IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 199 OF 2010

1. **MAKUMBI RAMADHANI MAKUMBI ..... 1ST APPELLANT**
2. **SHUKURU RICHARD SEBO..... 2ND APPELLANT**
3. **NASSORO MPUYA MIHAYO ..... 3RD APPELLANT**
4. **MASHAURI MASAGAJA @KULWA ..... 4TH APPELLANT**
5. **SAMWEL PETER TUNGU .....5TH APPELLANT**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania

at Mwanza)

(Rwakibarila, J.)

dated the 30th day of March, 2009

in

(DC)Criminal Appeal Nos. 148,149,150,151,152 and 153 of 2004

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JUDGMENT OF THE COURT

18th & 27th November, 2013

RUTAKANGWA, J.A.:

We have found it apposite to preface this judgment affirming that No. E 512 P.C. Rwehumbiza and his colleague No. F. 2464 P.C. Teophil, are alive today only by the grace of God or Divine predilection. They brushed with death in the early hours of 30th May, 2002, in a terrifying incident of the

nature where many in the past, have lost lives if not being left permanently maimed. We have to elaborate on this.

As of 29th May, 2002, P.C. Rwehumbiza and P.C. Teophil, were members of the Tanzania Police Force, stationed at Misungwi District Police station. On that day, they were detailed to guard the National Micro Finance Bank (N.M.B.), Misungwi branch premises. They commenced their guard duties at 6.00 p.m. and would have signed off at 6.00 a.m on 30th May, 2002. Their expectations for a peaceful incident free night, alas, were shattered when at 01.00hrs, the sound of gunshots within the Bank's premises burst their bubble. An unknown number of heavily armed bandits invaded the bank's premises, shooting randomly and incessantly. The policemen responded by firing in the direction they thought the gunshot sounds were emanating from. By the reckoning of P.C. Rwehumbiza, the exchange of gunfire between the two policeman and the bandits lasted for 40 minutes before they fell short of ammunition. They had to abandon, literally the "battle zone" and rush back to the police station to seek reinforcement and fresh ammunition.

The departure of P.C. Rwehumbiza and P.C. Theophil gave the bandits the opportunity to break into the bank building. The bandits who had explosives, detonators, etc. broke open doors leading into the strong room wherein were three cash boxes. Two of these cash boxes were opened using explosives, the resulting explosions nearly reducing the strong room to "shambles", as ASP Shabani Kimea, who led the investigation team and visited

the scene of the crime in the morning, put it. By the time P.C. Rwehumbiza and his colleagues returned to the scene of the crime, fully well armed, all the bandits had already left. According to Sophia Mabeba, the Bank's Misungwi Branch Manager, the bandits made away with Tshs.74,900,495/= out of the Tshs. 78,931,550/= that had been left in the strong room on 29/5/2002. At the scene of the crime, an assortment of articles, which included 43 spent cartridges, pieces of blood stained glasses, 12 bullets, etc., were found and collected. The police then mounted an investigation and a hunt for the bandits.

The police investigation led to the arrest of a number of suspects. Those arrested were: Makumbi Ramadhani Makumbi (1st appellant), Samwel Peter Tungu (5th appellant),Mashauri Masagaja @ Kulwa (4th appellant), Hassan Said Seleman, Nassoro Mpuya Mihayo (3rd appellant), Shukuru Richard @Sheba (2nd appellant) and Ibrahim Silas Masalu. The suspects were charged in the Court of the Resident Magistrate at Mwanza (the trial court). The accused persons faced one count of conspiracy to commit a felony (1st count) and one count of Armed Robbery (2nd count).

