Republic v Mackenzie alias Mtumishi alias Nabii alias Papaa & 30 others (Criminal Case E003 of 2024) [2026] KEHC 1029 (KLR) (6 February 2026) (Ruling)

Neutral citation: [2026] KEHC 1029 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE E003 OF 2024

DR KAVEDZA, J

FEBRUARY 6, 2026

BETWEEN

REPUBLIC .... APPLICANT

AND

PAUL NTHENGE MACKENZIE ALIAS MTUMISHI ALIAS NABII ALIAS PAPAA .... 1ST ACCUSED

SMART DERI MWAKALAMA ALIAS MZEE SMART .... 2ND ACCUSED

STEPHEN SANGA MUYE ALIAS STEVE ALIAS STEVE WA MTWAPA .... 3RD ACCUSED

EVANS KOLOMBE SIRYA .... 4TH ACCUSED

KELVIN SUDI ASENA ALIAS ALFRED ASENAALIAS BABA ASHLEY ALIAS SHITEMI ALFRED .... 5TH ACCUSED

STEPHEN OMINDE LWANGU ALIAS SERAPHINE AZUNGILA LWANGU ALIAS STEPHANO .... 6TH ACCUSED

ENOS AMANYA ALIAS AMOS NGALA AMANYA ALIAS ALLELUYA .... 7TH ACCUSED

JULIUS KATANA KAZUNGU .... 8TH ACCUSED

CHARLES KALUME CHARO ALIAS MUSA SULEIMAN .... 9TH ACCUSED

MICHAEL MWERI BAYA .... 10TH ACCUSED

TITUS MUNYAO MUSYOKA ALIAS JUSTUS MAKAU MUSYOKA ALIAS TITUS MNONO .... 11TH ACCUSED

ERNEST SAFARI KAZUNGU KATANA ALIAS EARNEST KAZUNGU .... 12TH ACCUSED

DAVID AMBWAYA AMANYA .... 13TH ACCUSED

EMMANUEL AMANI KILUMO ALIAS CHILUMO ALIAS BABA NOA .... 14TH ACCUSED

JOSEPH BOKOLE BIMRAMBA ALIAS JOSEPH KENGA BOKOLE .... 15TH ACCUSED

NEWTON KIMATHI IKUNDA ALIAS KIM ALIAS YUSUFU ...... 16TH ACCUSED

ROBERT KAHINDI KATANA ALIAS BABA NEEMA .... 17TH ACCUSED

ALEX MUNANGWE ODARI ALIAS ALEX WA GALILAYA .... 18TH ACCUSED

LUCAS OWINO OGOLA .... 19TH ACCUSED

MARK KIOGORA KIARA ALIAS JOHNMARK KIARA .... 20TH ACCUSED

MAURICE MACHACHA .... 21ST ACCUSED

MARY KADZO KAHINDI ALIAS MARY SMART .... 22ND ACCUSED

SIMON MUSEMBI MUNYOKI ALIAS SIMON SIMIYU .... 23RD ACCUSED

MWINZI KAVENGE ALIAS KITENGELA ALIAS STEPHEN MWINZI .... 24TH ACCUSED

GILBERT KEA KATANA .... 25TH ACCUSED

STEVEN NGUGI KIKO .... 26TH ACCUSED

EDISON SAFARI MNYAMBO ALIAS BABA SIFA .... 27TH ACCUSED

ALFONZE CHOMBA ELIUS ALIAS ALPHONZE CHOMBA ELIUD ALIAS ALPHONES TSOMBA ELIUD ALIAS BABA NATHAN .... 28TH ACCUSED

AMANI SAMUEL KENGA ALIAS BABA JOYCE .... 29TH ACCUSED

ANNE ANYOSO ALUKHWE ALIAS ANN AUKO OKELO .... 30TH ACCUSED

PETER RAMADANI KAHASO ALIAS PETER MENZA TUVA ALIAS BABA SARA .... 31ST ACCUSED

(Being an application to Reopen the Prosecution's Case for the Limited Purpose of Granting the Defence an Opportunity to Cross-Examine the 7th accused(convict) on his Confession Recorded on 16th January 2026)

RULING

1. The prosecution filed the present application dated 22nd January 2026 seeking orders to re-open its case for the limited purpose of affording the defence an opportunity to cross-examine the 7th accused (convict)/convict on a confession recorded on 16th January 2025. The application is supported by the affidavit sworn on 23rd January 2026 by Ms. Betty Rubia, Principal Prosecution Counsel.

