**IN THE COURT OF APPEAL OF TANZANIA**

**AT DODOMA**

**(CORAM: MBAROUK, J.A, MZIRAY, J.A AND MWAMBEGELE, J.A.)**

**CRIMINAL APPEAL NO. 147 OF 2016**

**MANJE YOHANA ..... 1ST APPELLANT**

**FIKIRINI ATHUMANI ..... 2ND APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Dodoma)**

**(Mkuye, J.)**

**dated the 27thday of September, 2013**
**in**
**DC Criminal Appeal No 13 of 2012**

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## JUDGMENT OF THE COURT

27th February & 7th March, 2018

**MWAMBEGELE, J. A.:**

The two appellants; Manje Yohana and Fikirini Athumani, were, together with three others, arraigned in the District Court of Manyoni at Manyoni for the offences of conspiracy to commit an offence and armed robbery in the first and second count respectively. While the other three accused persons were acquitted in both counts, the appellants were acquitted in the first count but found guilty in the second. They were convicted and sentenced to a term of thirty years in jail.

Their appeal to the High Court proved futile, for, Mkuye, J. (as she then was) upheld their convictions and sentence. Still protesting their innocence, they have preferred the present second appeal.

When the appeal was called on for hearing on 27.02.2018, the appellants appeared in person, unrepresented. Ms. Beatrice Nsana, learned State Attorney appeared for the respondent Republic.

At the very outset, we prompted Ms. Nsana to address us on the way the Extra Judicial Statement of the first appellant was admitted in evidence. We raised such a concern because the record of appeal at page 33 shows that the appellant objected to its admission but the court admitted it anyway; without making any inquiry. That is the subject of the first ground of appeal of each appellant in their separate memoranda of appeal. For easy reference, that ground reads:

> *"... the trial court and the 1st appellate court erred in law and fact when [they] did not consider that when a confession is retracted or repudiated ... the trial court should conduct trial within a trial (inquiry) to ascertain the legality of the*

*confession before it admits that confession in evidence, without doing so the act results in fundamental and incurable irregularity."*

Ms. Nsana told the Court that the first appellant, indeed, objected to the Extra Judicial Statement being tendered in evidence on the pretext that he did not agree with its contents and that he never signed it. In the premises, Ms. Nsana argued, the Extra Judicial Statement, should be expunged from the evidence. Going an extra mile, Ms. Nsana argued that the prosecution case stood or fell on the Extra Judicial Statement on the strength of which both appellants were convicted. Without the Extra Judicial Statement, Ms. Nsana submitted, the prosecution case crumbles. For that reason, she supported the appellants' appeal and urged the Court to release them from custody unless otherwise lawfully held.

On their part, the appellants, having heard the learned State Attorney's remarks, had nothing to say. They just asked the Court to set them free.

As rightly submitted by the learned State Attorney, the prosecution's case stood or fell on the Extra Judicial Statement of the first appellant which implicated both appellants to the hilt.

But, we are afraid, the confession was wrongly admitted in evidence. To appreciate what we are going to observe hereinbelow, we find it appropriate to reproduce what transpired in the trial court on 10.06.2011 when the Extra Judicial Statement was admitted in evidence. This is what transpired when Masatu Magessa PW IV; the Justice of the Peace before whom the confession was allegedly made, was testifying as appearing at page 33 through to page 34 of the record of appeal:

> *"On 21/10/2010 I was at my office at primary court of Manyoni in the morning I received a report that there was a person who wanted to confess before me I received that report from a police officer.*
>
> *The Accused who was brought before me at 10.00 am was Manje Yohana and he is before this court I was told that the Accused committed the Armed Robbery.*

*The Accused Manje Yohana was brought before me and we remained together in my office I ordered the workers and the policemen who brought him to go outside.*

*I asked the Accused if he was ready to confess and he told me that he was ready to confess. After he confessed he signed and I signed and I called the police officer who brought him at my office. This is the Extra Judicial statement.*