At the trial of the appellants and their colleagues, P.C. Rwehumbiza testified as PW5 and narrated how they were invaded, as briefly shown above. His account of the robbery was complemented by PW6 Ashura Philipo Nyenge and PW7 Shosha Njile, who lived nearby. These two witnesses testified that some of the bandits passed by their homes going towards the bank premises

and shortly later they heard sounds of gunshots. PW6 Ashura stated that she and her husband were physically assaulted by two of the bandits, but they nevertheless failed to identify them. On his part, PW7 Njile told the trial court that he only identified the 1st appellant Makumbi. PW2 Hamisi Holota, the O.C/CID Misungwi, PW4 No. C. 2871 D/Sgt. Leonidas and PW8 No. C. 4581 D/Sgt Mechales who were stationed at Ngudu/Kwimba Police station, testified on the arrest of the 2nd, 3rd, 4th and 5th appellants in Ngudu. It was their evidence that they first arrested the 4th appellant (Mashauri) whom they found along the road, and who allegedly led them to a point where his colleagues were resting under a tree. On seeing the policemen heading towards them, so claimed the three witnesses, the suspects took to flight abandoning their luggages. The policeman gave chase to the fleeing suspects and succeeded in arresting them. The three witnesses went on to testify that in the vicinity of where the arrested 2nd, 3rd and 5th appellants had been resting, they recovered one box in which they found 3 sub machine guns (SMGS). They also recovered Tshs. 25 million in cash, an NMB savings passbook, 90 rounds of ammunition, etc. The four appellants were taken to Ngudu police station and subsequently transferred to Mwanza Central Police station.

Once in Mwanza, the four suspects had their cautioned statement taken by the police investigators. The 5th appellant (Samwel) was interrogated/interviewed by PW9 No. D1496 D/Sgt. Paulo. PW10 No. E8591 D/Cpl. Rupeto, took down the cautioned statement of the 4th appellant

(Mashauri). While PW11 No. E6485 D/Cpl. Julius interviewed Hassan S. Selemani (who was the 4th accused), PW12 No.E5787 D/Cpl. Elias took down the statement of the 3rd appellant (Mihayo). Lastly, was the extra-judicial statement of the 2nd appellant (Shukuru) which was recorded by PW13 Mary Kasanga, a Justice of the Peace. Two other Justices of the Peace recorded the statements of other suspects.

Although the appellants unequivocally retracted these statements, the learned trial Resident Magistrate, in what appears to us to be an unconventional and strange procedure, admitted them in evidence. We shall have occasion to canvass this issue fully later on in this judgment. Suffice it to say here that in these statements, the appellants appear to confess unequivocally committing the two offences they were charged with. The retracted cautioned statements and extra-judicial statements of Samweli, Mashauri, Hassani and Mihayo were received in evidence as exhibits P26, P27 P28, P30, P31, P32, P33 and P35. The prosecution also tendered in evidence, through PW1 ASP Kimea three(3) SMGs (exhibit P1 collectively), three magazines (exhibit P2), 90 rounds of ammination (exhibit P3 collectively), Tshs. 25,824,500/= (exhibit P4), the Treasury Register for NMB (Exhibit P5), 49 damaged NMB passbooks (Exhibit P6), traditional medicine (Exhibit P7), three biycles (exhibit P8), 43 spent cartridges (exhibit P12), the ballistic expert report (exhibit P18), the Chief Government Chemist Report (exhibit P19), an N.M.B passbook (exhibit P.20), among other articles.

All the accused persons totally denied complicity in the undisputed robbery. The 2nd, 3rd and 5th appellants denied having been arrested together as alleged by PW2 ASP Hamis Holota, PW4 S/Sgt. Leonidas and PW8 D/Sgt. Michales.

In his judgment, the learned trial Resident Magistrate found all the accused persons except the 7th accused (Ibrahim Masalu), guilty as charged and convicted them accordingly. The convictions were mainly based on the cautioned and extra-judicial statements. He then sentenced them to serve a prison term of seven years on the first count and a prison term of thirty years on the second count. Both sentences were ordered to run concurrently. Aggrieved by the convictions and sentences, they appealed separately to the High Court at Mwanza, where their appeals were consolidated and heard together.