2. The deponent states that she is duly appointed by the Director of Public Prosecutions to conduct the prosecution in Republic v Paul Nthenge Mackenzie & 31 Others, Malindi High Court Murder

Case No. E003 of 2024. It is averred that the accused persons, including the 7th accused (convict), were charged with the offence of murder contrary to section 202 as read with 203 of the Penal Code, Cap 63 Laws of Kenya. On 14th January 2025, at the commencement of that day's hearing, the trial court informed the parties that it had informally received letters from the 7th accused(convict), whose contents appeared to amount to a confession.

3. Following that disclosure, the prosecution applied for the 7th accused (convict) to formally record a confession in accordance with the Evidence (Out of Court Confession) Rules, 2009. The confession was duly recorded on 16th January 2026 before Martin Ndegwa, a Superintendent of Police, who later testified and produced the confession in court as PW121.

4. The prosecution contends that the confession not only incriminated the 7th accused (convict)/convict but also substantially implicated his co-accused. Upon production of the confession on 16th January 2025, the court admitted it into evidence, after which the prosecution closed its case against the remaining accused persons. The 7th accused(convict) subsequently changed his plea and was convicted on his own plea of guilty.

5. It is argued that, due to an apparent procedural lapse, the prosecution closed its case before the remaining accused persons had an opportunity to cross-examine the 7th accused(convict) on the contents of the confession, particularly those aspects implicating them.

6. The prosecution further argues that, by virtue of section 32 of the *Evidence Act*, the court may rely on the confession not only against its maker but also against co-accused persons. It is therefore contended that fairness and the rules of natural justice require that the co-accused be afforded an opportunity to test the confession through cross-examination. It is further deponed that failure to allow such cross-examination poses a real risk of violating the accused persons' right to a fair trial and may potentially vitiate the proceedings, with grave consequences including a possible mistrial.

7. The prosecution maintains that the application is brought in good faith, in the interest of justice, and solely for procedural safeguards and the integrity of the trial. It is asserted that the application was filed without undue delay and that no prejudice will be occasioned to any of the accused persons if the orders sought are granted.

8. In conclusion, the prosecution urges the court to exercise its discretion to re-open the prosecution's case for the limited purpose of allowing the defence to cross-examine the 7th accused(convict)/convict on his confession, in order to uphold the accused persons' right to a fair trial and ensure a just determination of the case.

9. In their written submissions, the applicant submitted that the confession recorded by the 7th accused(convict) constitutes admissible and material evidence not only against its maker but also against the rest of the accused persons jointly charged in the proceedings. Reliance was placed on section 32 of the *Evidence Act*, which expressly permits a court, where persons are tried jointly for the same offence, to take into consideration a confession made by one accused which affects himself and others. It was argued that the statutory position is settled and that the court is entitled, in law, to consider such a confession against his co-accused.

10. The applicant contended that the confession in issue went beyond a mere self-incriminating statement and extensively implicated the other accused persons, including the 1st accused, whom the prosecution alleges to have been the mastermind of the offences charged. It was submitted that the prosecution intends to, to invite the court in its submissions to rely on the confession as part of the evidential matrix against all the accused persons.

11. It was further submitted that, until his change of plea, the 7th accused(convict) stood as a co-accused alongside the rest. The prosecution characterised him as a central actor rather than a peripheral participant, asserting that he occupied a senior position within the group, including roles in security and disposal of bodies. On that basis, his confession amounted to the evidence of a co-accused and, to the extent that it described joint criminal conduct, constituted accomplice evidence.

