



**IN THE HIGH COURT OF KENYA AT NYANDARUA**

**CRIMINAL CASE NO. E009 OF 2025**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ALEX KANINI KUNA alias PAUL..... ACCUSED**

**RULING**

1. On the 3<sup>rd</sup> day of November 2025, the prosecution attempted to produce a confession purportedly made by the accused before Chief Inspector MacMillan Chimbeko. The defence objected to its production. A trial within a trial was therefore ordered.

2. The purpose of the trial within a trial is to ensure a fair hearing as envisaged under Article 50 (2) (1) of the Constitution of Kenya, which provides:

***Every accused person has the right to a fair trial, which includes the right—***

***(1) to refuse to give self-incriminating evidence;***

3. The constitutional spirit can be seen in section 25A (1) of the Evidence Act, which states:

***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.***

4. Pursuant to the provision of section 25A (2), the Evidence (Out of Court Confessions) Rules 2009 were established. These rules enhance the judges' rules, which had been used for many years but originated from practice.

5. The second purpose for a trial within a trial is to ensure that the confession was made freely by an accused person.

6. The onus of proving that a confession was voluntary lies with the prosecution. In the case of the **Republic vs Nyugindo s/o Luhende (1948)**, 15 E.A.C.A 132, 133, the Court said:

*We consider that the prosecution failed to discharge the onus which lay upon it of proving that the extra-judicial statement in this case was, in its entirety, a voluntary one.*

7. In this case, the issue concerns the voluntariness of the extra-judicial statement. Chief Inspector MacMillan Chimbeko stated that the accused's father had informed him that the accused possessed information about the incident. During the recording of the statement, Paul Wanjiku, whom the accused favoured, was said to have been present. The court adjourned the case to allow the prosecution to summon these two key witnesses. When the hearing resumed on 20 November 2025, the prosecution chose to close its case without explaining the whereabouts of these witnesses. The Court of Appeal in the case of **Bukenya v Uganda [1972] EA 549** (Lutta Ag. Vice President) held:

*The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.*

*Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.*

8. I am persuaded that if the two witnesses had been called, their testimony would have conflicted with that of Chief Inspector MacMillan Chimbeko.

9. The prosecution has not met its burden to prove the extra-judicial statement was voluntary. The objection to its presentation is sustained.

**Delivered and signed at Nyandarua, this 18<sup>th</sup> day of December 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**