In his brief judgment, the learned first appellate judge upheld the convictions of the appellant. He took to be truthful the evidence of PW2 ASP Hamis, PW4 D/Sgt. Leonidas and PW8 D/Sgt. Michales, saying:-

> *"It is opined by this court that by the time appellants Nos. 2,3,6 and 4 (who led PW2's squad) were arrested, they were in possession and control of the weapons, instruments or loot which were within exhibits P.1 – P. 25.*

Some of the appellants like Appellant No. 3 tried to escape with a bag which had three SMG firearms (Exhibit P1) before he was intercepted and arrested. Therefore Appellants Nos. 2,3,6 and 4 were arrested before they slipped away to mix up with civilians at places which were not far from where they were arrested in order to enjoy the shade of the tree."

The retracted confessional statements were, in our respectful opinion, fleetingly thus referred to immediately thereafter:-

"But in the cautioned statements Exhibits P.26, P.28 and P.30 or the extra-judicial statement Exhibit P.35, these are synoptic accounts on how Appellant No. 1, Appellant No.2, Appellant No. 3, Appellant No. 4 and Appellant No. 6 took specific roles in the conspiracy and robbery constituting this matter. Salient roles mentioned therein with the status of appellants in bracket are like expertise in firearms (Appellants Nos. 1 and 6), expertise in traditional medicines (Appellant

No. 2), expertise in riding bicycles (Appellant No.4) and expertise in explosives (Appellant No. 3).

All this show how Appellant No. 5 HASSAN SAID SELEMANI who was arrested by civilians was not properly implicated in this matter and his appeal is allowed. He should be released forthwith, unless otherwise lawfully held. But other appellants namely ... (names) were properly implicated in the conspiracy and robbery on this matter. Their appeals have no merit and are dismissed entirely.

He then proceeded to enhance the sentence on armed robbery to one of life imprisonment.

We have to respectfully point out immediately that the above cursory analysis of the evidence did not address the major grievance of the all of the appellants. This was that the learned trial Resident Magistrate, contrary to settled law (citing **Tuwamoi v. Uganda** [1967] En. 84, among other cases), grossly erred in law in, first of all, admitting the retracted confessional statements in evidence and secondly, subsequently predicating their convictions on them. Because of this glaring omission and other alleged errors the appellants preferred this joint appeal.

The appellants, lodged separate memoranda of appeal, containing fifty two (52) grounds of complaint in all. From our objective reading of these grounds we have distilled therefrom the following major grievances:-

(a) They were wrongly convicted as they were not arrested at the scene of the crime;

(b) Their alleged retracted cautioned statements were recorded in utter violation of the mandatory provisions of the law;

(c) Their defence was not considered by the two courts below;

(d) The prosecution side, for no apparent reasons, failed to call essential and material witnesses;

(e) The trial was riddled with incurable irregularities, in that no trials-within-a trial or inquiries were conducted to determine the voluntariness or otherwise of the retracted confessions;

(f) The courts below erred in law in acting on uncorroborated retracted confensions;

(g) The identification parade was not conducted in compliance with the governing procedure;

(h) The doctrine of recent possession was wrongly relied on as they were not found in possession of any incriminating goods;

(i) Some exhibits were wrongly produced in evidence by witnesses who never recovered or seized them; and

(j) The prosecution evidence was full of irreconcilable contradictions.

To prosecute the appeal, the appellants appeared before us in person and unrepresented. For the respondent Republic, Mr. Timon Vitalis, learned Principal State Attorney, appeared being assisted by Mr. Paul Kadashi, learned State Attorney.

After the above listed grounds of appeal were read out and explained to the appellants, they severally accepted them. They had no additional grounds and they had nothing to tell in us in elaboration. They simply urged us to allow their appeal in its entirety.

Mr. Vitalis, vehemently resisted the appeal. He was of the firm opinion that the prosecution proved the guilt of the appellants to the hilt, with the sole exception of the 4th appellant Mashauri.