12. The applicant emphasised that it is trite law that evidence of a co-accused or accomplice, particularly where it implicates others, shall be subjected to cross-examination. Cross-examination was described as a fundamental component of the right to a fair trial under Article 25 of *the Constitution*, forming a core safeguard that cannot be derogated from. The failure to afford the accused persons an opportunity to test incriminating evidence through cross-examination was said to strike at the heart of a fair trial.

13. It was conceded that, in the present case, the remaining accused persons did not have the opportunity to cross-examine the 7th accused(convict) on the contents of his confession. The applicant acknowledged that neither the prosecution nor the defence raised the issue timeously, resulting in a procedural lapse. It was nevertheless submitted that the consequences of such an omission are grave, as appellate courts have consistently held that denial of cross-examination in such circumstances is fatal and often leads to a declaration of a mistrial.

14. In support of that position, the applicant relied on binding and persuasive authority, including Tedium Roger Leneni Mzungu & Another v Republic (Criminal Appeal No. 12 of 2004);[2007], Edward s/o Msenga v Reginam (1942) EA CA 553, and Harrison Ochilo v Republic (Criminal Appeal No. 153 of 2018); [2020] KEHC 977 (KLR) in which courts held that failure to allow cross-examination of a co-accused whose evidence incriminates another accused constitutes a denial of a fundamental right and results in a miscarriage of justice. It was argued that the strength of the evidence is immaterial where such a procedural violation occurs.

15. The applicant further submitted that it is irrelevant whether the confessing accused was formally called as a prosecution witness or whether the statement was sworn. The applicant argued that what is for determination is whether the evidence implicates co-accused persons, thereby triggering the mandatory requirement of cross-examination. Reliance was placed in the cases of Republic v Fredrick Ole Leliman & 4 Others (Nairobi High Court Criminal Case No. 57 of 2016) and Republic v Jane Muthoni Mucheru & Another [2021] KEHC 7647 (KLR), where courts permitted and facilitated cross-examination of confessing co-accused persons.

16. On the power of the court to grant the relief sought, the applicant relied on section 150 of the Criminal Procedure Code and section 146(4) of the *Evidence Act*, submitting that the court retains wide discretion, at any stage of the trial, to recall or re-examine a witness where such evidence is essential to the just determination of the case. It was argued that the present circumstances present a compelling and exceptional case for reopening the prosecution's case for the limited purpose of cross-examination.

17. In conclusion, the applicant submitted that the application is not intended to fill gaps in the prosecution's case but to cure a serious procedural defect and safeguard the accused persons' right to a fair trial. Failure to grant the orders sought was said to risk rendering the entire trial vulnerable to nullification on appeal, an outcome that cannot be cured under section 382 of the Criminal Procedure Code and would occasion a miscarriage of justice.

18. Mr Obonyo, learned counsel for the accused persons, submitted as follows. First, that the reasons advanced by the ODPP are disguised as concern for the 7th accused(convict), while in truth seeking to cure their own omission in failing to call the maker of the alleged confession as a prosecution witness. Counsel argued that had the ODPP approached the court in good faith, they would have admitted

that it was an oversight not to call the confessor to testify, and that the alleged denial of the right to cross examination is therefore an afterthought, raised belatedly on the last day of trial.

19. He submitted that the ODPP, through Mr, Jami and Ms. Betty Rubia, had earlier informed the court that the 7th accused(convict) was recording a confession and would testify. However, only the recording officer was called, examined and cross-examined, on matters touching on the voluntariness of the statement. The confessor was never called. The prosecution then voluntarily closed its case. Counsel emphasised that it was not the duty of the defence to compel the prosecution to call any witness. The defence, the court, and counsel for the confessor had legitimately expected the confessor to testify as a prosecution witness, but the ODPP, in exercise of its discretion under Article 157 of *the Constitution*, opted not to do so.

20. Reliance was placed on Rutto & Another v ODPP & Another; Cheptoyor & 3 Others (Interested Parties) JR No. 1 of 2021 [2023] KEHC 3811 (KLR), judgment delivered on 27 April 2023, where Ngetich J, citing Peter Ngunjiri Maina v DPP [2015] eKLR, held that prosecutorial discretion is constitutionally vested in the ODPP and the court ought not to interfere with that discretion once exercised.

