IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CORAM: MKUYE, J.A. GALEBA, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 289 OF 2018

SOSPETER NYANZA ..... 1ST APPELLANT

MICHAEL JOSEPH ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Ebrahim, J.)

dated the 17th day of November, 2017

in

Criminal Sessions Case No. 01 of 2014

JUDGMENT OF THE COURT

25th April & 13th May, 2022

MKUYE, J.A.:

The appellants, Sospeter Nyanza and Michael Joseph (henceforth the 1st and 2nd appellants) together with three others who were acquitted, were charged with murder contrary to sections 196 and 197 of the Penal Code, [Cap. 16 R.E. 2002; now R.E. 2019] (the Penal Code) in Criminal Sessions Case No. 1 of 2014. In the information levied against them, it was alleged that the appellants, together with the other three accused on 2nd December, 2009 at Bwiru Ziwani area within

Ilemela District in the City and Region of Mwanza, did murder, one, Edwin Miyaye.

In order to prove the offence, the prosecution marshaled thirteen (13) witnesses and produced four (4) exhibits. On the defence side, five witnesses (the accused inclusive) testified and four (4) exhibits were produced. Upon conclusion of the trial, the appellants were convicted and were each sentenced to be detained under the President's pleasure in terms of section 26(2) of the Penal Code on account that they were seventeen (17) years old when they committed the offence of murder. Aggrieved by that decision, the appellants have lodged the appeal to this Court.

The brief background of the matter leading to this appeal go thus:

The deceased was a young child who was aged four (4) years while the appellants at the material time were both students at Mnarani Secondary School aged seventeen (17) years. The 1st appellant was also related to Dorica Bagolole, the deceased's mother, (PW2), the latter being his paternal aunt.

On the material day of 2nd December, 2009, Najoge Donald Miyaye, the father of the deceased child, (PW1) arrived home from work at around 17:30hrs. Upon his arrival, he was informed that the deceased was not yet at home and that he had not been seen from 12:00 hrs.

Instantly, they started searching for the deceased in vain. They reported the matter to the street chairman whereby with the help of neighbours, Godfrey John Kwanzobe (PW7) and Witness Kusaga Makala (PW8) inclusive, the search was intensified further to the neighbourhood. Still the deceased was nowhere to be found. Upon the search yielding no fruitful results, the same was called off by the street chairman. PW1, then reported the matter to the police and went back home.

According to PW1 and PW2, at around 22:00 hrs they received a text message which was sent from mobile phone no. 0759 534808 via PW2's mobile phone no. 0754 603257 to the effect that they should not be worried as their son was with them and all what was required from them was TZS. 5,000,000/= as ransom. They were further informed that they will receive instructions the next morning of where to deliver the money – *"Msiwe na wasiwasi mtoto wenu tunaye ila tunahitaji shilingi milioni 5, kesho asubuhi tutawaelekeza mahali pa kuzipeleka"*. The text massage was shown to the police the next day.

At around 09:00 hours in morning, they received yet another text message which was heart breaking in which the author gave a note lamenting on why they went to report to the police and, as a result, they will never see their child again. The police, together with Adam Miyaye (PW5) started tracing the culprits until they managed to track the

transactions of the mobile phone from which the text message was sent to Mkuyuni area. The mobile phone lead the police to a certain house in which a certain lady was found in possession of the said phone and she readily agreed to take them to the owner of the said mobile phone which lead to the arrest of the 2nd appellant. It was then when they discovered that the 2nd appellant who at that time was in the company of PW1 was in communication with the 1st appellant via mobile phone. As a result, the 1st appellant was also arrested and placed under custody as well as the acquitted accused persons.

Following their arrest, of the 1st and 2nd appellants, took the search party to the lakeside where the deceased's body was drowned and Bahati Jackson (PW3) dived in the lake and retrieved the body of the deceased tied by ropes with two stones.