At first Mr. Vitalis forcefully argued that the 1st, 2nd, 3rd and 5th appellants were impeccably implicated in the undisputed armed robbery by their own confessions as well as the doctrine of recent possession. In addition, he contended, the 1st appellant Makumbi was implicated by the evidence of PW7 Shosha Njile. All the same, following questions from the Court seeking clarification on the factual and legal issues raised in the appellants' memoranda of appeal, he conceded that the Chief Government Chemist's Report does not show the identity of the person whose blood specimen was analysed. On this point, he also conceded that although the said Report (Exhibit P19) shows that the alleged blood sample was received

by them from one No. E 8591 D/Cpl. Rupeto (PW10), the said witness did not, in his evidence, testify to have done so. The same witness further failed to testify to that effect in relation to the three SMGs the subject of the Firearms Examiner's Report (Exhibit P.18), he conceded. On the disputed extra judicial statements, Mr. Vitalis eventually conceded that all the appellants were never asked by the trial court on whether or not they had any objection before they were received in evidence. Regarding the retracted cautioned statements, he had no option but to concede that the "trial-within-a-trial" purportedly carried out by the learned trial Resident Magistrate was inconclusive, although in his uncompromising view this was not necessary because there is no law requiring subordinate courts to do so.

After these concessions, he urged us to discount the Chief Government Chemist Report and expunge from the record all the disputed cautioned and extra-judicial statements. Nevertheless, he adamantly maintained that the convictions of the 2nd, 3rd, and 5th appellants be sustained on the strength of the doctrine of recent possession (i.e. being found in possession of Tshs. 25 million and an N.M.B savings passbook). He also pressed that the conviction of the 1st appellant be upheld on the basis of the cogent visual identification evidence of PW7 Njile.

The appellants responded by urging us to acquit them because none of them was found in possession of the stolen property and their alleged confessions were a result of torture. On his part the 1st appellant claimed that

the purposed visual identification is too weak to persuade, and must be rejected.

Before attempting to resolve the legal issues presented in this appeal, we should forthrightly admit that this was one of the most callous and ghastly armed robberies committed in our country in the last decade. It is fortunate that neither death nor serious injuries to any innocent person or serious damage to properties occured, although the bandits, it appears, were prepared for any eventuality. It's investigation, and the prosecution and trial of the suspects, therefore, in our considered opinion, called for greater circumspection, foresight and competence, in order justice to prevail. Having so observed in passing, it behoves us now to provide our answer or answers to the appellants' key grievence (s). We have found it proper to canvass first, the attack on the conduct of the trial. This is because all other grounds depend on our answer to this complaint.

In resolving the issue of whether or not the trial of the appellants was riddled with incurable irregurarities, we have found our springboard to be the perennial assertion of Mr. Vitalis to the affect that subordinate courts are not enjoined to hold a trial-within-a-trial. We are alive to the fact that this is a recurring issue in our courts. We have, therefore, found it worthwhile to expend our time and energy to resolve it. We shall start asserting that there is no law barring subordinate courts conducting trials under the Criminal Procedure Act, Cap 20, R.E. 2002 and applying the Evidence Act, Cap.6, R.E

2002 from holding such trials when the issue of admissibility of retracted or repudiated confessions arises. There is, equally, no statutory law requiring such trials to be held even in the High court when exercising its original criminal jurisdiction. In dispelling Mr. Vitalis' fears, we have found it refreshing, to return to the Court's holding on this issue in **Michael John Mtei v.R,** Criminal Appeal No. 202 of 2002 (unreported). In its judgment dated 6th June, 2011, the Court said:-

> *"In disposing of this ground of appeal, we shall begin by stating the obvious. This is that there is no rule of law requiring that a trial-within-a trial or an inquiry for that matter, should be held whenever an objection is taken to the admission of a statement by an accused person. This is true in criminal trials conducted in the High Court (with or without the aid of asessors) and/or all courts subordinate to it".*

In so holding, the Court was not laying down a new principle law. It was simply re-asserting what has been existence for decades. To vindicate this stance, the Court made reference to the holding of the then Court of Appeal for East Africa, the predecessor of this Court, in the case of **Bakran v. Republic** [1972] EA. 92.