21. Second, counsel submitted that an application to re-open a case lies within the discretion of the trial court, which discretion must be exercised judiciously, in accordance with the rules of natural justice, *the Constitution*, and the enabling statutory provisions.

22. Third, it was argued that the provisions relied upon by the ODPP are not couched in mandatory terms and do not compel the court to re-open the case in its favour. While Article 159(2) of *the Constitution* and section 3A of the Criminal Procedure Code enjoin the court to act in the interests of justice, those interests apply equally to all parties. Counsel submitted that the right to a fair trial, under Article 50 of *the Constitution*, would be undermined if, after the close of the prosecution case, the ODPP is permitted to re-open its case merely to repair perceived weaknesses.

23. In support, counsel cited Paanz Karuthi & 16 Others v Republic [2024] eKLR, where the court held that for a case to be reopened, the applicant must demonstrate the existence of new and crucial evidence, and that re-opening will not prejudice any party or amount to filling gaps in the evidence. Counsel contended that the ODPP has not demonstrated any failure of justice, nor has any new matter arisen since the close of its case. The witness sought to be recalled was available, present in court, and known to the prosecution at the time they elected to close their case.

24. Finally, counsel submitted that the authorities relied upon by the ODPP are distinguishable, as they concern situations where an opportunity to cross-examine arose immediately after evidence in chief. That is not the position in the present case.

Analysis and determination.

25. I have considered the application, the submissions in support and in opposition thereto, and the applicable law. The sole issue for determination is:

    i. Whether the prosecution has established a proper legal basis for the re-opening of its case for the limited purpose of recalling the 7th accused(convict) for cross-examination on the confession recorded on 16th January 2025.

26. The material facts in this case are largely uncontested. During the pendency of the prosecution case, the 7th accused(convict) expressed a desire to change his plea and to record a confession. This intention was communicated to the court through confidential handwritten correspondence authored by the

7th accused(convict) and through the officer in charge of Shimo La Tewa Maximum Prison. The correspondence clearly negated the plea of not guilty earlier entered, and indicated a willingness to plead guilty.

27. To avoid any conflict of interest, the court directed that the 7th accused(convict) be represented by his own independent counsel. Mr. Lisanza subsequently came on record on a pro bono basis. Upon confirmation that the 7th accused(convict) wished to plead guilty and record a confession, the court issued directions for the recording of the confession.

28. The first attempt at recording the confession was made before a magistrate but failed to culminate in the adoption of the confession. Following further directions of the court, a fresh confession was recorded on 16th January 2025 by a police officer of the rank of a Superintendent. Counsel for the 7th accused(convict) expressly confirmed on record that he had read the confession and had no objection to its production. The confession was produced before the court by the said officer on oath.

29. No objection was rendered by the defence counsel on admissibility, thereby necessitating a 'trial within a trial'. However, the maker of the confession was questioned only on matters touching on voluntariness. The recording officer was also cross-examined. Upon being satisfied that the confession was voluntary, the court admitted it.

30. Thereafter, the 7th accused(convict) pleaded guilty. The facts were read to him, and he was subsequently convicted on his own plea in compliance with the guidelines set out in Adan v Republic [1973] EA 445. The prosecution then voluntarily closed its case without calling the 7th accused(convict) as a witness. At no stage did the defence apply to have him called or cross-examined. The court notes that the decision whether or not to seek such cross-examination lay squarely within the province of defence strategy.

31. This position is materially distinguishable from cases where an accused person was denied the opportunity to cross-examine an adverse witness. In Harrison v Republic (Criminal Appeal E127 of 2023) [2026] KEHC 360 (KLR), the trial magistrate expressly refused the appellant the right to cross-examine. In the present case, no such refusal occurred. The accused persons, through counsel, did not rise to cross-examine the 7th accused (convict) and are presently opposed to the reopening of the prosecution case for that purpose. The omission was therefore elective.

32. The present application was filed after the close of the prosecution case. The prosecution is now seeking to re-open it so that the 7th accused(convict) may be recalled and cross-examined on the contents of his confession.

33. The power to reopen a prosecution case is discretionary and must be exercised within strict legal limits. It flows from the court's duty to ensure a fair trial and is anchored principally in section 150 of the Criminal Procedure Code, which provides:

> " A court may at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:
>
> Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be

adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

34. This provision, read together with section 146(4) of the *Evidence Act* and Article 50 of *the Constitution*, confers jurisdiction on the court to recall witnesses where their evidence is essential to a just determination. The discretion is not to be exercised to assist a party to fill gaps, repair omissions, or strengthen a case after it has been voluntarily closed. The applicant must demonstrate that the evidence sought is necessary, could not with reasonable diligence have been led earlier, and that no prejudice will be occasioned to the accused or to the integrity of the trial.

35. A 'trial within a trial' is a distinct and limited proceeding conducted outside the main trial. Its sole purpose is to determine the voluntariness of a confession and, consequently, its admissibility. It is not a forum for testing the veracity or accuracy of the contents of the confession, nor for determining guilt or innocence.

36. In Shah v Republic (1984) KLR 676, the Court of Appeal held:

> "The purpose of a trial within a trial is to determine the voluntariness of the statement tendered for the prosecution, because a statement by an accused person is not admissible against him unless it is proved to have been voluntary."

37. Similarly, in Ogama v Republic (2006) 2 KLR 125, the Court of Appeal stated:

> "The basis upon which a trial within a trial was held was the objection which an accused raised as to the admissibility of an extra-judicial statement... Section 211 of the Criminal Procedure Code had no application in proceedings in a trial within a trial."

38. The Kenya Judiciary Criminal Procedure Benchbook (2018) at page 93 reinforces this position as follows:

> "To satisfy itself that a confession complies with the *Evidence Act* and the Evidence (Out of Court Confessions) Rules, the Court should conduct a voire dire to determine whether the confession was obtained voluntarily."

39. The law is settled that an accused may only be examined or cross-examined in a 'trial within a trial' on matters strictly relating to voluntariness. Questioning on the veracity of the confession is impermissible. Equally, no evidence elicited during a 'trial within a trial' may be relied upon at the main trial to establish guilt. This principle was affirmed in R v Dunga (1938) EACA 223 and Wong Kam Ming v R [1980] AC 247

40. In the present case, defence counsel asked only two questions of the recorder of the confession, both directed at voluntariness: whether he had been threatened and whether he had been promised anything in exchange for the confession. Both questions were answered in the negative. No further questions were asked. The court could not have permitted broader questioning without collapsing the distinction between admissibility and merits.

41. The principle that voluntariness must be insulated from guilt was emphatically stated in S v De Vries (366/87) [1989] 3 All SA 779 (AD), where the court warned against converting an admissibility

inquiry into an investigation of the merits. This reasoning was echoed in R v Hnedish (1958) 26 WWR 685, cited with approval in Wong Kam Ming (supra), where it was stated:

> " I do not see how under the guise of 'Credibility' the court can transmute what is initially an inquiry as to the admissibility of the confession into an inquisition of the accused."

42. The question, therefore, is whether the 7th accused (convict) ought to have been, or should now be, cross-examined on the veracity of his confession before or after his change of plea. The reliance placed on How v Republic [1958] EA 124 is misplaced. In that case, the appellant was unrepresented, and the court held that it was incumbent upon the trial court to prompt him to exercise his right of cross-examination. The circumstances herein are fundamentally different. All twenty-nine accused persons are represented by counsel. Prior to the confession being read, learned counsel Mr Obonyo, while standing next to the first accused, expressly stated on record: "We have no problem with this confession; I have conferred with my clients." In those circumstances, no duty arose upon the court to prompt or compel cross-examination.

43. Ordinarily, confessions are recorded during investigations and, once found admissible after a 'trial within a trial', may be proved against the maker and, subject to section 32 of the *Evidence Act*, taken into consideration against co-accused persons. However, the manner and timing of such consideration is not governed by a rigid or universal procedure and must depend on the circumstances of each case.

