



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 8 OF 2010**

REPUBLIC.....PROSECUTOR

VERSUS

ELIJAH KIBE NTHIGA.....ACCUSED

**RULING**

Elijah Kibe Nthiga, the accused, is charged with the murder of Nicholas Mutembei Thurania contrary to section 203 read with section 204 of the Penal Code. The offence is alleged to have been committed with others not before the court on 11<sup>th</sup> January 2010 at Sunton Area in Kasarani District Nairobi Province (as it was then).

This is a ruling in respect of a trial within a trial following the objection to the introduction into evidence of the statement under enquiry allegedly made by the accused. The purpose of the ruling is to determine the voluntariness and admissibility into evidence of the said statement. The objection was raised by Mr. Wamwayi, defence counsel, during the testimony of No. 215495 Senior Superintendent David Wambua, PW7.

In the trial within trial SSP David Wambua testified as PW1 and he is the only prosecution witness in trial within trial. He told the court that on 5<sup>th</sup> February 2010 he was stationed at Kasarani Police Station as the deputy OCPD; that around 4.30pm while in his office the accused was taken to him to record a statement under inquiry. He said he followed all procedure in cautioning him; asking him to identify the language of his choice to communicate in and asking him if he required an advocate or a relative to be present. SSP Wambua testified that at the time of taking the statement he was alone with the accused and that the accused chose to use Kiswahili language and that the accused stated that he did not need an advocate to be present. He said he recorded the statement and read it back to the accused and invited him to make corrections or alterations to which he said he did not have any corrections or alterations to make. He said that the accused signed on all the pages of the statement. A certificate to that effect was made and signed.

On cross examination SSP David Wambua told the court that he complied with the Evidence Act and the Evidence (Out of Court) Confessions Rules 2009 in taking down the statement.

On his part the accused denied recording any statement with the police. He told the court that he was given papers and forced to sign on all the pages. He said he was threatened with a gun and hit with its butt in order to sign the document. He denied having been cautioned and having been advised to have an advocate or third party present. He said on cross examination that he complained to the police that he was in pain after being hit with the gun but the police did not take any action.

Section 25A of the Evidence Act reads as follows:

**A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.**

It is my understanding that a police officer taking a confessional statement from a suspect has no choice in the matter but to comply with this section that requires presence of a third party of the suspect's choice. This requirement is affirmed by Rule 4 (3) which provides as follows:

**“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”.**

Rule 4 of the Rules specifies the rights of an accused to include right to choose language of communication and to be allowed an interpreter where he cannot communicate in Kiswahili or English; right not to be threatened or coerced into giving the statement and right to legal representative of one's choice.

While allegations of threats to the accused cannot be verified, it is obvious to this court that there was no legal representative or third party nominated by the accused was present during the recording of the statement. In my view therefore the recording officer did not follow the law in recording the statement from the accused. I therefore find that the prosecution did not satisfy this court that all the requirements in taking down the statement from the accused were met. As a consequence, the voluntariness of the statement in issue cannot be ascertained. I will reject the introduction and admissibility into evidence of this statement. Orders are made accordingly.

**Dated, signed and delivered this 14<sup>th</sup> of July 2015.**

**S. N. MUTUKU**

**JUDGE**

**In presence of:**

Miss Macharia, prosecution counsel, for the State

Miss Odembo Advocate, for Mr. Wamwayi for the accused

Mr. Elijah Kibe Nthiga, the accused person

MR. Daniel Ngumbi, Court Clerk