



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Onyancha (Criminal Case 39 of 2023)  
[2025] KEHC 3754 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3754 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL CASE 39 OF 2023  
DR KAVEDZA, J  
MARCH 26, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PHILIP ONDARA ONYANCHA ..... ACCUSED**

**RULING**

1. The accused was charged with murder contrary to Sections 203 and 204 of the *Penal Code*. On 12th February 2025, PW13, Denis Kinaro, a retired magistrate, testified that in 2010, while serving as a Resident Magistrate, he was called to the Supreme Court Building on a Saturday, 12th June 2010. There, he was ushered into his chambers, where the accused was presented to him as a suspect in a murder case. He cautioned the accused and recorded a 16-page statement, which he later sought to produce as evidence.
2. Defence counsel, Mr. Wakaba, opposed the production of the statement, arguing that it violated Article 50(4) of the *Constitution* and The Evidence (Out of Court Confessions) Rules. He contended that the statement was recorded outside official court hours and without confirmation of the accused's access to legal representation or the presence of a third party. Further, he argued that there was no assurance that the statement was made voluntarily, free from coercion or threats. As such, he urged the court to conduct a trial within a trial to determine the admissibility of the confession.
3. The prosecution, represented by Mr. Omirera, countered that the rules governing confessions were designed to prevent abuse by the police, and a confession could be taken before a Chief Inspector of Police or a Magistrate. He asserted that the rules did not require a High Court judge to record the confession. Regarding legal representation, he argued that it was not mandatory and that the accused had the option to engage counsel. He maintained that the confession was voluntary.



4. The court, having considered the application, objections, submissions, and applicable law, must determine whether the objection is merited.
5. In Kenya, confessions are governed by the Constitution of Kenya, 2010 the Evidence Act (Cap 80) and the Evidence (Out of Court Confessions) Rules, 2009 and caselaw.
6. Both section 77 of the retired constitution as well as Articles 49 and 50 of the 2010 Constitution safeguard the rights of an arrested and accused person. Arrested/accused persons are guaranteed the right to remain silent and the consequences of not remaining silent; to communicate with an advocate, and other persons whose assistance is necessary; and not to be compelled to make any confession or admission that could be used in evidence against the person. Further, an arrested/accused person is guaranteed the right to refuse to give self-incriminating evidence and have any illegally obtained evidence excluded from the record.
7. As a general rule therefore, confessions are inadmissible unless proved that they were obtained in full compliance with the law i.e, the Evidence Act and the Rules. It is the solemn duty of the prosecution in this case to show that there was complied with the confession rules.
8. Section 25A of the Act reads as follows:
  - 25A (1) 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.
  - (2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.
9. The rules envisaged under (2) above are known as the Evidence (Out of Court Confessions) Rules, 2009 (hereinafter the "Confessions Rules".) The Confession Rules specify the rights of an Accused Person who wishes to record a confession.
10. Rule 4 provides that, among other things, the Recording Officer:
  - a. Shall ask and record the Accused Person's preferred language of communication;
  - b. Shall provide the Accused Person with an interpreter free of charge where he does not speak Kiswahili or English;
  - c. Shall ensure that the Accused Person is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;
  - d. Shall ensure that the Accused Person is informed of his right to have legal representation of his own choice among others;
  - e. Shall ask the Accused Person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.
11. In addition to this, the Confessions Rules require the Accused Person to be informed of the option to record his own statement in his preferred language or to have it recorded for him (Rule 7); the option to clarify or add anything in the statement after the same has been recorded (Rule 8) and the requirement to administer a caution before recording the statement (Rule 5). In addition to the legal provisions on this issue, there are numerous pronouncements by judges on the subject of extra-judicial confessions.



12. What then should happen when a confession is challenged on the basis that it did not comply with the rules and the law? I find it concerning for the prosecution to just state that the law was complied with before and during the recording of the confession. In deed it is for the prosecution to demonstrate by way of testimony of the person who took the confession that the statement was made voluntarily and in strict compliance with the laid down confession rules. The Court of Appeal has expressed itself on this in the leading case of *Karukenya & 4 Ors v R* (1987) KLR 458, 485, that :

“An unusual practice [that] was adopted whereby the prosecuting senior state counsel read out the alleged sate (a role played by a prosecution witness) and produced it. It is clear from what transpired at the trial that the appellant had no opportunity of cross-examining the police officer alleged to have recorded his (appellant’s) charge and caution statement and the prosecution tendered no evidence to prove that the statement, if any was voluntary. The circumstances surrounding the alleged recording of the statement and the lack of any evidence to prove the voluntary nature of the statement made it imprudent and improper to admit the alleged statement in evidence at the trial.”

13. That said, the correct procedure when the admissibility of a confession is challenged, the trial court is required to conduct a trial within a trial to establish whether the safeguards laid down in the rules indicated herein above were complied with. The Judiciary benchbook on criminal procedure at paragraph 125 requires the trial court to conduct a voir dire to determine whether the rules of confession were complied with. The Court of Appeal (*Potter, Kneller & Hancox JJA*) in *Imbindi v Republic* (1983) KLR 345, held that:

“Where accused persons challenge the admissibility of statements, a separate trial within a trial should be held for each impugned statement and each challenge is entitled to its own individual consideration.”

14. I find it prudent and as directed by the Court of Appeal to conduct a trial within a trial so as to determine whether the rules of confession were followed. It is only after conducting the trial within the trial that the court will establish whether the safeguards were complied with.

15. Accordingly, for the reasons set out above, the court makes the following directions:

- i. The application to produce the confession and statement under inquiry is hereby declined.
- ii. The witness shall be stood down until further directions of this court.
- iii. A trial within a trial to determine the admissibility of the accused’s statement under inquiry and alleged confession shall be conducted by this court.

Order accordingly.

**RULING DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF MARCH 2025.**

**D. KAVEDZA**

**JUDGE**

In the presence of:

Mr. Wakaba for the Accused

Ms. Njoroge for the State

Tonny Court Assistant

