

CHAPTER 80

THE EVIDENCE ACT

SUBSIDIARY LEGISLATION

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THE EVIDENCE (OUT OF COURT CONFESSIONS) RULES

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THE EVIDENCE (OUT OF COURT CONFESSIONS) RULES

[Legal Notice 41 of 2009]

1. Citation.

These Rules may be cited as the Evidence (Out of Court Confessions) Rules.

2. Interpretation.

In these Rules, except where the context otherwise requires—

“Act” means the Evidence Act (Cap. 80);

“electronic recording media” includes any removable or physical audio recording medium; and

“recording officer” means a police officer (other than the investigating officer) who is not below the rank of Chief Inspector of Police.

3. Availability of Rules.

These Rules shall be readily availed by the Attorney-General for reference by police officers, accused persons and members of the public and in particular, shall—

- (a) be displayed prominently at every police station and police unit;
- (b) upon request, be made available by a police officer, in a form of a copy, to an accused person.

4. Rights of accused person.

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

- (a) has stated his preferred language of communication;
- (b) is provided with an interpreter free of charge where he does not speak either Kiswahili or English;
- (c) is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;
- (d) is informed of his right to have legal representation of his own choice;
- (e) is not deprived of food, water or sleep;
- (f) has his duration, including date and time of arrest and detention in police custody, established and recorded;
- (g) has his medical complaint, if any, adequately addressed;
- (h) is availed appropriate communication facilities; and
- (i) communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under rule 5.

(2) The recording officer shall not record a confession from any accused person who complains to him of being a victim of torture or whose physical appearance shows signs of physical injuries including open wounds, body swelling, or shows extraordinary fatigue or any other indicators that would suggest that the accused person has been tortured.

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

5. Caution to the accused person.

(1) The recording officer shall caution the accused person in the following terms and shall record his response:

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“Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.”

(2) While recording the confession, the recording officer shall ensure, and record compliance, that where the confession session is prolonged, the session included rest and relaxation periods.

(3) The recording officer shall ensure that the confession is recorded at the same time it is made and shall record the date and time of commencement of the confession session and the place where the confession is recorded.

6. Electronic recording media.

(1) Subject to paragraph (2), the recording officer may record the confession of an accused person on electronic recording media.

(2) Where the recording officer records the confession of an accused person on the electronic recording media—

- (a) the accused person shall be notified of such recording and of his right to object and the notification and any response thereto by the accused person, preferably on electronic media; and
- (b) the recording shall be in the open.

(3) In the event of failure of the electronic recording media, the recording officer may—

- (a) opt to replace the equipment and record the failure upon the resumption of the confession session; or
- (b) record in writing.

(4) Upon electronic recording, the first recording which shall be the master recording, shall be marked with a reference number and sealed in the accused person's presence while a second recording will be used as a working copy by the prosecuting authority during the period of exercise of prosecutorial discretion.

(5) The recording officer shall produce the master electronic record to the court and may be requested by the court to prove its authenticity.

(6) A copy of the recording shall be given to the accused person, upon request.

7. Confession recorded in writing.

Where the confession is to be recorded in writing, the recording officer shall inform the accused person of his option to write his own statement in his preferred language or to have the recording officer record it.

8. Clarification of confessions by accused person.

At the conclusion of the recording, the accused person shall be offered the opportunity to clarify anything he has said and to add anything he may wish.

9. Certificate of confession.

The recording officer shall ensure that the written confession or electronic recording media contains the following certificate at the end of the confession, in the original language of the accused person:

“I have read the above statement and I have been told that I can correct, alter or add anything I wish. The statement is true. I have made it of my own free will.”

10. Confession not recorded in English or Kiswahili.

In the case of a confession not recorded in English or Kiswahili, the recording officer shall ensure that it is translated into English or Kiswahili.

11. Safety of recorded confession.

The master recording or the signed confession statement shall be kept securely and their movements accounted for on the same basis as material which may be used for evidential

purposes, as further elaborated in the Service Standing Orders issued under section 10(1) (r) of the National Police Service Act (Cap. 84).

12. Accused person arrested outside Kenya.

Where an accused person is arrested outside of the geographical boundaries of Kenya for the purpose of being arraigned in a Kenyan court, and, prior to arrival in Kenya, the accused person opts to record a confession—

- (a) the arresting authority shall record the confession if the governing procedures for obtaining of confessions in the arresting jurisdiction are in substantial compliance with these Rules; and
- (b) the trial court shall be the final determining judicial body to adjudicate on the admissibility of confession so obtained.

13. Recording officer to be a witness.

The recording officer, having informed himself of section 26 the Act, shall be the proper prosecution witness to prove to the court beyond reasonable doubt that the Rules were complied with.

14. Certification by recording officer.

The recording officer shall certify, in writing, that a confession was not obtained as a result of any inducement, threat or promise having reference to the charge against the accused person.

15. Language of publication.

These Rules shall be translated and published in Kiswahili in addition to the official copy published in English.
