way of proving the voluntariness of a confession, it happens that when the accused is taken to court and the confession read out, he finds himself having no otherwise but to admit that he wrote the confession down and signed it. While in court, he may raise the issue of involuntariness, that he wrote down the statement under fear yet the magistrate is left with no option but to admit the confession as being voluntary. The difficulty that arises is to prove the voluntariness of the confession since in most instances, the accused may not have any external injuries but they may be internal and once internal, this is a big problem to the magistrate.

S.27 of the Kenya Evidence Act provides for a further safe-guard. It states that "If a confession as is referred to in S.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, but if the induce-ment is prevalent, then, the confession is inadmissible".

This section shows that in order for a confession to be admissible, the previous inducements, threat or promise must first be removed. If they still persist, then, such a confession is inadmissible.

In Nanta s/o Ndimi V. R[15], the accused was charged with killing the deceased. He was arrested and on arrest, he showed the police where the spear used in killing the deceased was hidden. This evidence was discovered in consequence of the information received from the appellant while in police custody.

The court rejected the admissibility of the confession on the grounds that it was made while in police custody when an improper inducement was still in his mind.

S.28 of the Kenya Evidence Act deals with confessions made by persons in the custody of a police officer. Custody means any place where due to the presence of a person in authority, compulsive casual force may act on the accused compelling him to make a statement. Such a statement is not voluntary in view of the pressures on the accused while in custody. This safeguard avoids the danger of admitting a confession which is obtained by improper means like threat being admitted. It also takes into account the fact that once the accused persons are in custody, there is the harassment that they may get from the police officers. This kind of harassment could at times make an accused person admit that he committed the offence even when he did not. This section therefore, tries to avoid any miscarriage of justice being occasioned to an accused person.

S.29 also provides a safeguard. It provides that

> "No confession made to a police officer shall be proved against a person accused of any offence unless such a police officer is of above the rank of an assistant inspector or above or an administrative officer holding first or secondhand magisterial powers and acting in the capacity of a police officer".

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Any confessions made to persons not of that rank are inadmissible. This safeguard is useful in that at times some of the police officers are not well learned and may not even understand the procedures used in making the confessions. That is why it is important that the police officer be of that rank since, then, he might be in a position to understand the procedures of making a confession. In the unreported case of Joseph Ndungu Kimani V. R[16], the appellant was taken to the police station for investigation upon complaint that he had obtained something by false pretences. While in the police station, the assistant inspector left both the accused and a police officer together. In the course of their talk, the accused person made a confession to the police officer who was not of the required rank. This confession was held inadmissible mainly due to the fact that it was not made to a person of the required rank.

THE POLICE ACT - S.22 Cap 84

The Police Act S.22 provides a safeguard for the confessions being improperly obtained. The section states

> "..... A police officer may require a person to attend before him at the police station if he has reason to believe that such a person has information which will assist him in investigating on alleged offences. No person however, shall be required to answer a question, the answer to which may tend to expose him to a criminal charge. If the police officer has decided to charge a person, he must warn him that any statement that he wishes to make will be recorded and signed by the person making it, after it has been read to him in a language that he understands, and has been invited to make any corrections which he wishes to make".

This section of the Police Act makes it mandatory to caution a person before taking down his statement. The issue of a caution being administered is an important safeguard mainly because, at times a person may admit that he committed an offence but he does not admit because he wants but because he wants to get out of custody. Later, he may be heard to say that he did not wish to make such a statement. Thus the issue of caution is good because it enables the accused to realise that the statements he makes should be genuine since they will be used as evidence against him. In Balbir Joshi V. R[17], the appellant made an oral statement to a police officer conducting investigations that he had stolen Kshs.50,000 in currency notes while in a train travelling from Nairobi to Mombasa. No caution had been administered before the statement was recorded. The appellant challenged the statement on the grounds that it was not in conformity with the judges rules. The judges rules require that before a police officer takes down any statement from the accused, he must caution him that such statement will be used as evidence against him. In this case, the police officer taking down the statement did not do so and therefore, violated the judges rules.

The court held that the caution was a statutory requirement and the failure to administer the caution rendered the statement inadmissible. It was mandatory to warn the accused person before he makes the statement or else it may be rejected as being involuntary.

Another requirement of the Police Act is that if possible, such a statement should be recorded. This indeed is also important because there are times that a person may admit the statement, yet, later while in court, rejects that he ever made such a statement. This section therefore, tries to avoid the danger of a person later denying that he even made such a statement. The recording acts as an exhibit which is always produced as evidence against the accused. In R V. Kaperere s/o Muraya[18] , the accused had made an oral confession that he had killed his aunt. He later retracted the statement. The court held that he it was possible to convict a person on a retracted confession through oral confessions should be taken with great caution.

The above case tried to illustrate the fact that recording of a statement is necessary. An oral statement may pose a great danger since there is no record to show that the accused ever made such a statement. If the magistrate decides to convict on such a statement that is not recorded, then he might occasion injustice.

The act also provides that the confession should be taken in a language which the accused understands. This is because at times a person may not understand a particular language and may make a statement to the police officer even when he has not understood what he has been asked. This is an important requirement as it enables the accused to have a right to use the language that he understands so that he will not later be heard to say that he never understood it. In an unreported case of Njeru and another V. R[19],

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the court observed that it was necessary for the accused person to make a statement in his mother tongue or in a language of his own choice so that it corresponds with the actual words in which it was made. Any statement obtained from an accused person, should also be read to him and he should be able to make any corrections he wishes to make before he signs it. This is also important because at times the police inspector might write down what the accused did not tell him, yet the accused may be convicted. The fact that the accused has the statement read to him reduces the danger of the accused later saying that he did not say those words.

The Police Act is therefore, an important safeguard in ensuring that the rights embodied in the act are to the interests of the accused persons. This provides for a sufficient safeguard so that innocent persons may not be made to suffer unnecessarily.

JUDGES RULES

The judges rules further provide for a safeguard. They are rules of practice providing administrative directions for the guidance of police officers in the taking of statements and confessions from accused persons. Since they are rules of practice, they are declared by a court of competent jurisdiction to be followed until the court or a higher court declares them obsolete or until they are changed by legislation. The judges rules being rules of practice other than of law, a discretion distinction lies in the court in considering whether a statement taken in contravention of the rules shall be admitted in evidence or not. The above statement was expressed in R V. Bass[20] where the appellant was convicted at quarter sessions of larcency and shop breaking. The only evidence against

him consisted of answers made by him to two police officers who had interrogated him at a police station which amounted to an admission of guilt. No caution was administered before the interrogation. The court said

> "..... The court has said on many occasions that the judges rules have not the force of law, but are administrative directions for the guidance of police authorities. This means that if the rules are not complied with, the presiding judge may reject evidence obtained in contravention of them. If however, the statement is obtained in contravention of the judges rules, it may nevertheless be admitted in evidence provided it was made voluntarily".

The same was stated in R V. Voisin[21], where the accused was convicted of murder of a woman. The accused while at the police station had made a statement which was taken down in writing. He was then asked whether he had anything to say in objection to writing the words "Bloody Belgian". He said he did not have and he wrote the words "Bladie Belgian". No caution was given to him by the police either to the accused before he made the statement or when he wrote the words "Bladie Belgian". He was then charged with the offence of wilful murder and sentenced to death. The court in this case stated that

> "The total infringement of the judges rules never means total exclusion of the statement, but rather it all depends on the judges discretion. If the judge in his discretion thinks that the statement was voluntary despite the infringement of the rules, it will still be admissible".

The judges rules as he has been observed do not provide an effective measure in safeguarding the interests of accused persons as is required of them and this may pose a great danger especially if a statement or confession has been obtained involuntarily as this may amount to a miscarriage of justice.

CONSTITUTIONAL SAFEGUARDS

The Kenyan Constititution[22] is said to be supreme and any law that is inconsistent with it is null and void. It implies that if any other law does not abide with the constitution, then, that law is a nullity.

S.77(7) of the constitution embodies the safeguards against confessions. This section states that "No person who is charged with a criminal offence shall be allowed to give evidence at his trial". The section implies that when an accused person is brought to court and charged with the commission of an offence, that person will not be compelled to give evidence against himself. Any attempt by the court to compel the accused to give such evidence will be null and void.

