MWIYA AND IKWETI v THE PEOPLE (1968) ZR 53 (CA)
COURT OF APPEAL
BLAGDEN CJ, DOYLE JA, WHELAN J
23rd JULY 1968

Flynote and Headnote

[1] **Criminal procedure - Trial within a trial - Determining whether the accused made an out - of - court confession attributed to him.**
When the accused in a criminal case denies making a confession or statement attributed to him, but raises no question as to the voluntariness of that confession or statement, the trial court need not hold a trial within a trial before admitting the confession or statement into evidence.

[2] **Evidence - Confessions - Procedure prior to admission into evidence when accused denies making the confession.**
See [1] above.

Cases cited:

(1) *Chilenga v R* (1959) SJNR 94.

(2) *Mambilina v R* (1962) R & N 507.

(3) *Manjonjo v R* (1963) R & N 703.

(4) *Lukere v R* (1964) SJNR 65.

(5) *Mwangi s/o Njeroge v R* (1954), 21 EACA 377.

(6) *M'Murairi s/o Karegwa v R* (1954), 21 EACA 262.

(7) *Ibrahim v R* [1914] AC 599.

(8) *Sparks v R* [1964] AC 964; [1964] 1 All ER 727.

(9) *Deokinanan v R* [1968] 2 All ER 346.

(10) *R v Roberts* [1953] 2 All ER 340.

Gani, Legal Aid Counsel, for the first appellant.
Houston - Barnes, for the second appellant.
Heron, Senior State Advocate, for the respondent.

Judgment

Blagden CJ: The Court dismissed the appeals in this case on the 11th June, 1968, and we announced that we would give our reasons therefor later. These now follow.

The appellants, Nyambe Mwiya, a twenty - seven - year - old man (whom I shall continue to call "the first appellant") and Mutundakule Ikweti - a forty - five - year - old - woman (whom I shall continue to call "the second appellant") - were convicted of the murder of Sixpence Muyunda on or about 2nd August, 1967, near Namakongolo Village, Senanga, and sentenced to death.

The facts as found by the learned trial judge were that a few days after the 2nd August, 1967, the first appellant told Folosi Mukela, the Headman of Namakongolo Village, that Sixpence Muyunda, who was the first appellant's uncle, was missing. Search was made but proved abortive; and then the first appellant confessed to Folosi that he had killed him.

On the 13th August, the first appellant conducted police officers to a place in the bush near the village where he pointed out the spot where he had killed the deceased. He then took them to a nearby grave from which he exhumed the dismembered body of Sixpence Muyunda. He explained that he had killed him because he, the deceased, was a witch doctor. Subsequently, he made confessions to the police in the course of which he implicated the second appellant. The learned trial judge in his judgment was careful to

remind himself that what the first appellant said about the second appellant was not evidence against the latter.
In his confessions the first appellant stated that he had killed the deceased because he was a wizard who had killed three persons (whom he named) by witchcraft.
A post - mortem was conducted on the deceased's body by Dr Laedlein on the 13th August. It was dismembered into six pieces and was in such a condition that the doctor was unable to ascertain the cause of the death.
At his trial, the first appellant put up no defence at all; indeed, during the course of it he wished to change his plea to guilty, but the learned trial judge would not allow him to do so. Mr. Gani, who appeared for him on this appeal, stated that he could advance no submissions on his behalf but was available to assist us if we so required. In the circumstances, that was a very proper attitude. The first appellant's guilt was abundantly clear, and it is only fair to him to say that from the start he has been anxious to admit it.
The second appellant's case was of a somewhat different character. It was never the *People*'s case that she herself had killed the deceased, but rather that she had given the first appellant assistance in killing him - first by luring the deceased into the bush where the killing took place in her presence and then in helping to dispose of the body.
The evidence implicating her in these activities consisted of statements she was alleged to have made to the police, and her production to the police of a hoe which was allegedly used by the first appellant to dismember the body.
The second appellant's defence was coupled with a denial that she had made the statements imputed to her. She did not give evidence in her defence but made the following unsworn statement:

"I wasn't there when the man was killed. I want my witness 40 A/F Malishomwa Siloleki to be called, to give evidence if I walked in the company of her husband.
The statement made to the police wasn't made by me, but by Nyambe. They refused, and told me I was lying and that they'd believe what Nyambe said. About the hoe, I told them that Nyambe lied about the hoe, but they insisted he was telling the truth. I said: 'I know nothing about the hoe being used in the crime.' When I was called to Namakongolo Village, I went there with the hoe, and I didn't hide it.
I end there."

Defence counsel then applied for an adjournment "to find the witness", and the State advocate informed the court that this witness had already been named by defence counsel when the case initially came on for hearing at Mongu, but was transferred for trial at Lusaka to enablethe two appellants to be separately represented. The State advocate went on to say that the police had already searched Namakongolo Village where the witness was supposed to be living, according to information supplied by the second appellant herself, but that they had failed to find her. The learned trial judge then adjourned the case.
On resumption of the trial nearly four weeks later, the State advocate reported that the police officer who had been instructed to trace the witness had gone into hospital, and nothing further had been heard from him. The record shows that the court regarded this situation as "highly unsatisfactory". But defence counsel did not ask for any further adjournment; on the contrary, according to the record Mr Lisulo said: "I have consulted accused re this witness and, since the police have been uncooperative, the second accused won't call her I will make a submission later. I do not ask for a further adjournment to call the witness."
One of the submissions advanced on behalf of the second appellant was that insufficient inquiries were made with regard to obtaining the attendance of this witness, that the trial court itself regarded the situation as "highly unsatisfactory", and that, notwithstanding defence counsel's decision not to ask for any further adjournment, the court should have taken further steps to trace the witness as it amounted to a public duty in the interests of justice to have this witness called. The judge, however, clearly accepted Mr Lisulo's decision not to call this witness and proceeded with the trial. We cannot see that he was wrong to do so. In the event there was only Mr Lisulo's closing address to hear. In the course of it Mr Lisulo referred to the wanted witness and said that she "would have confirmed accused's statement in court that, on the day prior to the death, she was

not in the village, but in another village two hours' walk distant." It was not right of counsel to refer to what might have been in evidence before the court but in fact was not. The learned trial judge dealt fully on the evidence before him with the second appellant's contention that she was not present at the killing and rejected it. There was ample evidence to support him in so rejecting it.

The main argument addressed to us by Mr Houston - Barnes on behalf of the second appellant related to the admission in evidence of the cautioned statements allegedly made by her to the police. Altogether there were three of these. The first was made at about 2.30 p.m. on the 14th August to a Detective Sergeant Sitengu, who was making inquiries into the murder. The relevant part of the record of his evidence reads as follows:

"I produce it - no objection, except that she made no statement at all, per my instructions.
Court: Do you wish to argue that there should be a trial within a trial?
Mr Lisulo: I do not so submit.
Court: Admitted and ruled Ex. 'P.8'."

Although this statement started with the words "It is true that I am not the one who killed him", the remainder of it clearly inculpates the second appellant as a "principal offender" within the ambit of section 21 of the Penal Code. It relates how, by arrangement with the first appellant, the second appellant induced the deceased to accompany her into Nuse forest where first appellant killed him in her presence, and how she assisted to bury the body.

The second statement was made about an hour and a half later on arrest. It reads: "I deny the charge of killing a person."

The third statement was made to Detective Constable Mulife the following day at about 3 p.m. it reads: "I admit the charge of killing Sixpence Muyunda because he was a witch."

No objection was raised by counsel to the production in evidence of this statement, but he did cross - examine Detective Constable Mulife as to whether the statement had really been made. The witness replied: "I'm sure she made a statement. I didn't just ask her to thumbprint a paper."

The remaining evidence against the second appellant related to what happened on 6th September, 1967, when according to Detective Sergeant Sitengu she accompanied him to Likumba Village and there produced a hoe from her yard and said to him: "This is the hoe which Nyambe used to break the deceased's thighs." There is no record of any cross examination regarding this part of Detective Sergeant Sitengu's evidence. It was only put to him that the second appellant did not make the first of the statements attributed to her. He replied: "She did make a statement. If she says she didn't, she'll lie."

At the trial it is clear that the defence wished to challenge and did challenge the admissibility of the first and third statements, not on the grounds that they were not voluntarily made but on the grounds that they were not made at all.

[1] [2] Mr Houston - Barnes submitted that in these circumstances - and notwithstanding Mr Lisulo's declining to ask for trials within the trial to be held - the learned trial judge should have held a trial within the trial in respect of each statement to determine whether it had been made or not.

The learned trial judge in his judgment said:

"I did not hold trials within the trial because I do not consider that such should be held when an accused alleges that he made no statement (as opposed to an allegation that he made a statement involuntarily)."

He then went on to review the authorities on this point which are in conflict. In *Chilenga v R* [1], Somerhough, J, said: "A denial that a confession was voluntary introduces the procedure described often as a trial within a trial . . . On the other hand, if the accused's story is that he never made the confession at all, this is a straightforward traverse of the prosecution witnesses [sic] story, and must be dealt with, like any other traverse when the defence opens." In *Mambilina v R* [2] I said (at page 510): "It is obviously undesirable that the normal running of a trial should be interrupted by the holding of subsidiary trials on individual issues when this can be avoided. But the position in regard to statements allegedly made by the accused in the trial is somewhat different. If the

statement was not made voluntarily - *a fortiori* if it was not made at all - the accused is entitled to have it entirely excluded from the consideration of the court... Accordingly, where the introduction of a statement is challenged, the issue of its introduction should be resolved by the procedure of a trial within a trial." There are East African authorities which support this view of the matter.