44. The 7th accused(convict) did not testify as a witness in the main trial. He was neither called by the prosecution nor was there any attempt to convert him into a state witness. His confession was admitted solely through a 'trial within a trial'. Re-opening the prosecution case would not alter that position. Had counsel wished to cross-examine the maker of the confession (Accused No. 7), he could have done so at that stage. Counsel instead elected to cross-examine only the recording officer. His present opposition to the reopening of the prosecution case so as to facilitate such cross-examination reinforces the conclusion that the defence adopted a deliberate and carefully considered strategy, with which the court ought not to interfere.

45. Cross-examination presupposes a witness called by a party. Sections 144 and 145 of the *Evidence Act* are clear on this. The 7th accused (convict) was not a prosecution witness. His plea of guilty was a personal act, resulting in conviction on his own admission.

46. As articulated by Joe W. McClaran in "Admissibility of an Accomplice's Confession Against a Non-Confessing Defendant" (1948–1949) 39 Journal of Criminal Law and Criminology 498, where a co-accused pleads guilty and makes a confession implicating another accused, the admissibility and probative weight of such a confession lie within the discretion of the court and must be assessed having regard to the stage of the proceedings and the surrounding circumstances of the trial.

47. In the present matter, the confession was made after the final prosecution witness had testified. At that juncture, it was no longer practicable to sever the case of the convicted 7th accused(convict) from the proceedings. Had the 7th accused(convict) pleaded guilty at the commencement of the trial, the court could have ordered a severance and referred his case to another judge. However, by the time the confession was tendered, the court had already heard the evidence of 119 prosecution witnesses. Severance at that stage was therefore no longer feasible.

48. It's worth noting that an accused may change his plea at any stage before judgment under Section 281 of the Criminal Procedure Code (Cap. 75). Where an accused, having been placed on defence, subsequently changes his plea or implicates a co-accused, the prosecution cannot re-open its case merely to rely on such statements, as the prosecution's case closes after leading its witnesses as provided

under Section 212 of the CPC. Consequently, admissions made by an accused during defence do not form part of the prosecution's evidence, and the court cannot allow re-opening of the case at that stage. The principle is that the prosecution stands or falls on the evidence already led. This principle was emphasized in the case of Dato' Sri Mohd Najib bin Hj Abd Razak v. Public Prosecutor [2022] 1 Mlra 354, where it was stated that:

> " We accept the learned counsel's contention that the prosecution must stand or fall on the evidence as it stood at the close of the prosecution case and that the prosecution cannot seek to fill any lacunae or improve or supplement its case from whatever that may be elicited from the defence. The crown case rests at the close of the prosecution."

49. Even assuming this court were to find that the 7th accused (convict) incriminated the co-accused persons, such evidence would be of the weakest kind and incapable of sustaining a conviction without independent corroboration.

50. It is settled law that a co-accused's confession is not substantive evidence against others and may only be taken into consideration as supplementary material. It may only be taken into consideration and never as a stand-alone basis for conviction. Its function is merely supplementary, capable only of corroborative weight to other independent evidence already on record. The correct approach was articulated by the Supreme Court of India in Kashmira Singh v State of Madhya Pradesh AIR 1952 SC 159 and reaffirmed in Haricharan Kurmi v State of Bihar AIR 1964 SC 1184, where the Court held that the confession of a co-accused must first be ignored, and may only be used to support an already existing conclusion, not to create one. If the independent evidence against the implicated accused is weak, the confession must be wholly disregarded and cannot be used to fill gaps in the prosecution case. In Anyangu & Others vs. Republic [1968] EA 239, the Court of Appeal for East Africa held as follows at Page 240:

> " A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused, it may, in a joint trial be "taken into consideration" against that co-accused. It is however, not only accomplice evidence but evidence of the 'weakest kind' (Anyona s/o Omolo and Another VR (1953) 20 EACA 318). A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried."

51. In the case of Joseph Odhiambo vs. Republic Cr. Appeal No. 4 of 1980 this Court held that 'an exculpatory extra judicial statement by one accused cannot be used as evidence against a co-accused'. Even in confessions, a statement and evidence of a co-accused person is evidence of the weakest kind since an accused person can implicate another, intending to save himself from blame. See (Gopa s/o Gidamebanya & Others vs. Republic Cr. Appeal No. 106 of 1983.)

52. Even where a confession implicates a co-accused, the court must further be satisfied, on independent evidence, that the maker of the confession and the implicated co-accused were acting pursuant to a joint criminal enterprise. Absent such proof, the confession cannot be relied upon even as supplementary material.

53. Moreover, section 141 of the *Evidence Act* provides that an accomplice is a competent witness against an accused person. Competence, however, does not arise automatically. It arises when the accomplice is called as a witness. In the present posture of the case, the trial has not reached the defence stage. No accused person has been placed on his defence. If or when that stage is reached, nothing prevents the implicated co-accused, with leave of the court, from calling the 7th convict as a witness and examining him, subject to the law and procedure.

54. This position is consistent with Republic v Fredrick Ole Leliman & 4 others [2016] eKLR (Criminal Case 57 of 2016). (the “Willy Kimani case”), where the 5th accused retracted his confession, hence was not called as a prosecution witness, but nevertheless, he was cross-examined on the contents of the confession by his co-accused after being put on his defence. The case underscores the principle that a convicted person is a competent and compellable witness, and can be cross-examined at any stage of the trial, even within the defence case.

55. Mr. Owiti, learned prosecution counsel, argued that one of the reasons for re-opening the prosecution’s case is that the state intends to rely on the confession in support of the prosecution’s case, in the submissions on a case to answer.

56. It is imperative to emphasize that the judicial confession recorded did not form part of the prosecution’s evidence. The confession was made after all the prosecution witnesses had testified. The confession was a mere interlude that temporarily halted the closure of the prosecution's case. As soon as the confession was admitted and the 7th accused convicted, the prosecution proceeded to close its case. Accordingly, the confession cannot be treated as part of the evidence led by the prosecution, and the court must consider it separately, without allowing it to influence the assessment of the prosecution’s case.

57. The contention that the court ought to have compelled or prompted defence counsel to cross-examine the 7th accused (convict) is misconceived. The court is a neutral arbiter in an adversarial system. There is no constitutional or statutory obligation upon a trial court to advise counsel on how to conduct his case. Where counsel expressly indicates that he has no objection to the production of a confession after consulting his clients, the court cannot descend into the arena and impose a line of questioning.

58. I agree with the submissions by the prosecution that denial of the right to cross-examine an adverse witness may be fatal where such a witness gives evidence implicating a co-accused. However, those authorities are inapplicable here. The 7th accused (convict) did not testify as a witness in the main trial, and his confession is not a substantive prosecution exhibit capable of founding liability against the co-accused.

59. This court conducted a voir dire examination, being a ‘trial within a trial’, whose sole purpose was to determine whether the confession was freely and voluntarily made. Evidence adduced during such proceedings does not automatically form part of the main trial. Having admitted the confession and following the guilty plea entered by the 7th accused (convict), without his being called as a prosecution witness, the procedure to be adopted by this court must necessarily be tailored to the unique circumstances of this case, which are materially distinguishable from the authorities cited by the prosecution.

60. It is instructive to note that the 7th accused (convict) was, at all material times, available when the prosecution closed its case. Although the application is disguised as an attempt to cure what Mr. Owiti described as a “procedural misstep” meant to safeguard the rights of the accused persons, it is my considered view that it is, in substance, a strategy intended to assist the prosecution to fill gaps in its case through the re-examination of the 7th accused (convict).

61. In the premises, I find the application to be ill-conceived and devoid of merit.

62. I accordingly, and without hesitation, dismiss the application dated 22nd January 2026.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 6TH DAY OF FEBRUARY 2026

D. KAVEDZA

JUDGE

In the presence of:

Ms. Mutua for the state holding brief for Mr. Owiti, Mr. Jami and Mr. Rubia

Mr. Obonyo for 29 accused persons

Mr. Lisanza for the convict.

All accused – present physically