The law of confessions is one where an accused person may be asked questions by a police inspector concerning a particular offence that he has committed. It is therefore, one where a person may be compelled to admit that he committed an offence.

The constitution steps in to provide that such self incrimination is against the law and is ultra vires the constitution. This view has been followed in the United States. The United States constitution followed this rule in the case of Jackson V. Denno[23] where Jackson and one Miss Elliot were convicted of murder in the first degree and were tried together. They made statements to the police officers who were investigating. Jackson's argument was that he had been pressurized into answering questions yet the laws of New York has it that the voluntariness of a confession should be proved and if it is involuntary, the trial court should exclude it. The argument in this case was that Jackson had been forced to give evidence which was unconstitutional. The confession would have been inadmissible if it was obtained involuntarily. This case established the modern basis of the confession rule that it is a privilege against self incrimination. The use of evidence extracted from a person against his will amounts to compelling him to be a witness against himself.

The law is that where there is a constitutional guarantee against self incrimination, this should now form a formidable premise for the confession rule. Thus S.77(7) of the constitution as it now stands is a fundamental right and to use a confession which is not voluntary as evidence against the accused is a violation of this provision being tantamount to compelling him to give evidence at his trial.

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CHAPTER THREE

WEAKNESSES IN THE RULES RELATING TO CONFESSIONS

The law relating to confessions as was seen in the preceeding chapter, is one that has been carefully safeguarded. These safeguards are embodied in the Kenyan Constitution, the Kenya Evidence Act, Police Act, and the judges rules. All these safeguards show that where a confession is obtained in contravention of the rules set out, such a confession is inadmissible.

However, even though there are these safeguards, the law may not go without criticism since there are certain weaknesses inherent. The weaknesses in the law relating to confessions come about mainly due to the following reasons.

To begin with, there is lack of legal representation on the part of most accused persons. This is because the lawyers fee is too exorbitant for some people to afford whilst most of the accused persons are poor and cannot afford to engage lawyers to represent them.[57] The other problem related to the law of confessions is one of lack of effective communication of the legal norms to the ordinary mwananchi. The ordinary mwananchi does not know the law and will not know the procedures that he would follow if he was faced with a situation which he does not understand.

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All these problems are inherent not just in the law relating to confessions, but also in other areas of law.

However, the weaknesses involved in the law relating to confessions will fall into three categories as follows:

1. Confessions and illegally obtained evidence
2. Judges rules
3. Police malpractice

CONFESSIONS AND ILLEGALLY OBTAINED EVIDENCE

The Kenya Evidence Act defines a confession in S.25 of the Act, thus

> "A confession comprises of 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".

From this definition, a confession is an extra-judicial admission of guilt or circumstances from which guilt may be inferred.

The Kenya Evidence Act provides that for a confession to be admissible, it has to be voluntary[1] and the burden of proving voluntariness is on the prosecution.

However, where a confession is proved to have been involuntarily obtained, that confession is inadmissible.

This paper will confine itself to inadmissible confessions as provided by S.31 of the Kenya Evidence Act.

That section states that

> "Notwithstanding the provisions of S.26, 28 and 29 of the Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information whether it amounts to a confession or not, as relates distintly to the fact thereby discovered may be proved".

The effect of this section as regards confessions is that it defeats the intentions of the legislature contained in S.26, 28 and 29 of the Act. These sections embody the fundamental theory upon which confessions become inadmissible. They set out the circumstances under which a confession becomes inadmissible. For the confession to be admissible, it has to be voluntary in the sense that it has not been obtained through inducements, threats, or promises. What S.31 does is that instead of following what is set out in S.26, 28 and 29 it departs from these sections and gives the conditions under which any information which may be discovered may be proved. Under this section, the facts to be proved may be obtained from a confession which is inadmissible because it has been obtained from a confession which is inadmissible it has been obtained by illegal means. If the Act allows discoveries made from such illegal sources, then, it is sanctioning illegality on the part of the police and thereby attempting to promote the interests of the state to have the guilty punished at the expense of the individuals right to a fair hearing.

Such discoveries, just like evidence obtained through illegal searches and seizures, fall under the category of evidence illegally obtained[2]. Sarkar on Evidence[3] attempting to justify the existence of this section states that

> "..... The section seems to be based on the view that if a fact is actually discovered in consequence of such information given, some guarantee is afforded there by that the information is true and accordingly can be safely allowed to be given in evidence".

This view seems to be ignorning the fact that at times, the discovery of this information could be by an improper manner thereby rendering it unfair to the party against whom such discovery has been made.

Phipson[4] in support of Sarkar states that notwithstanding how the information has been obtained, so long as it is relevant, then it is admissible.

My submissions are that by so doing this ends up in justice not being done because at times this information may have been obtained by such crude manners as in instances where the accused person may have been beaten up thoroughly so as to admit a confession.

This brings a lot of unfairness especially in instances where the accused persons may not have committed that offence. Yet both Sarkar and Phipson argue that it matters not how such information was obtained, so long as it is relevant, it is admissible. Their arguments overlook the fact that justice has got to be done by taking only the relevant evidence obtained in the proper manner

and thus omitting the evidence obtained in an illegal manner.

In Kuruma s/o Kaniu V. R[5] an appeal from the Supreme Court of Kenya. Here, after an illegal search and seizure, the accused person was charged with the possession of ammunition contrary to the emergency regulations. The defence contended that the accused person could not be convicted of the offence because the evidence was obtained as a result of a search which had been conducted by a police officer of a rank below the one required. Lord Goddard[6] and their Lordships of the ~~party~~ Privy council were of the opinion that

> "..... The test to be applied in considering whether it is admissible is whether it is relevant, to the matters in issue, if it is, then, it is admissible and the court is not concerned with how it was obtained".

Coming back home, in R V. Sawe arap Kurgat[7], the accused person was charged with possession of stock in a prohibited area contrary to the Stock and Produce Theft Ordinance of 1933. He made a confession to an assistant chief which could not be admissible. He stated that he had placed the cattle with two persons one M and another R as a result of his statement, one of the cattle was discovered with M and 2 with R. It was held that while the confession was inadmissible, yet so much of it has led to the discovery of the cattle was admissible under S.27 of the Indian Evidence Act now S.31 of the Kenya Evidence Act. Thus, S.31 poses a great danger by stating that such information is admissible so long as it leads to the discovery of certain information.

This thereby gives use to major weakness in the confession law since by providing that such confession is admissible if it leads to the discovery of information, it is in effect contravening the rules of the confession law provided by S.26, 28, and 29 of the Act and by so doing, occasioning injustice.

In A.G. V. Manilal Patel[8], the respondents were jointly tried for contravening S.3(2) of the Prevention of Corruption Ordinance 1956. At the trial, the prosecution sought to put in evidence certain statements made by the respondents to the police when charged with an offence under S.4 of the Ordinance. The argument in this case was that while the magistrate ruled the statement as inadmissible, the Attorney General argued that these statements were admissible as they were relevant to the issue and it was immaterial that they were made on the basis of a different charge. The court held that, for a statement to be admissible, the issue to determine its admissibility was whether it was relevant to the charge for which the respondents were being tried and if it was, then, the statements were admissible.

Given the above, it is my submission that one cannot fail to see the weaknesses inherent in the law. This is by ruling that if any information given is relevant, then, it is admissible irrespective of how it was obtained. By so doing, it is in effect operating contrary to the sections in the Evidence Act which state the grounds on which a confession can be admissible. S.31 of the Act mainly dwells on the relevance of the information other than the manner in which such information was obtained and is thereby infringing one's right to a fair hearing and thus occasioning injustice to the innocent mwananchi.

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POLICE MALPRACTICE

S.25 of the Kenya Evidence Act states that for a confession to be admissible, it has to be made voluntarily. This has been interpreted to mean that, if any threats or inducements have been applied, then, the confession will be inadmissible. However, though this is the case, it appears that in most cases, the accused person will retract the confession as having been obtained involuntarily. The accused says that he was beaten and was made to sign the statement against his will. This happens in most of the cases but once an accused says that he was beaten, the magistrate will always ask for a medical report. There are instances where an accused could be beaten but has got no scars to show where he was beaten, the injuries could be internal and once an accused is sent to a government doctor, the government doctor will examine him and later be heard to say that the accused was not beaten. The accused person is left with no other proof to show that he was beaten. This was the case in R V. John Oluch[9] where the accused was charged that he had stolen from a company in which he was employed. The accused stated that while he made the statement, he was beaten up and was forced to make the statement. While in court, the accused person retracted the confession on the grounds that it was involuntarily made and that he was beaten up. The magistrate in this case ordered that the accused person be examined by the doctor since there was no external injuries. The doctor's report in this case showed that the accused had not been beaten and the magistrate admitted the confession as being voluntary.