However, in *Manjonjo v R* [3], the Federal Supreme Court held that the question of admissibility of evidence, which it was the function of a judge alone to decide, arose where there was some preliminary question of fact to be decided or some condition precedent to be established, and that a total denial of the making of a statement did not disclose any such preliminary question. Either the confession was made or it was not, and that was an issue in the trial.

Finally, in *Lukere v R* [4], at page 67, Conroy, CJ, said:

> "The admissibility of a confession is different from the admissibility of other kinds of evidence, and falls within a peculiar category of its own. Therefore, the test laid down by Somerhough, J, that a repudiated confession 'is a straightforward traverse of the prosecution witnesses' story, and must be dealt with like any other traverse when the defence opens', is an incorrect statement of law. In order that a confession should be admissible, it is necessary for the Crown to establish two things:
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> (a) that the accused made the confession; and
>
> (b) that he made it voluntarily.
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> The prejudicial nature of a confession is so great that the court is jealous to guard against injustice to the accused by its unfair admission. Therefore, the custom has grown up over the years, and now constitutes well - settled practice, that where the admissibility of a confession is challenged, the court should hold a trial within a trial."

BLAGDEN CJ

He went on to say that when, as here, the judge is both judge of law and judge of fact, "trials within trials are not wholly apt", but that they were so firmly established in our procedure that it was now too late to object to them in principle. He held that trials within trials were the proper means of establishing whether a statement was made and whether it was made voluntarily.

The motivating factor behind trials within trials to determine the admissibility of an accused's statement is the simple desire to avoid prejudice to the accused. A statement made by an accused person to a person in authority such as a police officer stands, as evidence, in a class by itself. It can constitute a vital and indeed conclusive pointer to his guilt or innocence. If there is any contest as to its admissibility this should be determined as soon as possible and before its contents become known to the tribunal of fact.

The trial within a trial procedure achieves this satisfactorily where issues of fact are decided by a jury or by assessors, since the legal issue of the admissibility of the statement is determined by the trial judge in their absence and thus without their acquiring any knowledge of the contents of the statement. The trial within a trial procedure is less satisfactory when it has to take place before a judge or a magistrate who has to act as judge of both fact and of law. He cannot separate his functions physically, and although an experienced judge may be able to shut out from his mind, where necessary, all prejudicial material which he may have heard of during the trial within a trial, it may not be so easy for a less experienced magistrate to do so; and the accused himself may feel that justice is unlikely to be done to him by a judge or magistrate who is aware of the contents of his statement, even though he has ruled it inadmissible. Furthermore, there is the added hazard that the accused's participation, or non-participation, in the trial within the trial may adversely affect his credit in advance of his defence. Here again, even if his credit is not so adjudged, the accused may think that it must have been, and feel, in consequence, that justice has not been done to him.

But, in my view, despite these disadvantages, the trial within a trial procedure still serves a purpose, and I am satisfied that it is fairer to the accused to have a trial within a trial than not to have one. I would point out that the procedure will indeed prove fully effective if, in the exercise of his discretion to reject evidence unduly prejudicial to the accused, the judge is able to resolve the issue of admissibility without recourse to the contents of the statement and without cross - examination of the accused upon its contents.

But the point raised in this appeal is whether it is really necessary to hold a trial within a trial where only the actual making of the statement is challenged. Whether a statement was made or not made is, of course, a question of fact, but it is a question of fact affecting the admissibility of the statement. See *Mwangi s/o Njeroge v R* [5] at page 380. I would first of all observe that it is comparatively rare, in my experience, for the actual making of a statement to be challenged *simpliciter*. Although in many cases allegations are made that the accused's statements have been concocted, they are usually coupled with further allegations that some form of inducement has been used to persuade the accused to sign or thumbprint the statement. *Mambilina's* [2] case was an example. In these circumstances, of course, a trial within a trial must be held. Where, however, the allegation is limited - as it would appear to be here - to the non-making of the statement, I would concede that this issue should be capable of resolution in the course of the trial, like any other issue within it, without occasioning any prejudice to the accused, since the court should have no difficulty in excluding from its mind any prejudicial matter contained in a statement which it was satisfied was never made by the accused at all. Nevertheless, I still take the view that a trial within a trial should be held whenever the admissibility in evidence of an accused's statement is challenged, whatever the reason for that challenge, if only because this makes for consistency of treatment. I have already stressed the special character of this type of evidence. There should be no half measures with regard to the admission of a statement to a person in authority. It should be either in or out, and the decision to admit or reject it should be determined as a special issue directly the question of its admission arises. This is best achieved by the trial within a trial procedure.
In the present case, the learned trial judge did not hold trials within the trial to determine the admissibility of the statements which the second appellant claimed she had not made. In accordance with what I have said, I think he should have done so, and I think he should have done so notwithstanding that defence counsel, although invited, did not ask for him to do so. That he did not do so constituted, in my view, an irregularity. But it was a curable irregularity. The question is, has it been cured, and, in particular, if so has it been cured without the occasioning of any prejudice to the second appellant?
I have had the advantage of reading the judgment which the learned judge of appeal is about to deliver, and I agree with his reasoning on this aspect of the subject. The second appellant may well have been prejudiced here and her counsel may well have been caught on the horns of the dilemma referred to by the East African Court of Appeal, in *M'Murairis/o Karegwa v R* [6] at page 265, where his judgment reads:

"when the Court follows the procedure of 'a trial within a trial', the accused may elect to give evidence and may call witnesses limited to the one particular issue of admissibility and, in such case, neither he nor his witnesses can be cross - examined on the general issue. If, how - ever, his opportunity to adduce evidence is postponed until he is called on to make his defence to the charge then, although he may restrict his own evidence - in - chief and that of his witnesses to the particular issue, yet nevertheless both he and they once in the witness - box are exposed to cross – examination on the general issue. There is obviously a very real danger of prejudice here: the defence may be caught on the horns of a dilemma - if no evidence is given the statement will be admitted and a conviction inevitably follow: if the accused goes into the witness - box, the probability is that he will make such damaging admissions under cross - examination that a conviction is almost as inevitable."

At her trial the second appellant did not give evidence. But she may have been influenced not to do so, to her prejudice, by the considerations I have just referred to.
Had the learned trial judge had her evidence before him he might have thought differently about the making of her statement. The possibility is slight, but it exists.
I do not think therefore that her conviction should stand, and I would for myself allow her appeal.

Judgment

Doyle JA: I agree that Nyambe Mwiya's appeal should be dismissed for the reasons given by the learned Chief Justice.
[1] [2] The success or otherwise of Mutundakule Ikweti's appeal depends upon whether her repudiated confession was admissible in the absence of a preliminary trial within a trial to determine admissibility. This question has already been the subject of a number of conflicting decisions in the East and Central African courts. It is necessary to consider the reasoning underlying these decisions.

In *Chilenga v R* [1], Somerhough, J, stated:

"If the accused's story is that he never made the confession at all, this is a straightforward traverse of the prosecution witnesses *[sic]* story, and must be dealt with, like any other traverse when the defence opens. "

In *Mwangi s/o Njeroge v R* [5], the same question came before the Court of Appeal for Eastern Africa. They dealt with the matter in the following passage (at page 380):

"In the course of the discussion Mr Twelftree contended that in a case where the defence repudiates the making of a statement it is not necessary for the trial court to conduct what is conveniently termed 'a trial within a trial' and to give an interlocutory ruling on the question. This argument is fallacious, but as there still seems to be some doubt on the matter we take this opportunity of resolving it. The question whether a statement tendered in evidence was or was not made by an accused person is a question of fact affecting the admissibility of the statement. The decision of such fact is a matter for the Judge. 'Where the question of admissibility depends on the proof of some preliminary but disputed fact, it must in general be decided by the Judge alone . . .and this is so even where the given fact happens to be also in issue in the action and ultimately determinable by the jury'." (The Court cited as authority Phipson on Evidence, 9th ed., page 11, without detailed examination of the cases upon which it was based.)

Here the court clearly holds that there is no mere traverse but that a condition precedent to the admissibility of a repudiated statement is the determination of the preliminary question of fact whether or not the statement was made by the accused. The court went on to say (at page 380):

"This question was recently fully considered by this Court in *M'Murairi v Reg. ante* page 262. What was there said applies equally to cases where the accused repudiates the alleged statement as to cases where he retracts it."

M'Murairi s/o Karegwa v R [6] was a case where the voluntariness of the statement was questioned, but no trial within a trial was held. The Court of Appeal for Eastern Africa reviewed the East African authorities in the following passages (at pages 264 - 265):

"The question now remaining to be answered in the instant appeal is, what is the effect on the trial of the admission of the statement at the wrong time and before all the relevant evidence has been heard?

In all the decisions of this Court on this issue which are cited above, the failure to follow the procedure of holding a 'trial within a trial' has been held to be a curable irregularity and the appeals against conviction have been dismissed. It must be presumed that in each of these cases this Court was satisfied that in fact no injustice had been caused. This Court has, however. not always been entirely consistent in its treatment of the statement irregularly admitted. When the Court had been satisfied that all the relevant evidence has been heard and considered by the trial Judge (though not necessarily at the right time) and that his conclusion thereon was the only reasonable one, it has taken the substance of the statement into consideration as part of the evidence in the case: for example, in the latest case to come before this Court, namely, *R v Ibraham and others* [7], this Court said:

' It is hard to see what other evidence could have been before [the trial Judge] had he in fact conducted "a trial within trial" before admitting the statements, which is what he should have done . . . We do not think for one moment that he might have found otherwise had he tried the issue at the proper time during the course of the trial.'

It is important to note that in these appeals the prosecution case mainly depended on the statements irregularly admitted.

On the other hand, in *R v Petero Mukasa (supra*), this Court appears not to have taken the substance of the statements into consideration because the accused, who were not legally represented had called no evidence on the issue whether the statement was voluntarily made and it was not clear from the record whether or not they had been informed of their right to adduce such evidence. We would, with respect, desire to say that that decision was obviously entirely correct.

Some difficulty caused by the judgment in *R v Sweta (supra*). In that case the trial Judge declined to conduct a 'trial within a trial', but did hear and consider the evidence for the defence relevant to the issue of admissibility when the accused elected to give evidence. This court was of opinion that the Judge's conclusion on the evidence was fully justified. Nevertheless, the court said 'the statement must be excluded on the sole ground that there was no proper determination by the learned Judge before its admission as to its voluntary character'. The appeal was, however, dismissed as the Court was of opinion that there was abundant evidence, apart from the disputed statement, to support a conviction. *Sweta*'s case, which had not then been reported, is not referred to in the case of *Ibrahim and others.*

Having fully reconsidered this aspect of the matter, we think any difficulties in reconciling these decisions can be resolved by applying the only true criterion, namely, has the irregularity in fact prejudiced the accused? In this connection we think it necessary to draw attention to one aspect of the matter which has never been specifically

referred to in any of the reported cases. It is this: when the Court follows the procedure of 'a trial within a trial', the accused may elect to give evidence and may call witnesses limited to the one particular issue of admissibility and, in such case, neither he nor his witnesses can be cross - examined on the general issue. If, however, his opportunity to adduce evidence is postponed until he is called on to make his defence to the charge then, although he may restrict his own evidence - in - chief and that of his witnesses to the particular issue, yet nevertheless both he and they once in the witness - box are exposed to cross - examination on the general issue. There is obviously a very real danger of prejudice here: the defence may be caught on the horns of a dilemma - if no evidence is given the statement will be admitted and a conviction inevitably follow: if the accused goes into the witness - box, the probability is that he will make such damaging admissions under cross examination that a conviction is almost as inevitable.

This is an aspect of the matter which this Court should always fully consider before deciding that the irregularity has not led to injustice. If there is reason to believe that the appellant has been forced to give evidence on the case generally by the failure of the trial Judge to follow the correct procedure and that he has been prejudiced thereby, the effect may well be that the conviction cannot stand and not merely that the disputed statement cannot be looked at. In this connection we think it well to say that the record in the appeal of *Ibrahim and others (supra*) shows that there was in fact no prejudice caused to the appellants in that case: both their evidence - in - chief and the cross - examination were confined to their allegations of ill treatment suffered prior to the making of their statements."

The following determinations emerge from this case:

(1) Where the voluntariness of the statement is challenged, that goes to its admissibility, and this fact should be determined as a preliminary point by a trial within a trial.

(2) If the statement is admitted without a trial within a trial, this is an irregularity, but this irregularity can be cured if all the evidence upon which the judge must make his decision on admissibility is in fact before him and there is no prejudice to the accused.

(3) If the accused gives evidence, the whole evidence on admissibility does come before the judge, and the irregularity can be cured.

(4) If the real purpose of the accused in giving evidence is to rebut the statement, he will or may be prejudiced if he is cross examined on the general issue, a course which would not have been open to the prosecution if the issue of admissibility had been dealt with by a trial within a trial.

These determinations were made on the issue of voluntariness, but as has already been shown were adopted in relation to repudiation by the Court of Appeal for Eastern Africa in the case of *Mwangi s/o Njeroge* [5].

If the reasoning of the Court of Appeal for Eastern Africa is followed, the appeal of Ikweti should be allowed. She did not give evidence, and therefore the whole of the evidence which should be considered before the statement was admitted was not before the judge. It seems to me of no avail to argue that Ikweti had a choice of giving evidence when her defence opened. How can one know that her choice was not influenced by a belief on the part of herself or her counsel that she would then be exposed to cross - examination on the general issue? This could be so whether or not her counsel took the right course when at an earlier stage he declined to submit that a trial within a trial was required in law. On the East African case law, she has clearly been prejudiced. Indeed, it is difficult to envisage any case where an accused is not prejudiced by the admission of a *prima facie* inadmissible statement or confession, except that postulated by the East African Court of Appeal where the accused person gives evidence in his defence, including evidence on the voluntariness, and the prosecution refrains from cross - examination except on the latter issue.

The next case to which I shall refer is *Mambilina v R* [2], a decision of the High Court of Northern Rhodesia. In this case the trial magistrate had admitted a repudiated statement without a trial within a trial, but the accused had given evidence. He was, however, unrepresented and had omitted to cross - examine the Crown witnesses on the voluntariness of the statement. Blagden, J (as he then was), on appeal, referred to the cases of *Mwangi s/o Njeroge* [5] and *M'Murairi s/o Karegwa* [6] and went on - to say (at page 511 - 512):

In the present case before me it seems likely that the magistrate had before him all the evidence which could have been adduced with regard to the taking of the statement on the appellant's side, from the appellant himself

when he gave evidence. But what he did not have before him was the testing of the Crown evidence about it by cross - examination. He admitted the statement purely on Chibasa's *ipse dixit* without giving the appellant any opportunity to cross - examine on it. The appellant did have the opportunity to cross - examine Chibasa and also the witness Detective Constable Kabungu who had been present at the taking of the statement, on the conclusion of their evidence in chief. He did indeed cross - examine them but not as regards the taking of the statement and the magistrate has criticised this omission in the course of his judgment. But it must not be forgotten that the appellant was not legally represented at his trial, and he may well have thought that, having had his protest about the admission of the statement overruled, it would be a mere waste of time for him to pursue the matter by cross - examination. At any rate the final position in regard to it is that the admissibility of this statement and the issue as to whether it had been made by the appellant, or not as he maintained, was not properly tested as it should have been."

He eventually allowed the appeal on this ground. The decision in *Mambilina's* [2] case clearly follows and is in accordance with the East African cases referred to by the learned judge. Again it seems to me that if this case is to be followed this appeal should be allowed. The prejudice suffered by Ikweti in her failure to give evidence is at least as great as that suffered by Mambilina in his failure to cross - examine.

The point then came before the Federal Supreme Court in *Manjonjo v R* [3]. The court considered the English and East African cases and came to the conclusion that in the case of a repudiated statement there was no requirement to determine a preliminary question of fact on admissibility. Clayden, F.C.J., had this to say in his judgment in which the other members of the court concurred:

"In this case, if it be regarded as concerned with the admissibility of evidence, there is no preliminary question of fact. Either the confession was or was not made and that is the issue in the trial. And if it could be said that there was an issue of fact to be decided as to admissibility it is the issue in the trial, and what was said: by Baron Bramwell applies. With respect I do not consider that the case of *Mambilina v R [8],* 1962 R & N 507 (N.R), in so far as it decided that on a mere denial of the making of a statement there should be a trial within a trial, is correct. In fact, in that case the accused also maintained that he was assaulted to make him thumbprint the statement. So there was some indication of an alternative allegation that if anything was said force was used. For that issue there had to be a trial within a trial. The East African cases on which it is based do not discuss authority except one passage from Phipson. And the prejudice which is spoken of, that the trier of fact becomes aware of the statement, is not I consider prejudice but part of the *Crown* case, of which the trier of fact should become aware."

This decision is in accord with that of Somerhough, J, in *Chilenga* [1] and was arrived at after a full examination of the *English* case law.

At this stage there were, therefore, in favour of the proposition that there was a preliminary question of fact to be decided, decisions of the Court of Appeal for Eastern Africa and one reported decision of the High Court of Northern Rhodesia. For the contrary proposition there was a decision of the Federal Supreme Court and one reported decision of the High Court of Northern Rhodesia. Both of these opposing propositions purported to be based on the same English law.

The point again came up for decision on appeal in the High Court of Zambia in the case of *Lukere v R ,* [4], a case decided after the dissolution of the Federation. Here again a statement had been repudiated, but the trial magistrate had admitted it without holding a trial within a trial. Conroy, CJ, referred to the cases already cited in this judgment. Without deciding whether previous decisions of the Federal Supreme Court were binding on him, he held that *Manjojo's* [3] case was not as it had been decided in part on section 280 of the Criminal Procedure and Evidence Act of Southern Rhodesia. This was a somewhat specious ground as the Federal Supreme Court had decided the point after consideration of the English and East African cases and without reference to the Southern Rhodesia Act and had expressly disapproved of *Mambilina's* case. However, Conroy, CJ, felt able to deal with the matter untrammelled by that authority and did so in the following passage at page 67:

"My own view of the matter is as follows. The admissibility of a confession is different from the admissibility of other kinds of evidence, and falls within a peculiar category of its own. Therefore, the test laid down by Somerhough, J, that a repudiated confession 'is a straightforward traverse of the prosecution witnesses' story, and must be dealt with like any other traverse when the defence opens', is an incorrect statement of law. In order that a confession should be admissible, it is necessary for the Crown to establish two things:

(a) that the accused made the confession; and

(b) that he made it voluntarily.

The prejudicial nature of a confession is so great that the court is jealous to guard against injustice to the accused by its unfair admission. Therefore, the custom has grown up over the years, and now constitutes a well - settled practice, that where the admissibility of a confession is challenged, the court should hold a trial within a trial. This practice grew up in England and other parts of the Commonwealth where trial by jury is normal. There trials within trials are held by the judge in the absence of the jury, because the question of admissibility is one of law for the judge and not of fact for the jury. Where, as in this country, the judge is both judge of law and judge of fact, I regard trials within trials as not wholly apt for our conditions; nevertheless, they are so firmly established in our procedure that it is too late in the day to raise any objection to them in principle. The issue to be tried in a trial within a trial is a question of law, i.e. admissibility. The admissibility of a confession depends upon the two factors I have mentioned above. If, therefore, an accused challenges a confession on the ground that he did not make it, then it is for the Crown to establish that it was so made, and for the court to try that issue in a trial within and trial. Therefore, trials within trials are the proper means of establishing the issue of whether a statement was made and whether it was made voluntarily. I wish to make it clear that I am not now dealing with a retracted confession as opposed to a repudiated one; in respect of retracted confessions different considerations arise."

Conroy, CJ, then went on to purport to overrule Somerhough, J's decision in *Chilenga's* [1] case, a strange ruling, as this was a decision of a court of concurrent jurisdiction from which the learned Chief Justice was merely differing.

It is clear that Conroy, CJ's decision is based on the postulation that before a repudiated confession is admitted, there is a preliminary point to be determined, namely, was it made by the accused. It is not 25 clear whether he considers that this is a requirement of the general law of evidence as was decided by the East African cases and *Mambilina's* [2] case or whether he is holding that this arises exceptionally in the case of a confession, solely by long custom in England and other parts of the Commonwealth.

It is obviously correct that a confession is not evidence against an accused person unless it is proved to have been made or assented to by him. Clearly if this is not proved the statement becomes a mere irrelevance. It is, however, to me a novel proposition that the laws of evidence require that the making must be proved as a separate and preliminary point before it is admitted. There are numerous matters of evidence which only become relevant when the connection with the accused person is proved, for example, documents allegedly made in connection with the crime by the accused person before or during the crime, articles of clothing allegedly belonging to the accused person, fingerprints allegedly taken from the accused person at the police station, incriminating conversations (which may be confessions) allegedly overheard taking place between the accused person and another prisoner. In any of these cases it is open to the accused person to deny that he made the document, owned the articles, gave the fingerprints, or had the conversation. In none of these cases in my experience has there ever been a trial within a trial to determine admissibility, but in each case the matter is left to the general issue.

The English cases referred to in Archbold, *Criminal Pleading Evidence and Practice,* 36th ed., paragraph 1115, set out the test of admissibility of a confession as follows:

(1) was any promise of favour or any menace or undue terror made use of to induce the prisoner to confess;

(2) if so, was the prisoner induced by such promises or menace etc. to make the confession sought to be given in evidence.

As is pointed out in that paragraph the prisoner was not at one time entitled as of right to give evidence at that stage of the proceedings. It is only in comparatively recent times that his right to do so has been conclusively admitted by the judges. Furthermore, the restriction on admissibility of confessions is related solely to confessions made to a person in authority. Where, then, is the rule of evidence upon which the East African decisions and *Mambilina's* [2] case depend? I consider that there is no such rule. The clog on the admissibility of confessions is entirely a judge - made rule which has evolved in its present form and practice over a period of time. As Lord Sumner said when delivering the judgment of the Judicial Committee of the Privy Council in *Ibrahim v R* [7], at pages 609 - 611:

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

and further on:

"It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. In an action of tort evidence of this kind could not be excluded when tendered against a tortfeasor, though a jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy. 'A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it': *Rex v Warwickshall.* (1) It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice: *Reg. v Baldry.* (2) Accordingly, when hope or fear was not in question, such statements were long regularly admitted as relevant, though with some reluctance and subject to strong warnings as to their weight."

Lord Sumner then demonstrated how the rule grew up and clearly showed that it has always been a matter of the discretion of the judges, that discretion hardening in favour of the prisoner with the passage of time. The reasons given have no application to the case where the making of the confession is denied.

Lord Sumner's view was reiterated by Lord Morris in *Sparks v R* [8] at page 981.

The fact that the rule is judge - made and of limited application, and not to be extended by mere logical process, is also illustrated in *Deokinanan v R* [9], where Lord Dilhorne, delivering the judgment of the Judicial Committee of the Privy Council, had this to say (at page 350):

"The fact that an inducement is made by a person in authority may make it more likely to operate on the accused's mind and lead him to confess. If the ground on which confessions induced by promises held out by persons in authority are held to be inadmissible is that they may not be true, then it may be that there is a similar risk that in some circumstances the confession may not be true if induced by a promise held out by a person not in authority, for instance if such a person offers a bribe in return for a confession. There is, however, in their lordships' opinion, no doubt that the law as it is at present only excludes confessions induced by promises when those promises are made by persons in authority."

I therefore consider that the East African cases referred to and *Mambilina's* [2] case were based on an incorrect premise.

I have furthermore been unable to find any long course of custom in the English and other Commonwealth courts requiring, in the case of a repudiated confession or statement, proof by a trial within a trial of the making as a preliminary and separate issue before its admission. Indeed, the only reported case which I can find and which was referred to by the learned trial judge is the decision of Devlin, J (as he then was) in *R v Roberts* [10], which is to the contrary.

Furthermore, the practice which on the question of voluntariness limits the clog on admissibility to those confessions made to a person in authority is at variance with any such supposed extension to repudiated confessions, whether on grounds of logic or otherwise.

I do not consider that there is any such customary practice in England or in Zambia and to introduce it now will be an extension of the long - standing English practice which has been followed in Zambia. It is of course open to this court to extend the practice, if such were desirable, in the particular circumstances prevailing in Zambia. In my opinion it is not desirable so to do. Conroy, CJ, in *Lukere's* [4] case, said: "where as in this country the judge is both judge of law and judge of fact . . . trials within trials are not wholly apt for our conditions". I agree with this comment, and I can see no reason why a not very apt procedure should be further extended. It would not in my view even be in the interest of the prisoner to do so. Indeed, in my opinion even the existing practice of a trial within a trial on the question of voluntariness is of little practical use to a prisoner and may require further examination in an appropriate case with a view to making it a merely discretionary procedure. In the vast majority of cases, unless the prisoner is able by cross - examination of the prosecution witnesses to cast a doubt upon the voluntariness of the confession, his own evidence carries his case no further. In such case he is in the unhappy position, when called upon for his defence, that he must feel he has already been discredited. Whether in these circumstances he feels that justice is being done is open to question.

It is a rare case where, nothing having been achieved in cross - examination, a prisoner convinces the judge that his statement is involuntary. Where cross - examination has implanted a doubt, the prisoner's evidence is unnecessary.
I would, however, say that in my view, and I am fully aware that I am further trespassing outside the strict bounds of this case, where it is shown that an accused person has at first denied a crime and then after a considerable period in police custody suddenly comes forward with a confession, these circumstances in themselves raise a *prima facie* reasonable suspicion of involuntariness which requires cogent evidence to remove.
For the reasons I have given earlier I consider that a trial within a trial is not required before a repudiated confession or statement is admitted and on this question I consider that *Mambilina's* and *Lukere*'s cases were wrongly decided. I would dismiss the appeal of Mutundakule Ikweti.

Judgment
Whelan J : For the reasons given by the learned Chief Justice I agree that the appeal of the first appellant Nyambe Mwiya should be dismissed and that with regard to the appeal of the second appellant Mutundakule Ikweti there is nothing in the submission made by her in support of her fourth ground of appeal - as to the insufficiency of inquiries made to procure the attendance as a witness at her trial of the wife of the deceased - which would incline this court to interfere with the findings of the learned trial judge.
[1] [2] The only matter of substance in this appeal is whether or not a trial within a trial should have been conducted to determine not whether the statement alleged to have been made by the second appellant was voluntary but whether it was made by her at all. For the reasons given by the learned judge of appeal I am of the opinion that it should not.
In a trial before a magistrate or a judge sitting without a jury, when the magistrate or judge is the judge of both law and fact, a trial within a trial to determine the admissibility of a confession is, to say the least, in the words of Conroy, CJ, in *Lukere's* [4] case "not wholly apt". I consider it most undesirable that the judge or magistrate should have to make a preliminary finding involving the credibility of an accused prior to putting him on his defence. In my experience when a statement is ruled as inadmissible it is usually as a result not so much of what the accused has said in evidence but as a result of answers given in cross - examination of the prosecution witnesses seeking to produce it.
But the issue here is whether there should be a trial within a trial to establish whether a confession has been made or not. I can see no reason why this question, which is purely one of fact, should be the subject of a preliminary issue any more than any other matter of fact adduced in evidence of the prosecution - such as to the evidence of an eye - witness as to an act done by the accused when the accused's defence will be, one of alibi. As to the question of prejudice, if an accused submits that he never made an alleged confession, the question of whether it was voluntary, that is to say, whether as a matter of law it is admissible in evidence against him, cannot arise. I cannot imagine any judge or magistrate, having found as a fact that a statement was not made, nevertheless being influenced by its contents.
I would, therefore, dismiss the second appellant's appeal.
Appeal dismissed.