Then, the appellants' extra judicial statements (EJS) (Exh. PE2 and PE4) were recorded by Violet Mwandu Mahizi (PW4) and Ajala Mtani (PW13) respectively. The body of the deceased was examined by Dr Kalima Jackson (PW12) who through a Postmortem Examination Report (Exh. PE1) established that the deceased's death was caused by Asphyxia due to strangulation.

In defence, both appellants disassociated themselves with the commission of the alleged offence. The 2nd appellant complained that he

was linked with the offence because his mobile phone was used to communicate with PW2.

At the end of the trial, the trial Judge believed in the prosecution evidence and convicted the 1st appellant on the basis of his EJS (Exh. PE2) and the 2nd appellants' EJS (Exh. PE4) which she found to have been corroborated by the evidence of PW1, PW2, PW3, PW5, PW7, PW8, PW10 and PW12. Particularly that, the evidence of PW2 relating to the text message demanding to be given Tshs. 5 million ransom and not reporting to the police tallied with exhibits PE2 and PE4 respectively.

In relation to the 2nd appellant, the trial Judge convicted him on the basis of the evidence that his mobile phone was used to communicate with PW2 as was stated in exhibit PE4 and PW2's testimony. Moreover, the 2nd appellant was among culprits who took the search party to the lakeside where they had drowned the deceased's body and was indeed, recovered.

The appellants had, initially, each lodged a separate memorandum of appeal. While the 1st appellant's memorandum of appeal consisted of two (2) grounds of appeal; the 2nd appellant's memorandum of appeal was on seven (7) grounds of appeal which, for a reason to become apparent shortly, we do not intend to reproduce them.

On 20th April, 2022 the counsel for the 1st appellant lodged a supplementary memorandum of appeal which he sought to argue while abandoning the substantive memorandum of appeal filed by the appellant. The grounds of appeal in the latter memorandum of appeal read as follows:

> *"1) That, the extra judicial statement of the 1st appellant (Exhibit P2) relied in convicting him was improperly procured.*
> *2) That, the trial court erred in law and fact by failure to consider that the 1st appellant was not a free agent when his extra judicial statement was being recorded.*
> *3) That, the trial judge erred in law and fact by imposing a custodial sentence to the 1st appellant."*

Yet, during the hearing of the appeal, the learned counsel for the 1st appellant sought and was granted leave to add one more ground to the effect that:

> *"That, the trial court erred in law and fact in taking into consideration Exhibit PE4 in convicting the 1st appellant."*

As regards the 2nd appellant, the learned counsel who represented him opted to rely on the appellant's self-crafted memorandum of appeal on only one ground appearing in paragraph 7 which is to the effect that:

"The prosecution case against the appellant was not proved to the hilt as in contrast to the strong and probative defence contention and exhibits."

When the appeal was called on for hearing, Messrs. Emmanuel Sayi and Anthony K. Nasimire, learned advocates represented the 1st and 2nd appellants respectively; whereas the respondent Republic was represented by Mr. Emmanuel Luvinga, learned Senior State Attorney assisted by Mr. Erasto Anosisye, learned State Attorney.

Elaborating on the complaint that the 1st appellant's EJS (Exh. PE2) was not taken in accordance with the law, Mr. Sayi argued that although the same was relied on in convicting him, it was taken in contravention of the Chief Justice Instructions 1994 on the Guide for Justice of Peace. While relying on the case of **Mpemba Mashenene v. Republic**, Criminal Appeal No. 557 of 2015 (unreported), he faulted it for having not been signed by the appellant; for not showing that he consented to give his statement; and for not showing that the said statement was read over to him. He rounded it up submitting that according to the case of **Mpemba Mashenene** (supra), failure to read out the EJS to the appellant rendered it to have no evidential value and liable to be expunged.

Mr. Sayi went on arguing that the EJS of the 1st appellant was recorded while he was not a free agent. He pointed out that when Justice of the Peace inspected him before recording it, he found him with injuries which the appellant said he sustained when he was arrested by the police a day before being taken to the Justice of Peace. Hence, he was of a view that the said EJS has to be discounted.

As regards the additional ground of appeal on the complaint relating to the trial court's reliance on exhibit PE4 in convicting him, it was the learned counsel's argument that much as it mentions the 1st appellant, the same ought not to be relied on since it was not signed on some pages as was admitted by PW13 when cross examined by Advocate Katemi at page 117 of the record of appeal. On being prompted by the Court, if there is any law requiring each page of EJS to be signed, he said there is none. Nevertheless, he was of the view that, due to such shortcomings it should be expunged from the record.

Regarding the 3rd ground of appeal on custodial sentence imposed on the appellant, it was Mr. Sayi's submission that it was wrong for the trial court to impose a custodial sentence contrary to section 119 (1) of the Law of the Child Act, [Cap 13 R.E. 2019] since the appellant was 17 years old at the time of the commission of the offence. To buttress his argument, he referred us to the case of **Joseph Lazaro and 2 Others**

v. Republic, Criminal Appeal No. 118 of 2014 (unreported). He was, therefore, of the view that following the amendment of the law through Act No. 4 of 2016 it was wrong for the trial Judge to sentence him under section 26 (2) of the Penal Code since a child is not supposed to be given a custodial sentence. On being prompted by the Court if the trial Judge ordered the appellant to be taken to prison, the learned counsel replied in the negative but stressed that the appellants are in prison where, infact, they came from. In the end, he left the matter to be determined by the Court.

The 2nd appellant's major complaint is that the prosecution failed to prove the case beyond reasonable doubt. Mr. Nasimire contended that the 2nd appellant was convicted on the basis of the evidence that the text message sent to PW2's mobile phone came from his phone; and his EJS (Exh PE4). However, he assailed such evidence that; **one**, the text message alleged to have been sent to PW2 was contradictory as it differed contextually with what was testified by PW1 and PW2. Mr. Nasimire gave an example of the first text messages to the effect that *"their child was with them but what they needed is a ransom of Tshs, 5 million"* and the 2nd text to the effect that *"since you have reported to the police you will never see the child again."* **Two,** the mobile phones which were used by offenders to communicate were registered with

VODACOM service provider, however, no witness from VODACOM came to testify in court. **Three,** there was no print out produced in court to show such text messages. **Four,** no police officer with cyber-crime technology competency was called on to testify in court on it. **Five,** ownership of the alleged mobile phone was not proved as a certain lady at Mkuyuni was the one who was found with it and then she took the search party to the 2nd appellant who was the owner. However, the said lady was not called to testify, which Mr. Nasimire urged the Court to draw adverse inference against the prosecution for failure to do so.

Mr. Nasimire went on assailing the trial court's finding on the coherence of exhibit PE4 in that it had no evidential value. He contended that, since it was repudiated, it required to be corroborated which was lacking due to the contradictions in the prosecution evidence.

In this regard, it was Mr. Nasimire's argument that the two sets of evidence were not sufficient to mount a conviction against the 2nd appellant and implored the Court to allow the appeal, quash the conviction, set aside the sentence against 2nd appellant and set him free.

In response to the appellants' submissions, Mr. Luvinga was fairly brief and to the point. He prefaced his argument by declaring their stance of supporting both the conviction and sentences meted out against both appellants. After having done so, he submitted in relation

to the 1st appellant that; **one,** the 1st appellant's EJS (Exhibit PE2) was taken in accordance with the requirements set out in **Mpemba Mashenene's case** (*supra*). As to whether the appellant consented to give his statement, he argued that he consented as shown by the portion that was cancelled by PW4 who recorded it at page 175 of the record of appeal. **Two,** much as the 1st appellant objected to have the EJS tendered in court, during the trial within trial that was conducted, he denied to have been tortured when at the Justice of Peace and that the injuries found in his body were sustained at the time of arrest. **Three**, that the EJS was not read over to the appellant, he said, the answer was at page 176 where the justice of peace indicated that he read it over to him. He, thus, prayed to the Court to dismiss this ground for lack of merit.

As regards the additional ground of appeal on reliance on the 2nd appellant's EJS (Exh.PE4) to corroborate other evidence, it was Mr. Luvinga's contention that the trial Judge properly did so since the said EJS was admitted as an exhibit without any objection and that the 2nd appellant's advocate did not fault it. As such, he urged the Court to find this ground devoid of merit and dismiss it.

As regards ground No. 3 faulting the custodial sentence on the 1st appellant, Mr. Luvinga contested it. He submitted that, the trial Judge

properly sentenced the appellants under section 26(2) of the Penal Code which was the sentencing provision against persons convicted with an offence of murder punishable by a death penalty as opposed to section 119 of the Law of the Child Act which deals with offences punishable by imprisonment.

With regard to the 2nd appellant's appeal on the issue that the offence was not proved beyond reasonable doubt, Mr. Luvinga in the first place conceded to the argument that the witnesses who testified on text messages contradicted themselves on the messages allegedly sent to PW2's mobile phone. However, he was quick to submit that despite such contradictions, contextually there was no contradiction. He reasoned that, those contradictions were expected due to the fact that it took a considerable long time for the case to be heard from 2009 to 2014. Nevertheless, he maintained that the gist of the text remained the same which was **firstly,** that they had the child and what they needed is to be given was money to the tune of Tshs. 5,000,000/= as ransom; and **secondly,** threatening them not to report to the police. He rounded up the point saying that, even if there were contradictions, such contradictions did not go to the root of the matter.

As regards the proprietor of the mobile phone, he argued that the 2nd appellant admitted in his EJS (Exh PE4) that his phone was used to send messages with a similar content.

In relation to the trial Judge's reliance on the 2nd appellant's EJS (Exh. PE4), the learned Senior State Attorney argued that the same was tendered and admitted in court without any objection from Advocate Katemi who represented him (2nd appellant). On that account, the said EJS did not require any corroboration as it was not repudiated. In the end Mr. Luvinga prayed to the Court to find the appeal by the 2nd appellant lacking merit and dismiss it.

When asked to make a rejoinder, Mr. Sayi did not have any rejoinder while Mr. Nasimire stressed that Exh. PE4 did not comply with the requirements as some pages were not signed.

We have considered the grounds of appeal and the arguments from either side and we think, we are now in a position to deal with the appeal. The first appellant's complaint is on the EJS (Exh PE2) that it was not signed in some of the pages; that the 1st appellant did not consent to give his statement; and that the said statement was not read over to him and therefore it was not admissible in evidence.

In the case of **Mpemba Mashenene** (supra) that was cited by Mr. Sayi, the Court emphasized the need to comply with the Chief Justice Instructions to the Justice of Peace published in a booklet titled "A Guide for Justice of Peace" when recording extra judicial statements which states as follows:

> *"The Justice Peace ought to observe, inter lia, the following:*
>
> *(i) The time and date of his arrest;*
>
> *(ii) The place he was arrested;*
>
> *(iii) The place he slept before the date he was brought to him;*
>
> *(iv) Whether any person by threat or promise or violence he has persuaded him to give the statement;*
>
> *(v) Whether he really wishes to make the statement on his own free will;*
>
> *(vi) That if he makes a statement, the same may be used as evidence against him.*
>
> *[See also: **Japhet Thadei Msigwa v. Republic,** Criminal Appeal No. 367 of 2008 (unreported).*

Our examination of the said Exh. PE2 titled "KUANDIKA UNGAMO (MAELEZO YA MTUHUMIWA AU MSHTAKIWA ALIYE KATIKA ULINZI WA POLISI)" appearing at pages 175 to 176 of the record of appeal, has revealed that it is a Standard Form with a guidance of some information required to be extracted from the suspect. Under item 2 of the said Form for recording the extra judicial statement shows that the 1st appellant consented to give his statement. This is clearly shown in the portion which reads as follows:

> *Mshitakiwa ameelezwa kuwa yupo mbele ya ulinzi wa amanl na ameulizwa kama anataka kutoa maelezo.*
>
> *"Mshitakiwa anajibu:*
>
> ***Ndiyo nataka kutoa maelezo".*** *(Iwapo anajibu hapana arudishwe mara moja katika ulinzi wa polisi.)"*
>
> [Emphasis added]

The said portion also shows that the words in brackets (*iwapo anajibu hapana arudishwe mara moja katika ulinzi wa polisi)* were cancelled, which Mr. Sayi doubted as to who cancelled them.

However, we think that might be a normal practice in standard forms which provide for an option for cancellation of the inapplicable portion and remain with what is applicable. When looking at the said

excerpt it is clear that the same gives options. Option one is when the suspect consents to make his statement which was a position/case in point in this case; and the other one in brackets which is applicable in a situation where the suspect does not wish to give his statement, which in our case was cancelled by PW4 following the 1st appellant's consent to give his statement. We wonder why the counsel for the 1st appellant was doubting such a settled practice. At any rate, he did not give us any good reason for doubting it.

With regard to the issue that the 1st appellant did not sign on some pages of Exh. PE2, in the first place, we are unable to see which item of the Chief Justice's Instruction cited above was contravened. On top of that the learned counsel for the 1st appellant was unable to assist the Court on the law that was contravened. At any rate, our perusal of the same has shown us that the 1st appellant had signed by a thumb print at pages 176, 177, 179, 181, 183, 185 and 186 of the record of appeal. It is only on pages 178, 180 and 182 which were not signed but the signed pages were followed with the unsigned pages on every other page of the same paper. This makes an assurance of impossibility of tempering with them.

On the other hand, having looked critically at the contents of Exh PE2, we think, the coherence of the information on every page is consistent and that such information must have come from none other than the appellant himself. Thus, failure to affix a thumb print on those pages did not vitiate its contents as they still look intact.

As regards the issue that the said Exh. PE2 was not read over to the 1st appellant after having been recorded, we do not agree with Mr. Sayi. To the contrary, we agree with Mr. Luvinga as he rightly submitted that PW4 had indicated in item 9 of the Standard Form as shown at page 176 of the record of appeal that the said Exh PE2 was read over to him. In the said portion, PW4 declared that:

> *"Naamini maelezo haya yametolewa kwa hiyari.*
> *Yametolewa na kuandikwa mbele yangu na*
> ***nimemsomea mshitakiwa amekubali ni maandishi sahihi ya maelezo aliyotoa."***
>
> [Emphasis added]

Hence, the learned counsel's contention that Exh. PE2 was not read over to 1st appellant was misconceived.

Regarding the contention that the 1st appellant was not a free agent at the time of recording the statement because of injuries, he was found with when inspected by PW4, we go along with Mr. Luvinga's line

of argument that the same did not have impact to the EJS in question. We say so because of the fact that during trial within trial in relation to the admission of Exh PE2 as shown at page 48 of the record of appeal, the 1st appellant denied to have been tortured while at the Justice of Peace. He categorically stated that the injuries which were seen in his body were occasioned during his arrest, the fact which was explained to the Justice of Peace at page 175 of the record of appeal. Thus, the said EJS was admitted in evidence as Exh. PE2. In addition, having examined the compliance with other requirements or conditions set out in the case of **Mpemba Mashenene** (*supra*), we are satisfied that Exh. PE2 was in compliance with those requirements. We, thus, dismiss this ground of appeal for lack of merit.

As regards the complaint that was brought as an additional ground of appeal regarding reliance on Exh. PE4 that was not signed on some of the pages, we think, our position would be the same as we have canvassed in the 1st and 2nd grounds relating to Exh. PE2. It is without question that some pages in Exh. PE4 were not signed as was conceded by PW13 during cross examination as clearly seen at page 117 of the record of appeal.

Our careful scanning of Exh PE4 appearing at pages 192 to 198 of the record of appeal reveals that there is no signature of the 2nd appellant on some of the pages of Exh PE4 be it in written form or thumb print. However, at page 194 of the Exh PE4 there is a thumb print at the end of item 9 "*sahihi ya mshtakiwa (dole gumba la mkono)*" signifying what he had stated in the preliminary part of Exh PE4. Also, at page 195 of Exh PE4, there is a hand written signature just before he began to give his statement; then at the end of his narration at page 198 of the record of appeal he signed it. We, therefore think that, since the learned counsel for the 2nd appellant was not able to avail us with the basis for the requirement to sign or thumb print each of the pages of Exh PE4, failure to do so by the appellant did not vitiate the evidential value of the said statement. At any rate, we find that even questioning it at this stage when the statement was admitted without any objection during trial is a mere afterthought. Given the circumstances, Exh PE4 could be relied on without any corroboration.

We now turn to the appeal by the 2nd appellant which is based on the prosecution's failure to prove the case against him. The major complaint is that the text messages allegedly sent by him to PW2 lacked coherence due to contradictions with other prosecution witnesses, and

that since his EJS (Exh PE4) was repudiated, it ought to be corroborated.

Admittedly, the two types of evidence were relied upon by the trial court in convicting the 2nd appellant. In relation to the text messages, both PW1 and PW2 testified on the aspect. The record shows that PW1 said that the text message sent to PW2 by the 2nd appellant was that "*Msiwe na wasiwasi mtoto tunaye ila tunahitaji shillingi milioni 5, kesho asubuhi tutawaelekeza mahali pa kuzipeleka";* and the 2nd message was that *"mambo haya yalikuwa ya wawili lakini kwa kuwa mmeenda polisi mtoto wenu hamtamwona kamwe."* As to PW2, she testified that she received a message through her mobile phone No. 0754 603257 from 0759 534808 to the effect that "*Edwin tunaye tunahitaji milioni 5 (tano) tutatoa maelekezo asubuhi saa nne."* Then later she received another message saying "*Kwa ujinga ulionao hao Polisi si umewajua, sisi tulihitaji dili nawe utaona matokeo yake."*

On the face of it, one might see that there was a contradiction on what was exactly communicated to PW2. However, we find that reading the said text messages contextually there is no such contradiction. We say so because of the common gist of such messages which were to the effect that **One**, the assailants had the child and that what they needed

was a 5 million shillings ramson of which they were to give instructions on the next day where to take it; and **two,** a rather disappointing text that since they have informed the police they won't see the child again.

In any case, we think that the appellant was not convicted on the basis of the text messages from the 2nd appellant to PW2 but rather that communication led to his arrest and being connected with the offence he was charged with. But again, even if there were such contradictions, we find that they did not go to the root of the matter. (**See Armand Guehi v. Republic**, Criminal Appeal No. 242 of 2010; **Dickson Elia Shapwata v. Republic**, Criminal Appeal No. 92 of 2009; **Paul Dioniz v. Republic**, Criminal appeal No. 171 of 2019; and **Twaha Salum v. Republic** Criminal Appeal No. 21 of 2018 (all unreported).

The other complaint in relation to the text messages was that there was neither evidence from VODACOM service provider who proved existence of such text messages nor any print out to that effect; and that no police officer from cyber-crime unit was called to testify in court.

In our view, we think, the evidence from VODACOM as a service provider or a police officer with cyber-crime knowledge could have been important had the fact in issue been on the messages themselves. However, in this matter, the mobile phones' importance is that it led to

the arrest of the 2nd appellant who in fact, as was submitted by Mr. Luvinga, did not deny his phone to be used to communicate or to send messages to PW2. It is for this reason that even calling the lady from Mkuyuni to testify in court was not necessary after having pointed out the 2nd appellant as the owner of the said mobile phone. We, therefore, do not find merit in the complaint.

Regarding Mr. Nasimire's complaint that Exh PE4 was not corroborated despite the fact that it was repudiated, Mr. Luvinga dismissed it, rightly so in our considered view, since the same was admitted in evidence without any objection from the defence side or rather by Advocate Katemi who represented the 2nd appellant. However, we note that the learned counsel tried to fault it during cross examination on unsigned pages of the same which was answered in the case of **Emmanuel Lohay and Another v. Republic,** Criminal Appeal No. 278 of 2010 (unreported) in which the Court was confronted with a situation where the appellants sought to repudiate their statements in their defence while the same had been admitted in evidence without objection during trial, the Court stated as follows:

> *"In essence the appellants are now seeking to challenge the admissibility of the statements. With respect, it is too late in the day for them to do so*

because their admissibility or otherwise was never raised at the trial. As a matter of general principle any appellate court cannot allow matters that were not raised and decided by the courts below.