This therefore, is the main problem since an accused states that he was beaten but the doctors report is usually against the accused and the accused is thereby left with no other evidence to show that his confession was not voluntary. In the above case, the accused could have been beaten, but once the doctor failed to see any physical injuries, then he ruled that the accused was not beaten.

The other weakness inherent is one relating to the time when the confession is made. On the making of the statement, it is only made in the presence of the police inspector. There is no other third party apart from both the accused and the inspector. The accused may be beaten by the inspector and may also be made to sign the statement but there may be no other evidence to support the accused case. This may lead to the magistrate ruling that the evidence of the police inspector is true and that of the accused as untrue yet, the accused may have been beaten but due to the fact that there is no evidence to support him, then the magistrate will rule the confession as being inadmissible.

JUDGES RULES

(ADMINISTRATION OF CAUTION)

These are rules of practice not of law. Their function is to provide administrative directions to the guidance of police officers in the taking of statements and confessions from an accused person. However, these rules have a few weaknesses. The rules provide that before a police officer takes down a statement from the accused person, he must caution him that whatever information he gives may be used in evidence against

him. The accused has therefore, got to be careful lest he gives the wrong information.

However, there are instances in which the police inspector fails to administer caution as is required of him. This may be a great danger because the accused may make a statement not knowing that such a statement may jeopardise him. Where an accused person states that he was not given the necessary caution, the prosecution may find it difficult to prove since at the time the accused made the statement, it was only him and the police inspector thus it is the word of the accused against that of the police inspector.

In R V. William Okumu[10] the accused person was charged with house-breaking and theft contrary to S.306(9) of the Penal Code. He was questioned while in police custody but no caution was administered. The prosecution alleged that the accused made a voluntary statement admitting taking act in the crime. The accused alleged that at the time of ~~making~~ making the statement, he was forced to make the statement without caution being administered. The magistrate ruled that the statement was voluntary and that the issue of caution was not fatal to the statement. The gist of the case suggest that the statement was not voluntary, yet, the magistrate ignored the issue of caution which is one of the circumstances to be taken into account in deciding whether the statement was voluntary or not. This case illustrates the fact that at times, the magistrates ignore some of these rules and rule that a confession is voluntary even when it may not be and this results in a miscarriage of justice.

SIGNING OF THE STATEMENT

The judges rules provide that

> "Any statement made should be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any correction he may wish. In some cases, the accused person may be illiterate and once a statement is read to him, he may not understand its contents. There is therefore a likelihood that justice is never done".

In R V. Absalom Henry Omach[11] , the accused a clerk with the government was charged with stealing by a person employed in the public service contrary to S.28 of the Penal Code. While in custody, he had been cautioned by a police officer on the making of his statement. He had been in custody for a total of three months before he was brought to the trial. The accused at the trial contended that the statement had been obtained from him through inducements, and that the inspector had forced him to sign the statement whose contents he did not know. The accused was unrepresented. The magistrate admitted the statement as being made voluntarily. He argued that the accused could not sign a statement which was not of his own intention. Taking into account that the accused was still in police custody, this was unjust because the accused could have made the statement against his will. Having been in custody for that period, the accused could have been tortured to the extent that he made the statement involuntarily. In such instances where the accused has been in custody for long, it is the work of the courts to examine with the closest care and attention the circumstances under which such a

statement was made. The magistrate therefore, ignored the circumstances of a legal importance and concentrated on the clever and responsible nature of the accused. The possibility of justice not having been done cannot be overlooked.

JUDGES RULES

This criticism goes on the judges rules generally. Whereas, the rules are supposed to be followed for a confession to be voluntary, yet on the other hand, as stated by Durand on Evidence, their infringement does not render the confession inadmissible. The question then is, why have these rules if at all by infringing them, this will not result in a confession being inadmissible? It is my submission that these rules should be followed strictly if justice is to be seen to be done. The law should not read that if the rules are not followed, then, the confession will be inadmissible.

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CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

In this desertation, an attempt was made to look at the law of confession and what role confessions play in the administration of justice. At the end of it all, it is submitted, that though there are laid down rules which should be followed before a confession is admitted, it appears that there are a few weaknesses in the law as was pointed out in the last chapter. It is therefore, submitted that the question of confessions should be settled once and for all.

In the first place, the definition of the term confessions provided under S.25 of the act leaves a lot to be desired. It is not certain when an admission falls under confessions, or even when to admit a statement if other facts are not proved. It is therefore, recommended that if the law of confessions is to serve any useful purpose, it must be very certain what is included in it. It is the duty of the courts to determine clearly and specifically the kind of admissions which fall under the confessions doctrine and the procedure to be followed when these admissions which do not admit all or substantially all the facts constituting the offence are tendered in evidence. Only then will the law of confessions be clear and hence easily applied.

It is also recommended that the category of inducements which render a confession inadmissible should be widened. Thus, the trial magistrate should closely consider the circumstances of each case to establish if an inducement of whatever nature has been offered.

Further, there is time wasted in going through a trial in the case of a repudiated confession. It is the writer's opinion that a trial within a trial is of little use, if, any. This is due to the fact that in nearly all the cases, it is the word of the accused against that of the experienced policeman who can easily swear that white is black. Thus, a trial within a trial is nothing more than a delay in the eventual conviction of the accused. I concur = Okuth's murder case

It is also observed that the accused persons are not free with the police officers. Most of the accused persons still retain the colonial mentality of looking upon the police officers as tormentors so they panic once they see police officers and can confess to anything. It is thereby suggested that confessions to the police should be made inadmissible and provision should be made that all confessions should be made to and recorded by magistrates.

No more. Its the police who have retained this ~~not~~

The Tanzanian provision is contained in schedule: (The Primary Courts Evidence) Regulations, 1964, Rule 13(2) which is reproduced here below.

> "No evidence may be given in a case against a person accused of an offence of any confession made when he is in custody unless the confession was made directly to a magistrate or to a justice of the peace who has been assigned to a district court. Even if such a confession is made to a magistrate or such justice of the peace, no evidence may be given of the confession if it was caused by an inducement or threat or promise".

A practice note can be added to the effect that the magistrate recording the confession should justly satisfy himself that the accused or suspect has not been coerced, threatened, or induced in any other way to make such confession against his will.

The other issue is one where the court is said to have a discretion to decide whether a threat or inducement has been sufficiently removed when the statement was being taken is another provision that has given rise to many problems. This provision gives the police officer the right to mistreat the accused person for they very well know that a subsequent caution is deemed to remove the threat or inducement. Even here, it is submitted that an amendment is called for to specify, the minimum period of time which should expire after the threat is made when it can be assumed that such a threat or inducement has been sufficiently removed. Some accused persons might never forget what they underwent through and so they might confess because they are still labouring under previous threats. Since it is difficult to forget threats easily, the law of confessions should probably be amended so as to set out as closely as possible what amounts to reasonable duration between the time the threats or inducements were administered and the taking of the statements occasioning any miscarriage of justice to innocent mwananchi. It is the author's contention that if the above recommendations are implemented, then, there will be a likelihood that justice is not only done, but is also manifestly seen to be done.

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22. S.3 of the Kenya Constitution
23. 377 U.S., 378 p.908

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CHAPTER THREE

FOOTNOTES

1. S.26 of the Kenya Evidence Act

2. GRANVILLE WILLIAMS "Evidence obtained by illegal means", 1955 criminal law report p.339

3. SARKAR "On Evidence", 12th Ed., at p.285

4. PHIPSON "On Evidence", 11th Ed., Sweet & Maxwell, London, 1975

5. (1955) A.C. at 177(PC)

6. At p.203

7. (1939) KLR 166

8. (1961) EA 354

9. At the D.M.'s ct. at Makadara criminal case No. 8676/1978

10. In the R.M.'s ct. at Kisumu, criminal case No. 742 of 1976

11. In the R.M.'s ct. at Kisumu criminal case No. 716 of 1976

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