***Sgd. N.K. MUNUO – DM***

***10/6/2011***

*Court: The witness is allowed to read the statement to this court.*

***Sgd. N.K. MUNUO – DM***

***10/6/2011***

***PW IV:*** *After reading it I pray to tender the Extra Judicial statement as P.III*

***Sgd. N.K. MUNUO – DM***

***10/6/2011***

*1st, Accused: I do not agree with the content of the Extra Judicial statement and I din't signed on the document.*

***Sgd. N.K. MUNUO – DM***

***10/6/2011***

*2nd, Accused: I do not object for the Extra Judicial statement.*

***Sgd. N.K. MUNUO – DM***

***10/6/2011***

***Mr. Kuwayawaya:*** *I do not object for them*

*4th, Accused I do not object for them*

*5th, Accused I do not object for them*

***Sgd. N.K. MUNUO – DM***

***10/6/2011***

*Court: The Extra Judicial statement is received as P.III of this case.*

***Sgd. N.K. MUNUO – DM***

***10/6/2011"***

We have quoted *in extenso* the proceedings of 10.06.2016 to appreciate what we are going to observe shortly. From the foregoing record of proceedings reproduced, we note two shortcomings. First, the document was read to the court by the witness before the same was admitted in evidence. Secondly, it was admitted in evidence without any inquiry, even after the maker recanted it. We now turn to investigate the effect of these shortcomings.

It is apparent in the quoted proceedings of the case on 10.06.2011 that the Extra Judicial Statement of the first appellant was read out in court before it was admitted in evidence. That was patently wrong. It is wrong to read out a document before it is admitted in evidence. In the recent past, we were confronted with a somewhat akin situation in **Jumanne Mohamed & 2 others v. Republic**, Criminal Appeal No. 534 of 2015 (unreported). In the decision we rendered on 13.02.2018, we relied on our previous decision of **Robinson Mwanjisi and three Others v. Republic** [2003] TLR 218 to articulate the position that reading a document before it is admitted in evidence is wrong and prejudicial. In **Robinson Mwanjisi** (supra), we observed at p 226:

> *"It is noted that the statements were read out before the Trial Court although they were subsequently rejected, a practice unfortunately common in trials before Subordinate Courts. Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial. If the document is ultimately excluded, as happened in this case, it is difficult for the Court to be seen not to have been influenced by the same."*

Also apparent in the proceeding of 10.06.2011 quoted above is that the first appellant who was alleged to be the maker of the confession sought to be tendered, refused it being tendered in evidence under the pretext that he did not agree with its contents and that he did not sign it. With this remark of the first appellant, it is our view that the document assumed the status of a retracted or repudiated confession. By that statement, we think, the accused simply meant he did not make the statement or that he was forced to make it and therefore disowned it. What the court should have done in such an eventuality was to clear the

document for admission. The clearing process intended here comprises conducting an inquiry with a view to verifying whether or not the first appellant made it and whether or not he did not sign it. That was not done and we are of the considered view that the omission was prejudicial to the appellants. As we stated in **Robinson Mwanjisi** (supra) whenever it is intended to introduce any document in evidence, that document should first be cleared for admission. The clearing process being an inquiry or trial within a trial is a matter of nomenclature; while it is referred to as an inquiry in subordinate courts, the same process is referred to as a trial within a trial in the High Court.

The foregoing said, we are in agreement with the learned State Attorney that the alleged confession was wrongly admitted in evidence and therefore should be expunged from the record. We thus expunge the Extra Judicial Statement of the first accused person which was admitted in evidence and marked Exh. PIII.

As we observed above and as submitted by the learned State Attorney, the prosecution case stood on the Extra Judicial Statement of the first appellant. Now that the document has been expunged from evidence,

the prosecution case has nothing on which the Court can found a conviction of the appellants.

The foregoing said, we quash the conviction and set aside the sentence meted out to the appellants. We allow the appeal and order that the appellants Manje Yohana and Fikirini Athumani should be released from custody forthwith unless they are held for some other lawful cause.

Order accordingly.

**DATED**at **DODOMA** this 5th day of March, 2018.

M.S. MBAROUK
**JUSTICE OF APPEAL**

R.E.S. MZIRAY
**JUSTICE OF APPEAL**

J.C.M. MWAMBEGELE
**JUSTICE OF APPEAL**

I certify that this is true copy of the original.

E.F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**