In the instant case objection, if any, ought to have been taken under section 27 of the Evidence Act that the statements were not made voluntarily or that they were not made at all. Objection could have also been taken under section 169 of the Criminal Procedure Act that they were taken in violation of the CPA etc. If objection had been taken under section 27 above the trial court would have been duty bound to conduct a trial within trial to determine the admissibility of a statement/confession he must do so before it is admitted and not during cross examination or during defence - ***Shihoze Semi and Another v. Republic*** *(1992) T.L.R. 330. In this case, the appellants "missed the boat" by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before they were admitted in evidence."*

In this case, we think, the 2nd appellant's counsel missed the boat when he started to challenge the EJS which was already admitted without objection.

In any case, we agree in principle that it is unsafe to act on repudiated confession without corroboration unless before finding a

conviction on such a confession the court is fully satisfied that in all the circumstances of the case the confession is true. - See **Tuwamoi v. Uganda [1967] E.A 91**; **Bombo Tomola v. Republic** [1980] T.L.R. 254; and **Hemed Abdallah v. Republic** [1995] T.L.R. 172.

In this case, despite the fact that Exh. PE4 was admitted without objection suggests that it was neither retracted nor repudiated to allow the process of trial within trial to take place to ascertain its voluntariness or whether it was truly made, the same was corroborated by the evidence of PW1 and PW2 in material particular. We thus, find this ground of appeal unmerited and we dismiss it.

In the last complaint, Mr. Sayi for the 1st appellant faulted the trial court for awarding the appellants a custodial sentence. It was Mr. Sayi's argument that the alleged punishment was contrary to section 119(1) of the Law of the Child Act [Cap 13, R.E. 2019] which states:

> *"Notwithstanding any provisions of any written law, a child shall not be sentenced to imprisonment."*
>
> *[Emphasis added)*

Our reading of the above, provision reveals that it prohibits imprisonment sentence against a child, as opposed to section 26 of the Penal Code which provides for the death sentence for persons convicted

with an offence of murder. Moreover, we think section 26(2) of the Penal Code that was relied upon in sentencing the appellants is very clear. It provides as follows:

> *"The sentence of death shall not be pronounced on or recorded against any person who at the time of the commission of the offence was under eighteen years of age, but in lieu of the sentence of death, the court shall sentence that person* ***to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Minister for the time being responsible for legal affairs may direct****, and whilst so detained shall be deemed to be in legal custody." [Emphasis added].*

Our construction of the above cited provision does not reveal to us that the appellants were required to be sent to prison. What we discern from it is that, **one,** it prohibits a death punishment against a person who committed the offence while under the age of eighteen years. **Two,** it provides for the person who is detained during the President's pleasure to be taken to a certain place; and **three,** there are conditions to be issued by the Minister for legal affairs. And, to show that such place is not the normal prison, the last part of the provision puts it clear of the presumption of a person so detained to be treated as being in

legal custody. It is, therefore, our considered view that Mr. Sayi's contention that the appellants are in prison might have been caused by mere administrative arrangement and not a requirement of law. Nor was it the Judge's order. In this regard, we find this ground to have no merit and we dismiss it.

In the final analysis, we still maintain that the case against both appellants was proved beyond reasonable doubt. Hence, we hereby dismiss the appeal in its entirety.

DATED at **MWANZA** this 13th day of May, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The judgment delivered this 13th day of May, 2022 in the presence of Mr. Emmanuel Sayi, learned counsel for the 1st appellant who also took brief for Mr. Anthony Nasimire, learned counsel for the 2nd appellant and Mr. Emmanuel Luvinga, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL