

ILLEGALLY OBTAINED EVIDENCE: WHICH WAY FOR KENYA COURTS?

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Abstract

In any criminal trial, for the accused to be found guilty the prosecution must prove its case beyond reasonable doubt not unless the accused person admits the offence. The prosecution is required to adduce evidence which evidence must be relevant to the issues in question and must have weight. How the evidence presented during the hearing was obtained can be an issue for determination by the court. If the evidence is found to be illegal it may be rejected by the court under what is called exclusionary rule. In some jurisdictions it may be admitted even if it was illegally obtained so long as the evidence is relevant. This is known as mandatory inclusion approach. The question is: which way for Kenyan courts? Should they adopt the common law approach (Mandatory inclusion) or the American approach (Exclusionary rule) or a hybrid of the two doctrines?

Key Words: Illegal evidence; Warrant of search; Mandatory inclusion; Exclusionary Rule.

Introduction

The issue of whether the courts should admit or not illegally obtained evidence in both civil and criminal proceedings is still subject to debate. A number of decisions have been rendered both in civil and criminal cases addressing the issue from different jurisdictions. However, this issue is more prevalent in criminal cases as compared to civil cases. The question is “what is meant by illegally obtained evidence? This is the evidence obtained by means of acts which are the illegal. Such evidence could be illegal because it is against the spirit of the constitution, statutory law, case law and

even international conventions. However international conventions apply if a state has ratified or domesticated the same. The evidence could also be illegal if the procedure or method used to obtain such evidence is contrary to the law. Illegal means of obtaining such evidence could include but not limited to committing a criminal offence in the course of obtaining the such evidence, a tortuous act, conducting illegal searches by the police, illegal seizures, breaking of a contract, fraud, deception, threats, inducements or and any other means that may be considered unfair and or contrary to public policy.

According to the Blackwell illegally obtained evidence is defined as:

“Evidence acquired by violating a person’s constitutional protection against illegal searches and seizures; evidence obtained without a warrant or probable cause”¹

From the above definition, evidence qualifies to be illegally obtained if:

- (a) Person’s fundamental rights as contained in the constitution have been violated.
- (b) The rights are violated by conducting not only illegal searches but also illegal seizures. This implies that some kind of authority or permission is required for a search to be carried out before any item or document is taken away from a person by those carrying out a search.
- (c) The evidence is obtained in the absence of a search warrant issued by a court or the search is carried without any probable cause. The implication of this is that if the police who are carrying out a search do not have a warrant of search, then they must have reasonable grounds upon which they carry out a search.

Contextual analysis of Statutory Law in Kenya

i) The Constitution of Kenya 2010

The constitution of Kenya is the main source and supreme of Kenya. Any law passed anybody must be in line with the provisions of the constitution. According to the Constitution of Kenya 2010 it is provided as follows: -

“Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental of the administration of justice”²

The article provides that any evidence obtained by the police cannot be acceptable in criminal proceedings in particular if admissibility of such evidence may render the trial unfair. The same evidence will also not be admitted if its admission will be to the detriment of the accused person so far as the administration of justice is concerned. The article seems to impose limitations on admission of such evidence. If the evidence will not render the trial unfair and or won’t be detrimental to the administration of justice, such evidence will otherwise be admitted even if the manner of obtaining it violated the fundamental rights of an accused person. Perhaps this where a judge or a magistrate will have to exercise his/her discretion whether to admit the evidence or not.

Provisions relating to privacy of a citizen are contained in the Constitution which provides as follows:

¹ Blackwell 2004

² Article 50(4)

“Every person has the right to privacy, which includes the right not to have: -

- (a) Their person, home or property searched*
- (b) Their possessions seized*
- (c) Information relating to their family or private affairs unnecessarily required or revealed; or*
- (d) The privacy of their communication infringed³*

The courts and the investigating officers in criminal cases have to balance between the two articles without violating either of them.

ii) The Evidence Act chapter 80 Laws of Kenya

This is the main statute under which the law of evidence is covered for both civil and criminal cases in Kenya. Unfortunately, there are no express provisions about illegally obtained evidence. However, a number of sections of the Act provide for the manner of handling confessions that are obtained involuntarily.⁴ If a confession from a suspect or accused person is not obtained in the manner provided by law, it will not be admitted.

iii) Criminal Procedure Code Cap 75 Laws of Kenya

This main statute that regulates criminal proceedings in Kenya. It provides for the procedure to be followed in the conduct of criminal proceedings. In relations to obtaining evidence to be used in a criminal trial, the Act gives power to a court to issue a warrant of search. The Act provides as follows:

“Where it is proved on oath to a court or Magistrate that anything upon which or in respect of which an offence has been committed, or anything which is necessary for conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or magistrate shall by written warrant (called a search warrant) authorize a police officer or person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and if the thing be found, to seize it and take it before a court having jurisdiction to deal with according to law.”⁵

This provision implies that a court or magistrate shall issue a warrant of search on the following grounds: -

- (a) The court must be persuaded by the reason for issuance of the warrant of search to the person who wants to carry out a search.
- (b) This should be done by way of affidavit by the deponent in most cases who is an investigating officer..
- (c) The grounds upon or reasons why the applicant believes that an investigation is necessary to enable him/her to search a particular place or thing must be given on oath.

³ Article 31

⁴ Sections 25-29

⁵ Section 118

- (d) The court will issue a search warrant in writing and not orally and the warrant must be signed by the issuing magistrate or court officer.
- (e) The name of the officer or person to carry out the search must be indicated in the search warrant.
- (f) The place or thing to be searched must also be indicated in the search warrant.
- (g) If the thing that is searched is found, it should be seized and brought before the court which has jurisdiction to deal with it in accordance with the law.

iv) National Police Service Act Cap 84 Laws of Kenya

Police have power to enter premises and stop vehicles, etc without a warrant. This power is provided in the Act which provides as follows:-

“Subject to the constitution, if a police officer has reasonable cause to believe

- (a) *That anything necessary to the investigation of an alleged offence is in the premises and that the delay caused by obtaining a warrant to enter and search those premises would be likely to imperil the success of the investigations; or*
- (b) *That any person in respect of whom a warrant of arrest is in force, or who is reasonably suspected of having committed a cognizable offence, is in any premises, the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises, and if, after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained, the officer may enter such premises without warrant and conduct search, and may, if necessary or in order to effect entry, break open any outer or inner door or window or other part of such premises.*

(2) A police officer may stop, search and detain any vehicle or vessel which the police officer has reasonable cause to suspect is being used in the commission of, or to facilitate the commission of, an offence

(5) A police officer who exercises the powers conferred under this section shall: -

- (a) *Identify himself before hand*
- (b) *Record the action*
- (c) *Record the items taken*
- (d) *Make a report regarding such exercise and make it available for the superior⁶*

Further to the above the Act provides further as follows: -

“Where a police officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something was used in the commission of a crime, is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the Criminal Procedure Code (Cap 75) will in his opinion substantially prejudice such investigation, he may, after recording n writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant, enter any premises in or on which he or she suspects the thing to be and search or cause search to be made for, and take possession of such thing.⁷

⁶ Section 57(1)

⁷ Section 60(1)

As can be observed, this provision gives wide discretionary powers to the police to carry out searches without a warrant. The end result may be violation of the right to privacy of a person who is a victim of police searches.

The question is; should illegally obtained evidence be admitted or excluded during the hearing of criminal proceedings? A careful analysis of the above statutory provisions suggests there are two contradictory theories. These are as follows: -

(a) Exclusionary Rule

The exclusionary rule provides that evidence collected or analyzed in violation of the US constitution is inadmissible for a criminal prosecution in a court of law i.e. it cannot be used in a criminal trial. The aim of this rule was to give maximum protection of an individual's rights and civil liberties and to ensure that law enforcement procedures are followed and conducted properly. This rule originated in the United States of America in 1914. It arises from the case of *Weeks V. United States*⁸. In 1911, Fremont Weeks was suspected by the police of transporting lottery tickets through mails, which was an offence according to the American Criminal Code. Police officers from Kansas City traced Weeks at his place of work and carried a search in his office which search was extended to his house of residence. The officers seized documentary evidence in Week's absence which included papers, envelopes and some letters. The officers had no search warrant. Weeks was charged on the basis of the evidence seized without a warrant. Despite the objection from Weeks' attorney, he was found guilty and convicted. Weeks appealed to the Federal Court on the ground that the prosecution had violated his Fourth Amendment protection against illegal searches and seizures by conducting an unwarranted search and by using the product of that search in court against him. The Court of appeal was faced with two issues for determination namely: -

- (i) Whether it was illegal for a federal agent to conduct an unwarranted search and seizure of a person's home; and
- (ii) Whether this illegally obtained evidence could be used against someone in court.

The Fourth Amendment states as follows:-

*"The right of the people to be secure in their positions, houses, papers and effects, against unreasonable searches, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*⁹

Reversing the judgment of the state court, the Federal Court held as follows:-

- (i) That the documents (letters) in question were taken from the defendant's house in direct violation of the rights of defendant.
- (ii) The refusal of the petition for the return of the letters was a denial of the defendant's constitutional rights.
- (iii) That all the foregoing was done in violation of the Fourth Amendment.

The judges ruled that the illegally seized evidence was "*fruit from the poisonous tree*". The purpose behind this doctrine is to prevent the police from using illegal means to obtain evidence against an accused person. Illegal obtained evidence is considered to be a poisonous tree, and any evidence that stems from this tree is similarly tainted by the poison.

In the majority opinion, Justice Day wrote as follows: -

⁸ Weeks V. United States, 232 US.383-(1914)

⁹ Us Constitution Fourth Amendment

“The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law.”¹⁰

He further stated as follows: -

“If letters and private documents can thus be seized and held accused of an offence, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and so far of those thus placed are concerned, might as well be stricken from the constitution”¹¹

This theory propounds that illegally obtained evidence is not admissible in criminal trials. There are however a few exceptions to the exclusionary rule. If the officers had reasonable grounds and good faith belief that they were acting according to the legal authority, such as by relying on a search warrant that is later found to have been legally defective, the illegally obtained will nonetheless admissible under this rule.

(b) Mandatory inclusion Approach

This is a common law position which provides that as long as the evidence is relevant to facts in issue, it admissible. It does not matter how it was obtained. This rule is contained in the case of *R.V. Leatham*¹² the defendant objected to the production of a letter against him which was obtained through his answers given to the commissioners during an inquiry. The defendant argued that such answers should not be admissible as provided for in the Corrupt Practices Prevention Act, 1884. The Court of Queen’s Bench held that though the answers were not to be used against the defendant if the clue is given for other evidence, the letters in the instant case which would prove the case, then answers were admissible. In the judgment of the court Compton J. stated as follows: -

“Suppose by threats and promises, a confession of murder is obtained which would not be admissible but you also obtain a clue to a place where a written confession may be found, or where the body of the person murdered is secreted, could not the latter evidence be made use of as the first clue to it came from the murder? It matters not how you get it; if you steal it even, it would be admissible in evidence”¹³

In the case of *Kuruma .V. Queen*¹⁴ the appellant had been charged with the offence of being in possession of rounds of ammunition contrary to Regulation 8A (1)(b) of the Emergency Regulation 1952. While walking through a roadblock, he was stopped by a police officer and upon being searched, he was found to be in possession of two rounds of ammunition and a pen knife. He was convicted by the lower court. On appeal, the appellant argued that the evidence used against him was illegally obtained. The appellate court ruled that the evidence was properly admitted. Lord Goddard, CJ guided by the finding in *R.V. Leatham*¹⁵ stated as follows:-

¹⁰ Weeks V. United States, 232 US.383-(1914)

¹¹ Ibid

¹² R.V. Leatham 8 cox CC 498, 501 (1861)

¹³ Ibid

¹⁴ Kuruma .V. Queen AC 197 (1955)

¹⁵ R.V. Leatham 8 cox CC 498, 501 (1861)

“In their Lordships’ opinion, when it is the question of the admissibility of evidence, strictly it is not whether the method by which it was obtained in tortuous but excusable, but whether, what has been obtained is relevant to the issue being tried.”¹⁶

This case set a precedent that the only condition necessary for admissibility of evidence is its relevance to the facts in issue and not how it was obtained. However, illegally obtained evidence can be excluded if it can affect fair hearing of the accused case. This gives the court discretion to reject some particular piece of evidence which is illegally obtained. Similarly, in *Jeffrey V. Black*¹⁷ the accused person was arrested by police in his house. The police officers improperly searched the home of the accused and found *cannabis* and the accused was finally charged with being in possession illegal drugs. In his defence, the accused argued that his house was searched illegally because the police officer had no search warrant. The lower court agreed with the accused’s argument but on appeal by the prosecution the appeal was allowed. The Court of Appeal held as follows:-

- (i) The mere fact evidence is obtained in an irregular fashion does not itself prevent the evidence from being relevant and acceptable to the court (citing *Kuruma .V. Regina* with approval).
- (ii) Justices, as any other court, have the discretion to decline to allow any evidence called by the prosecution if they think it would be unfair or oppressive to allow it.
- (iii) That the test whether evidence was admissible was whether it was relevant or not, and not whether it had been properly obtained or not.

The common law position has been that of mandatory inclusion. This means that if the evidence is relevant to facts in issue, such evidence is admissible notwithstanding how it was obtained. However, the UK Parliament passed a law in which evidence may be excluded by the court under section 78 of the Police and Criminal Evidence Act 1984 (PACE). This section of the law expressly prohibits any type of evidence that may affect the notion of fairness of the proceedings in line with the Human Rights Act, 1998 which is based on the European Convention that prevents a court from allowing illegally obtained evidence.

The Constitution of Kenya 2010¹⁸ tends to limit the admission of illegally obtained evidence in a criminal trial but two conditions apply namely: -

- (i) If such admission would render the trial unfair, and or
- (ii) Such an admission would be detrimental of the administration of justice considering also the powers police have under the National Police Service Act (Cap 84)

It is possible that illegally obtained evidence can be admitted in Kenyan courts. While in USA it is very clear what the Fourth Amendment provides and the UK has also passed a statute that codifies the rules relating to illegally obtained evidence, in Kenya it remains to be seen whether the Evidence Act or the Criminal Procedure Code can be amended to be in line with the provisions of the Constitution of Kenya 2010 with regard to illegally obtained evidence.. The law as it is gives magistrate discretion either to admit or disallow such evidence. It is important to note that discretion may be abused. The right to privacy and fair hearing are fundamental rights which must be protected at all cost. It must however be noted that there are consequences of excluding illegally obtained evidence towith the suspect may be set free and this could also negatively affect the work of law enforcement officers undertaking investigations. The victim may also be offended if the suspect is acquitted because the police used illegal means to obtain evidence.

¹⁶ Supra, Note 11

¹⁷ Jeffrey V. Black 1978 QB 490

¹⁸ Article 5(4)