In **Bakran's** case, the Court had thus succinctly held:

"... but it is a rule of practice and there are numerous decisions arising from trials in the High Court which set out the necessity of holding a trial within a trial and fully dealing with all its various aspects. The advocates before us were unable to refer to any decision of this Court dealing with the holding of a trial within a trial in a magistrate's court ***but they both agreed that the system of a trial within a trial was always carried out in a magistrate's court*** *and they referred us to a judgment of the High court of Kenya sitting on an appeal from a magistrate's court in which the procedure was approved (see* ***Lakhani v.R.,*** *[1962] E.A 644.)* ***We agree that the procedure of holding a trial within a trial should always be adopted in trials in a magistate's court.*** *In this connection, we would also refer to our judgment in the case of* ***Uganda v. Lwasa*** *[1968] E.A. 363, in which this court pointed out the desirability that a judge should ascertain, when an accused is unrepresented, whether a statement tendered by the prosecution is objected to on any ground which would make it*

inadmissible in law. ***In our opinion this practice should be followed in a magistrate's court.***

The object of holding a trial within a trial is twofold. First, in cases tried with a jury or with assessors, to avoid prejudice being caused to the accused person if the jury or the assessors should hear evidence which will subsequently be ruled inadmissible. It has always been held and considered that a judge or magistrate, by virtue of his legal training, will be able to divorce his mind from any inadmissible evidence when considering his verdict.

The second advantage of holding a trial within a trial is to avoid prejudice being caused to an accused person if the court subsequently holds, in coming to its decision, that the statement was improperly admitted."

[Emphasis is ours.]

If we have chosen to quote at length from this judgment, it is not because we have any personal preferences for the Justices who delivered it (i.e Duffus, P., and Law and Mustafa,JJ.A.), but it is on account of its pedagogical value.

We are also aware that this issue did not surface in our East African jurisprudence for the first time in the **Lakhani** case. The same Court had the opportunity of expounding on the second advantage, alluded to above, of holding a trial within a trial, to avoid prejudice to an accused person, in **M'Muraira Karegwa v.R,** (1954) 21 EACA. 262 at pg 264. But the most significant **reported** early decision on the issue under scrutiny, is that of H.M. Court of Appeal for Eastern Africa in **Israel Kamukolse & Five Others v. R.** (1956) 23 EACA 521.

In **Israel Kamukolse** (supra), the Court said:-

> *"Lastly, we must point out that although, as already stated, every one of the accused present at the trial objected to the admission of the statements made by them to Inspector Manohas Singh Sandhu (who was the investigating officer) ...,* ***yet in no case did the learned magistrate try the issue of admissibility by the procedure known as "a trial within a trial."*** *In every case he appears to have admitted the statement in evidence and had it read without asking the accused whether he intended to object to its admissibility. The accused could, therefore, only cross-examine on their allegations of ill-treatment and inducement after the statement had*

been admitted and could only give evidence in support of their allegations after they had been called on for their defence, thereby exposing themselves to cross-examination on the general issue. ***The procedure to be followed by all trial courts where an issue of admissibility of such a statement is raised*** *was recently considered at length by this Court in* ***Kinyori v. The Queen*** *C.A 551 of 1955 (unreported).* ***Although in a Magistrate's Court there is neither jury nor assessors the onus is still upon the prosecution to show that any statement made by the accused and tendered in evidence was voluntarily made and the court must satisfy itself on that issue before admitting the statement."*** *[Emphasis is ours.]*

The **Kinyori** decision is now reported as **Kinyori s/o Karuditi v. Reginan** (1956) 23 EACA 480.

On the basis of the above cited authorities, it will be accepted without further emphasis, that the only way for **every trial court** to satisfy itself on the voluntariness of a disputed accused's statement is by holding a trial within a trial. But as held by the same Court, in **Mwagi s/o Nyange v. Reginan**

(1954) 21 EACA 377, a holding followed by this Court in **Michael John @ Mtei** (supra):-

> *"a trial within a trial should be held to determine not only the voluntariness or otherwise of an alleged confessional statement but also whether or not it was made at all..."*

The overriding necessity of always holding that a trial within a trial in this country, in all subordinate courts, was yet underscored by this Court (Kisanga, Lubuva and Lugakingira, JJJ.A.) in a judment dated 13th July, 2001, in Criminal Appeal No. 154 of 1994 between **Robinson Mwanjisi & 3 Others and Republic.** We said:-

> *"...We think, with respect, that although the trial magistrate considered the statements to be voluntary, their voluntariness was in fact hotly contested, the defence counsel contending that the first and second appeallants were "strongy tortured."* ***This issue was not resolved in the appropriate manner for as far as the record goes, the trial magistrate did not hold any trial-within-a trial."*** *(Emphasis is ours.)*

The Court went on to emphasise that such a trial is necessary before admitting a disputed confessional statement even in the High Court on appeal if it intends to have it as additional evidence. Indeed, we are aware that more often than not trials within a trial are held in all subordinate courts to determine the voluntariness of repudiated or retracted confessions.

In the light of the above, we now hold without any demur that subordinate courts have a duty to hold a trial within a trial whenever an accused confessional statement is either repudiated or retracted before it is admitted in evidence. Once objection is made by the defence after the trial court has informed the accused of his right to say something in connection with it, which is an unavoidable duty on the part of the court, the trial court must stop everything and proceed to conduct a trial within a trial, giving each side opportunity to call a witness or witnesses in support of its position: See, **Twaha Ali & 5 Others** v.R, Criminal appeal No. 78 of 2004 (unreported). This trial is like an ordinary trial in a criminal case. The only difference is that it ends up with the determination of the admisibility or otherwise of the disputed statement only. Once ruled to have been made and voluntarily, the statement should be tendered in evidence by the concerned witness in the main trial. The acceptable procedure to be followed, fortunately, was clearly described in detail by this Court in our judgment in **Seleman Abdallah & Two Others R.**, Criminal Appeal No. 384 of 2008 (unreported).

Failure to conduct a trial within a trial is, in our settled view, a fundamental and incurable irregularity and inevitably leads to the admitted confessional statement being expunged from the record and/or vitiating the trial either wholly or partially depending on the facts of each case. Having clarified the stance of the law on this pertinent issue, we can now confidently tackle the appellants' crucial challenge on the legality of their trial and subsequent convictions.

As already shown in this judgment, the prosecution's smoking gun at the trial of the appellants were the appellants' alleged confessional statements. That the appellants retracted them is not disputed. That the statements were admitted in evidence despite objections from the defence is not in issue. That the two courts below placed much reliance on these statements in concluding that the appellants conspired to commit the armed robbery and ended up committing it, is glaringly obvious from their judgments. The issue here in whether their admission in evidence was legal and authorised by law. On this, the record speaks for itself.

As we have amply demonstrated earlier on, there are two categories of such confessional statements. We have the cautioned statements and the extra-judicial statements. These statements were tendered in evidence by PW9 D/Sgt. Paulo (Exhibit P.26-27), PW10 D/Cpl. Rupeto (exh. P 28), PW11 D/Cpl. Julius (exh.P29 – 30), PW12 D/Cpl. Elias (Exh. P31) and PW13 Mary

Kasanga (exh. P. 35). But this does not tell the whole bizzare story which began with PW9 S/Sgt. Paulo.

The prosecution had called PW9 D/Sgt. Paulo to tender in evidence the cautioned statement of the 5th appellant. His evidence was remarkably short. He simply testified that on 30/5/2002 he recorded this appellant's cautioned statement in which he confessed to have participated in the robbery. He accordingly prayed to tender the statement together with the appellant's extra-judicial statement before a Justice of the Peace (R.D. Kamani) as exhibit. The prayer was granted.

The next witness was PW10 D/Cpl. Rupeto. His entire evidence centred on the cautioned statement of the 4th appellant, which he recorded on 1/6/2002. He testified that this appellant admitted committing the robbery. He further testified that thereafter he took the appellant to one M.U.Kassanga, who took down his extra-judicial statement. He then prayed to tender both statements as exhibits. The appellant objected on the ground that the alleged confessions were a result of torture. The magistrate's ruling on the prayer and objection was as follows:-

> *"**Court:** The incidence occured on 30/5/2002 and on 1/6/2002 the 4th accused's statement was recorded, the accused is lying in stating that the statement was recorded after four days. I am of the considered view that the same was recorded voluntarirly in terms*

of section 27(2) of the TEA. The same are admitted and marked Exh P 29 for the caution statement and Exh. P30 for the statement before the J.P."

PW12 D/Cpl. Elias testified on how he took down the cautioned statement of the 3rd appellant. He then sought to tender it in evedence as well as the appellant's extra-judicial statement before a Justice of the Peace (R.D. Kamani). The appellant retracted both. The magistrate admitted the extra-judicial statement as exh. P31, while the cautioned statemet was reserved for admission after a "trial within trial". That was on 8th October, 2002. The trial was adjourned for the holding of a "trial within a trial".

The "trial within a trial" was held on 29/10/2002. It was a mockery of a trial within a trial we are well all familiar with. PW10 and PW12 were recalled. The two were not sworn. They proceeded to tell the trial court briefly on how each one of them recorded the so called cautioned statements. The appellants in their cross-examination made it clear that they were tortured. The pleas of torture fell on deaf ears. Without the prosecution closing its case and the appellants being called upon to give their own evidence, the learned trial Resident Magistrate came up with this surprising ruling:

"RULING

Both cautioned statements recorded on 1/6/2002 and the PF3 were issued on 6/6/2002. So if there were any tortures and or beatings then were inflicted by other policemen than PW10 and PW12. Its my considered view that the two caution statements were recorded voluntarily in terms of section 27(2) of the TEA No. 6/1967. I accordingly admit them to form part of the prosecution evidence.

Court: *the same are admitted and marked Exh. P32 and P33."*

We have noted and have been appalled by the naked fact that the cautioned statements were not only admitted "as part of the prosecution evidence" in the so-called trial within a trial, but were also not tendered in evidence by any witness. Worse still, the voluntariness of the same was determined without the affected appellants being heard in rebuttal. This was nothing short of a traversity of justice. Identical irregularities were found to have been committed by the High Court in **Francis Mashara Makera v. R,** Criminal appeal No. 215 of 2007 (unreported). This Court found the two flaws to be fundamental and incurable and the retracted confessional statement was totally discounted. We are constrained here to do the same. We accordingly expunge exhibits P32 and P33 from the record.

After D/Cpl. Elias, and the admission into evidence of the retracted statements, PW13 Mary Kasanga testified. She claimed to have recorded the extra-judicial statement of the 2nd appellant, which she tendered in evedence

as exh. P35, as already shown. All the same, we have gleaned from the record of proceedings that this piece of incriminating evidence was admitted without the appellant being asked as to whether or not he had any objection. As the Court has persistently held, this was an incurable irregularity. We find it apt repeat what we said in **Twaha Ali's** case (supra) for the benefit of all trial magistates. The Court said:-

> *"While still on this issue we wish to emphasize the importance and necessity for the trial courts not only to inform accused persons of this right, but also to remind them (the courts) of the duty they have to record faithfully what an accused person says in response. The trial court's record of proceedings must reflect this. Accusseds' procedural rights are there to be strictly observed not only for their benefit but also to ensure that justice is done in the case ..."*

We have no option here, therefore, but to expunge exh. P35 from the record.

As we have already indicated, the extra-judicial statement recorded by the justices of the peace, R.D. Kamani and M.U. Kassanga, retracted as they were, were not only tendered in evidence by police officers who never authored them but without a trial within a trial being held to detemine their voluntariness. We accordingly expunge them from the record.

After expunging all the cautioned and extra judicial statements, we are, admittedly, left with a skeleton of the prosecution case. There is no gainsaying that the prosecution case has been remarkably weakened by the laxity or ignorance of the trial magistrate and not through failure by the prosecution to tender material evedence, leaving alone the issue of its admissibility. We are not ready to speculate under the circumstances, that on a proper re-evaluation of the remaining evidence this Court would be prepared to sustain the appellants' conviction or not. We would like to arrive at that decision after being satisfied that the expunged statements were either properly admitted or properly rejected. Short of that we feel that justice in the case would not be seen to have been done.

Since we are convinced that the blame lies on the trial court, what order should be made to avoid a failure of justice? In considering the possible solution to this question, we were mindful of this Court's observations in **Marko Patrick Nzumila & Another v.R,** Criminal Appeal No. 141 of 2010 (unreported). The Court said:-

> *"The term "failure of justice" has eluded a precise definition, but in criminal law and practice, case law has mostly looked at it from an accused/appellant's point of view. But in our view the term is not designed to protect only the interests of the accused. It encompasses both sides in the trial. Failure of*

justice or (sometimes, referred to as "miscarriage of justice") has, in more than one occasion been held to happen where an accused person is denied an opportunity of an acquittal (see for instance ***WILLIBARD KIMANGO V. R.*** *Criminal Appeal No. 235 of 2007 (unreported)) but in our considered view, it equally occurs where the prosecution is denied an opportunity of a conviction. This is because, while it is always safe to err in acquitting than in punishment, it is also in the interests of the state that crimes do not go unpunished. So, in deciding whether a failure of justice has been occasioned, the interests of both sides of the scale have to be considered.*

In the present case by unwittingly allowing PW1, PW2, and PW7 to give unaffirmed testimony, the trial court certainly prejudiced the prosecution case substantially as those were crucial witnesses for its case but for which they were not to blame for giving of their evidence in violation of the law. To that extent, we think, there was a failure of justice."

We are convinced that we could not have put it more forcefully and instructively. The plain language used cannot be improved upon. We shall gladly adopt this compelling reasoning in our search for the appropriate orders in this appeal, aware that conviction of the guilt is a public interest as is the acquittal of the innocent, for in a just society all are needed: see, for instance, **The D.P.P V Owen Kasanja and 9 Others,** Criminal Appeal No.305 of 2009 (unreported).

In **Marko Nzumila's** case, the issue of the illegality in receiving the witnesses' unaffirmed evidence was raised ***suo motu*** by the Court. It accordingly proceeded to invoke its revisional powers, quashed the entire proceedings and the lower courts' judgments and ordered a re- trial. In **Twaha Ali's** case where the issue of the improper admission of the confessional statements was one of the grounds of appeal, as is the case here, the Court allowed this particular ground of appeal. It nullified the proceedings in the courts below and ordered a retrial.

All things being equal we would have done likewise. However, the peculiar circumstances of this case dictate the taking of a different course. First of all, there is the issue of the possibility of non-availability of witnesses, whose evidence was properly received in case we quash the entire trial court's proceedings. Secondly, we have considered the issue of the exhibits which have already been disposed of. How will they be traced? Thirdly, and of great significance in the orderly administration of justice, in ordering a re -

trial the court must guard against the prospect of giving the prosecution a chance to fill in gaps in its evidence at the trial (see, **Fatehali Manji v. R.**[1966] E.A 334). We are not prepared to do that here.

Having the above considerations in mind, we have found it to be in the interests of justice to partially nullify and set aside the irregularly conducted trial court's proceedings, ie. from 8th October, 2002 when PW9 D/Sgt. Paulo began to testify to the closure of the defence case, as the appellants were prejudiced in the preparation of the defence, which we hereby unreservedly do. And as the judgments, sentences and all orders of the trial court (subsequent to 8th October, 2002) and High Court were based on the partly illegal proceedings, they are also accordingly quashed and set aside. The proceedings in the trial court prior to 28/10/2002 are left intact. The effect of this order, therefore, is that the case against the appellants should be heard afresh from PW9 in order to determine the voluntariness or otherwise of all the expunged statements. The D.P.P. remains with the sole discretion to determine whether or not to continue with the prosecution of the two accused persons who were acquitted by the two courts below as indicated herein.

All said and done, we allow the appeal to the extent shown in this judgment. The convictions and sentences are accordingly quashed and set aside. Pending the resumption of their re-trial the appellants should remain in custody.

DATED at MWANZA the 26th day of November, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K. MUSSA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

W.P. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL