IN THE COURT OF APPEAL OF ZAMBIA **APP NO.194/2022**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

JOSEPH MUBANGA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Mchenga, DJP, Banda-Bobo and Sharpe-Phiri, JJA
On the 19th day of October, 2023 and 14th November, 2023.

For the Appellant: **Ms. E. E. Banda- Senior Legal Aid Counsel of Messrs Legal Aid Board**

For the Respondent: **Mr. C. Baku – Deputy Chief State Advocate of Messrs National Prosecutions Authority**

JUDGMENT

Banda-Bobo delivered the Judgment of the Court.

Cases referred to:

1. Tapisha v. The People (1973) ZR 222 CA.
2. Chinyama and Others v. The People (1977) ZR 426
3. George Nswana v. The People (1988 – 1989) ZR 174
4. Charles Lukolongo and Others v. The People (1986) ZR 115 (SC)
5. Chigowe v. The People (1977) ZR 21
6. Patrick Kunda and Robertson Muleba Chisenga v. The People (1980) ZR 105
7. Kambafwile v. The People (1972) ZR 242
8. Simon Malambo Choka v. The People (1978)
9. Mutambo and 5 Others v. The People (1965) ZR 24
10. Major Isaac Masonga v. The People (2009) ZR 129
11. Misupi v. The People (1978) ZR 271
12. Oscar Kakunda and 2 Others v. The People (App No. 52, 53, 54/20 22
13. Sekeleti v. The People (SCZ No. 36 of 1974) (unreported)
14. Lukolongo and Others v. The People (1986) ZR 115

1.0. **INTRODUCTION**

1.1. This is an appeal against the judgment of Hon. Lady Justice Chembe, delivered on 4th November 2022 in which she convicted the appellant on two counts of aggravated robbery and murder.

1.2. The allegation in count one was that the appellant and his fellow accused (now late) robbed David Likambi of a motor vehicle, Toyota Carina registration No. ACL 1811 valued at K40,000 by using actual violence to obtain it or to overcome resistance to it being stolen.

1.3. In the second count, it was alleged that during the same period, and after stealing the said vehicle, the appellant and his fellow accused (now late) murdered the said David Likambi.

1.4. Needless to say, the appellant denied both charges.

2.0. **EVIDENCE IN THE COURT BELOW**

2.1 At trial, evidence for the State came from three witnesses.

2.2 **PW1** was the brother to the deceased. He testified that prior to his brother going missing, they had been together and had only parted ways when he had to take a passenger. Upon his return,

he found that his brother was not at the place where he left him. Assuming that he had gone home, he too left and went home.

2.3 According to PW1, his brother's wife called him the following morning to tell him that his brother had not come home the previous night. A search for his brother was instituted; and a report of a missing person was made at Kansenshi Police and two other police stations.

2.4 Later, they went to Chipulukusu Police Post, where they found his brother's vehicle. The police officers informed them that the vehicle had been found abandoned in Chipulukusu Compound. They were also informed of a body found floating in water. Later, they were taken to the Kafubu river, where he was able to identify the body in the river as that of his brother.

2.5 With respect to the recovered vehicle, PW1 said it had been stripped of the battery, radio and the distributor. Later, he proceeded to identify the car as that of his brother, pointing out its features, as well as the location of the missing items from the car.

2.6 Under cross examination, the witness told the court of the location where his brother used to operate his taxi from. He

also confirmed that there were other people operating taxis from the same location but no one had confirmed seeing who booked his brother's taxi. Further, he agreed that the police were the ones who told him of the missing battery, radio and distributor from the car.

3.0. **PW2** was **Rodger Katebe.** He testified that he had been approached by two people and he had bought the battery from the stolen vehicle. Later, the same person had also returned with someone selling a distributor. He told the court that he had dealt with Joseph and given him the money for the two items. Though he said he knew Joseph, he said he had just been seeing him around, and only got to know his name when he was buying the items. He identified the appellant as the person he bought the items from. He also identified the items that he bought from him.

3.1 Under cross examination, PW2 admitted that the items in issue were found in his possession. He admitted to being in possession of the battery and distributor, but not the radio.

4.0. **PW3** was **Webster Zemba**, Detective Sergeant by rank stationed at Ndola Central Police Station. He received a report of an

abandoned motor vehicle in Chipulukusu. He retrieved the vehicle from the scene. He discovered that the battery and distributor were missing, as was the radio.

4.1 Later, a report of a missing person was received. Further, that he discovered a dead body floating in the Kafubu river. He told court that PW1 identified the body as that of his brother. Investigations were instituted into the cause of death.

4.2 Their investigations led to the arrest of the appellant and another person, as they had been seen with a battery and distributor. The two were arrested in connection with the two crimes. In a Warn and Caution Statement, Amos Lubumba (Deceased) told PW3 that it was the appellant who killed the deceased.

4.3 This confession evidence was objected to. A trial-within- a trial was conducted to ascertain the voluntariness of the confession.

5.0 **DECISION ON TRIAL-WITHIN-A TRIAL**

5.1 After receiving evidence from both sides in the trial-within-a trial, as well as submissions, the learned trial Judge rendered her Ruling.

5.2 In coming to her decision, the learned Judge relied on the case of **Tapisha v. The People**[1], for the principle that voluntariness is a condition precedent to admissibility and that the onus to prove voluntariness once it is raised rests on the prosecution. The learned Judge found that the accused/appellant voluntarily gave a statement to the police and signed the warn and caution statement, contrary to what he and his counsel said.

5.3 As regards the breach of the Judges Rules by failing to explain the accused's rights, the learned Judge explained the consequences of the breach of Judges Rules by relying on the case of **Chinyama and Others v. The People**[2].

5.4 On the totality of the evidence adduced in the trial-within-a trial, the learned Judge found that the accused person gave his confession in the warn and caution statement freely and voluntarily. She admitted the confession statement into evidence and the matter proceeded.

5.5 We note that the sole ground of appeal herein relates to the admission of the statement by the learned trial Judge. We deem

it unnecessary to deal with the rest of the evidence adduced by each party.

6.0 DECISION OF THE LOWER COURT

6.1 After considering all the evidence before her, the learned Judge found as a fact that the deceased was killed. That the accused confessed to the police that he strangled the deceased and threw him in the river. She thus concluded that the death was homicide.

6.2 As to whether the prosecution evidence was sufficient to show that it was the accused who caused the deceased's death, the learned Judge answered in the affirmative. She was of the view that though the evidence was circumstantial, it was sufficient to remove the case from the realm of conjecture as it had attained a degree of cogency, which could only permit an inference of guilt.

6.3 That the evidence showed that the accused was seen by a police informant selling a car battery and distributor on 21st December 2021. That the evidence also showed that the deceased's vehicle was found abandoned on 20th December 2021 in

Chipulukusu with missing parts. That the accused was found in possession of stolen items a day or two after they were stolen.

6.4 The learned Judge applied the principle of recent possession as applied in the case of **George Nswana v. The People[3].** The learned Judge relied on the evidence of PW2, who told Court that he bought the items from the appellant. That though the witness fell into the category of a witness with an interest to serve, having received or bought stolen property, she accepted his evidence, as it was corroborated by other evidence, specifically the confession statement. She ruled out the possibility of false implication.

6.5 As regards malice aforethought, she found that the appellant had a clear intention to kill. That by strangling the deceased with a shoe lace, he knew that death would result. That the act of throwing the deceased in the river was meant to ensure that there was no chance for him to survive. That he had an intent to commit a felony as his desire was to steal the motor vehicle.

6.6 Ultimately, she convicted the appellant on both counts.

7.0 **THIS APPEAL**

7.1 Dissatisfied with the lower court's judgment, the appellant has appealed, fronting one ground of appeal crafted thus:-

> **(i) The trial Judge erred in law and in fact when she admitted into evidence the confession statement made by the appellant to the police after a trial-within-a-trial.**

8.0 **HEADS OF ARGUMENT**

8.1 The appellant filed Heads of Argument on 4th September 2023. At the hearing, counsel relied entirely on the filed documents. In arguing the sole ground of appeal, the appellant took issue with the learned Judge's acceptance of the prosecution's evidence after stating earlier that the now appellant was not properly cautioned as appear at page 64, R9, paragraph 2, lines 6 – 9 of the court record. That the learned Judge went on to state at lines 19 on the same page that:-

> **"In the present case, although the evidence of the prosecution witnesses was somewhat unsatisfactory on the issue, the proper caution was recorded on the statement and <u>I do not find any improper or unfair conduct on their part"</u>** (underline supplied)

8.2 It was contended that this was a misdirection and one which was fatal and prejudicial to the appellant. Further, that the learned Judge misapplied the law in the case of **Chinyama and Others v. The People**[2] which she cited at page 64 of the record. Counsel conceded that the Judges Rules are not law, but rather rules of practice applied world over, but was of the view that that fact alone means that courts have discretion in applying them; especially when it came to the probative value and prejudice to an appellant person.

8.3 In support, counsel relied on the case of **Charles Lukolongo and Others v. The People**[4] where it was stated that:-

> **"we are mindful that Judges Rules are rules of practice and therefore that they have no force of law. However, we are of the view that where the prejudicial effect of any given piece of evidence far outweighs its probative value, justice demands that such evidence must, per force be excluded. It is our considered opinion that the prejudicial effect of the statements in dispute in this case did outweigh their evidential value. The trial**

Judge should therefore, in his discretion, not have allowed the prosecution to tender them in evidence. That he did admit them was a serious misdirection on his part." (underline supplied)

8.4 Counsel reiterated that the warn and caution statement from the appellant was extremely prejudicial to him, contending that it led to his conviction.

8.5 That it was clear that, in the trial-within-a-trial, PW1 failed to explain exactly how he warned and cautioned the appellant at the time of taking his statement. That this was the same with PW2 and therefore the court was right to state that it appeared that the appellant was not cautioned. It was counsel's contention that the importance of informing an accused person of their rights cannot be over emphasized, since the same is constitutionally enshrined.

8.6 It was submitted that the officers in the case mostly concentrated on informing the appellant on who he could have present during the warn and caution, but left out the most fundamental rights tht an officer must give to an individual, namely:-

(i) the right to remain silent, and

(ii) the right to avoid self incrimination.

8.7 That these must be given only when a suspect is both in custody and subject to interrogation. Counsel was of the view that being in custody was not restricted to being in a police cell or at the police station and went on to submit on the import of what it meant to be in custody. Counsel avowed that he was bringing up this issue, because the evidence of both PW1 and PW2 in the trial-within-a-trial as appear on page 38, lines 10 to 16 was to the effect that the appellant had been interviewed several times while in custody, and his rights were not explained to him during the said interviews and at the time of giving the statement.

8.8 That the Court in its Ruling alluded to the inconsistences in the prosecution evidence on how long the interrogation took. That however, the court chose to fill in the blanks, concluding tht:-

"In my view, even if I were to accept that the period took two hours, the period is not too long considering that a caution must be recorded and signed before the statement is recorded and read back to the accused."

Counsel contended that this was a total misdirection by the court

8.9 Counsel contended that the appellant denied ever making a statement, nor signing P4; but the court accepted that the appellant made the statement and therefore had no issue on that score. This is because the appellant accepted that the signature on P4 was his. That despite this, the fact still remained that the warn and caution statement administered on the appellant before his alleged confession was not done in accordance with the law. Counsel contended that this was because he was not warned that anything he would say would be used against him in the courts of law, should the matter proceed to trial. Counsel claimed that there was thus no compliance with the principles laid down for the admissibility of admissions and confessions. To illustrate, he placed reliance on the case of **Chigowe v. The People**[5] where it was held that:-

> **"At a trial-within-a-trial to determine the voluntariness of a confession, the prosecution must negative beyond reasonable doubt any form**

of inducement which might have caused the accused to make a statement."

8.10 It was contended that based on the above, there was misdirection by the court when it admitted P4, and it should thus be excluded from the prosecutions' evidence. Our attention was called to the case of **Patrick Kunda and Robertson Muleba Chisenga v. The People**[6] in support.

8.11 It was submitted that once P4 is excluded, the court must then decide whether without it, there is sufficient evidence on the record to warrant the conviction of the appellant. Counsel referred us to the court's conclusion found at page 116, where, after analyzing the evidence, the learned Judge stated that she was satisfied that the prosecution evidence showed that the appellant was in recent possession of the stolen items a day or two after they were stolen. Counsel disagreed with this conclusion, and relied on the case of **Kambafwile v. The People**[7]**,** on inferences that the court can draw when confronted with an issue of recent possession.

8.12 Counsel submitted that the evidence before court established that the stolen items were found with PW2. That PW3 stated that the radio was recovered from Amos (deceased) and yet it was established under cross examination that in fact PW3 had, in his report to his superiors, indicated that infact the radio was recovered from PW2 as appear at page 79 of the Court record.

8.13 Further, that the court recognized that PW2 was a witness with an interest to serve and thus treated his evidence with caution. That despite that, the court misapplied the law, when in one breath, it said that he appeared very nervous when he gave his testimony, but then went on to justify it without any reason or prompting by stating that "It was understandable given the circumstances under which he was testifying and the fact that he was a suspect at some point."

8.14 In furtherance of the argument on a witness with a possible interest to serve, we were referred to the case of **Simon Malambo Choka v. The People**[8]

8.15 Further, that the evidence given by PW3 that the accused was seen by an informant with Amos selling stolen items was hearsay, as that informant was not before court to speak to its admissibility; and thus denied the appellant an opportunity to test the veracity of the statement by cross examination. The case of **Mutambo and 5 Others v. The People**[9] was adverted to. That in the absence of the inadmissible hearsay evidence relied on by the court below, showing that the appellant was seen with stolen items, there is no other evidence upon which a conviction could be competent.

8.16 We were urged to allow the appeal, quash the conviction, set aside the sentence and acquit the appellant.

9.0 **RESPONDENT'S HEADS OF ARGUMENTS**

9.1 We granted leave to the Respondent to file their heads of argument which they did on 22nd September 2023.

9.2 In response to the first limb of the sole ground of appeal, it was counsel's submission that the trial court was on firm ground when she found that there was no improper or unfair conduct on the part of PW3 when recording the

warn and caution statement. Counsel referred to page 64 of the court record lines 6 on what the court said; and p4 found on page 119 and 121; which the trial court referred to as containing the proper caution. That the court had expressed shock when she found that the officers were mainly alluding to having informed the appellant to have the right to call a witness to attend the warn and caution, while appearing not to have verbally warned him that he had the right to remain silent and further, that whatever he said could be used in a court of law. Counsel then went on to quote the first page of p4, second paragraph, which reads:-

> **"You are further warned that you are not obliged to say anything in answer to the above allegation unless you wish to do so, but whatever you say shall be taken done in writing and may be given in evidence. Do you wish to say anything"**

9.3 It was counsel's contention that although the Judge expressed shock, she did not contradict herself nor did she misdirect herself when she held that there was no unfair

or improper conduct on the part of PW1 and PW2 in the trial-within-a-trial. That this is on the basis that the words extracted from P4 above, were read out to the appellant together with the allegation against him before the recording of the appellant's warn and caution statement which was his confession.

9.4 That the trial court was on firm ground to hold as she did, namely that the appellant was properly informed of his rights, even though the witnesses were not very articulate on the stand on the issue.

9.5 In responding to the allegation of discrepancies in the testimonies of PW1 and PW2 in the trial-within-a-trial, on the duration of the process, where PW1 said it took 30 minutes, while PW2 said it took about two hours, counsel adverted to P4. He contended that the same consisted of three pages, and was divided into four parts, where two offences were shown. Counsel set out what each part contained. Based on the same, he argued that the trial court came to the conclusion she did as the discrepancies

were not fatal and fell within the acceptable parameters, regard being had to P4.

9.6 In arguing that the confession statement was properly admitted, counsel referred to the case of **Major Isaac Masonga v. The People**[10] where the Supreme Court stated that:-

> **"Every suspect has a fundamental right not to give evidence against himself unless he freely decides to do so. ...the courts in our country have a mandatory duty not only to guarantee a fair trial, but also to ensure that even the investigations were done in accordance with well-established principles of fair trial to all suspects regardless of their social status."**

9.7 Moving on to the second limb of the appeal, namely the issue of recent possession, counsel opined that the guidance by the Supreme Court in the case of **George Nswana v. The People**[3], was properly applied and adhered to by the trial Court.

9.8 Counsel went over the evidence adduced in the lower court, beginning with the disappearance of the deceased, discovery of the motor vehicle with missing components, his body being found floating in the Kafubu river, and how the appellant and his co accused sold a battery and distributor and their eventual apprehension by the police. Counsel recounted the role PW2 played in the recovery of the items, confirming that he bought the items recovered from him, from the appellant and his co accused at a total cost of K850.00. That he infact gave the money to the appellant.

9 .9 That in reviewing the evidence, the court had been alive to the fact that PW2 in the main trial, fell in the category of a witness with a possible interest to serve; as he was found in possession of stolen items, as per page 114 and 115 of the Record of Appeal.

9.10 That the court did not misapply the law as set out in **Misupi v. The People**[11], by not adhering to the requirement of the second tier that calls for exclusion of the danger of false implication before relying on the

evidence. Counsel relied on the case of **Oscar Kakunda and 2 Others v. The People**[12] where the Supreme Court stated that:-

> **"In practice, though, it is not necessary for the court to pedantically follow the two tier stage process, it is perfectly in order for the court to look out simultaneously for either corroborative evidence or something more."**

9.11 It was his submission that pages 115 and 116 of the record of appeal shows that the court was alive to the fact that there was need to look for corroborative evidence or something more as regards PW2's evidence to satisfy herself that the danger of false implication had been excluded. That the court found that there was corroborative evidence sufficient to exclude the danger of false implication. That these were in the form of the confession, the apprehension of the appellant way before knowing about PW2 as being the buyer, and finally the recovery of the items from PW2 after being led by the appellant and his late co accused.

9.12 Counsel contended that there was no evidence of possible collusion between PW2 and PW3 to concoct a story implicating the two, other than that PW2 was a suspect. That PW3 infact came to know PW3 through the appellant and his late co accused.

9.13 It was prayed that the appeal be dismissed as it lacked merit and that the conviction and sentence be upheld.

10.0 **HEARING**

10.1 At the hearing, Ms. E. Banda, acting for the appellant relied entirely on the sole ground of Appeal and the Heads of Argument. Mr. Baku, respondent's counsel relied entirely on the respondent's Heads of Argument.

11.0 **ANALYSIS AND DECISION**

11.1 We have carefully considered the record, the judgment of the lower court and submissions by counsel through their Heads of Argument.

11.2 In the sole ground of appeal, two issues have been raised, namely that the trial court ought not to have admitted the confession statement made by the appellant to the police after a trial-within-a-trial. The argument, in the first limb,

as we understand it, is that the appellant was not properly warned and cautioned prior to his confessing, in that the police did not inform him of his rights especially the right to remain silent.

11.3 That the appellant was not warned that anything he said would be used against him in a court of law. The second limb in the ground of appeal is to the effect that PW2's evidence was not corroborated by PW3 as it related to the doctrine of recent possession.

11.4 In arguing the first limb of the ground of appeal, reference was had to page 64 ROA, R2 paragraph 2 lines 6 – 9, where the court accepted that from the prosecution evidence it appears that the appellant was not properly cautioned. Counsel's argument was that despite such a finding, the learned Judge still went on to state that:-

> **"... the proper caution was recorded on the statement and that <u>I do not find any improper or unfair conduct on their part"</u>** (underline supplied)

11.5 The appellant contends that this was a misdirection on the part of the court and it was fatal and prejudicial to the

appellant, as it led to the appellant's conviction. Counsel faulted PW1, in the trial-within-a-trial, contending that he failed to explain exactly how he warned and cautioned the appellant at the time of taking his statement. Counsel went on to submit on the importance of informing an accused person of their rights, contending that this cannot be overemphasized, as this is a Constitutional right. That the officers did not alert the appellant of his fundamental rights, namely to remain silent, right to avoid self-incrimination. That these must be given only when a suspect is both, in custody and subject to interrogation.

11.6 While accepting that the court was right to accept the confession statement because the appellant acknowledged that the signature shown on p4 was his, the appellant was still aggrieved, contending that the warn and caution statement recorded prior to the confession was not done in accordance with the law, for the reasons shown in paragraphs 11.2 and 11.3 above.

11.7. The respondent on the other hand was of the view that the trial court was on firm ground when it held that it did not

find any improper or unfair conduct on the part of PW3 when recording the warn and caution statement, which was later admitted in evidence. Counsel acknowledged that the trial court expressed shock that the police witnesses in the trial-within-a-trial could not articulate the caution and rights they read to the appellant. That the Judge's shock was premised on the fact tht the two witnesses in the trial-within-a-trial appeared not to have verbally warned the appellant that he had a right to remain silent and further that whatever he said could be used in a court of law against him.

11.8 The issue for resolution on this limb is whether the learned trial Judge was on firm ground to accept into evidence the appellant's statement in view of the circumstances that were revealed in the trial-within-a-trial. In the case of **Major Isaac Masonga v. The People**[10], it was held *inter alia* that:-

> **"2. It is trite law and a constitutional duty for the prosecution to guarantee a fair trial and a fair trial starts with investigations. Any**

shortcomings in the investigations may seriously jeopardize the right to a fair proceeding and thereby also prejudice the accused person's rights to be presumed innocent.

3. **It is well established principle at law that a suspect who has to be interviewed by a person in authority has to be warned and cautioned before he makes any statement which may be produced in court against him."**

11.9 In the case of **Sekeleti v. The People**[13] which the Supreme Court cited with approval, in the **Chinyama v. The People**[2] case, it was stated that:-

"In the present case, no question of discretion arises; the only <u>improprieties alleged</u> were the <u>assaults</u>, and once the court expresses itself to be satisfied that these alleged assaults did not take place, there was no basis for the exercise of "its discretion". (underline ours for emphasis only)

The above authorities and indeed those cited to us by the appellant are still good law; and we are properly guided. The court is obliged, when dealing with an objection to the admission of an alleged confession, to satisfy itself that it was freely and voluntarily made. Once so satisfied, the court would then consider whether in its discretion it can be excluded, despite finding that it was voluntary and therefore admissible, because in all circumstances, the strict application of the rules as to admissibility would operate unfairly against the accused.

11.10 Reverting to the matter before us, page 24 ROA at lines 20 to 25, it is clear that what triggered the objection to the admission of the statement, was the evidence by PW3 when he was asked in examination in chief, whether he had recorded statements from the appellant and his late co accused. This is what he said:-

> **"Yes, it was warn and caution statements. So when I interviewed Amos Lubumba, he informed me tht it was Joseph Mubanga who killed David Likambi"**

11.11 Thereupon, Mr. Sakala, Counsel for the appellant then, rose and objected to the admission, contending thus:-

> **"Objection my Lady, the information from our client pertaining to the aspects of admitting were not voluntary."** (underline ours for emphasis only)

11.12 It was then that Mr. Libakeni, for the prosecution told court that they would be going into a trial-within-a-trial. When asked, Mr. Libakeni told court that they would go into a trial-within-a-trial to ascertain the voluntariness of the statement. See page 25 lines 7 to 10, ROA.

11.13 From the above, it is clear that the only reason for going into a trial-within-a-trial was to test the voluntariness of P4, the statement by the appellant. It is apparent from the record therefore that the basis for objecting to the confession statement, P4 was its voluntariness. This is evident from R2, the Ruling on a trial-within-a-trial appearing at page 57 ROA where the court said:-

> **"Counsel for the accused objected to the statement implicating the accused on ground that the confessions obtained from both accused**

was not given freely and voluntarily as the accused person was severely beaten."

11.14 Further, in the submissions on the trial-within-a trial, counsel for the appellant made it clear that the objection was on voluntariness of P4 when he submitted that:-

"It is our humble submission that the prosecution have failed to prove the critical elements of a voluntary confession against the accused person beyond reasonable doubt."

11.15 The point we are making in setting out the above, is that the objection that was raised was not on the fact that the appellant had not been warned of his rights to remain silent, and that anything he said would and could be used against him in a court of law. Rather, it was that he intimated that his confession was extracted through inducements or beatings as captured by the learned Judge.

11.16 In the case of **Lukolongo and Others v. The People[14],** cited to us by the appellant, the court made it clear that if one is appealing regarding an admitted statement, the

same should be premised on the grounds on which the objection was made in the lower court. The Court said the following at p122:

> **"We shall summarily dispose of this argument by pointing out that when at the trial, the first appellant's warn and caution statement was offered in evidence, its admission was objected to on the basis that it had been obtained under duress. The present argument by Mr. Zulu is therefore irreconcilable with the objection at trial. It is untenable.** (underline ours for emphasis only)

We are guided by the decision of the court in the above authority.

11.17 In *casu*, the objection had been on the voluntariness of the confession statement and not on the fact that the appellant was not advised of his rights as per Judges Rules. We find that the learned Judge was on firm ground in finding as she did. Even though the issue was raised

during the trial-within-a trial, that was not the ground for the primary objection, as shown above.

12.0 Further in the case of **Chigowe v. The People**[5] cited to us by the appellant, it was clearly stated that:-

"At a trial-within-a trial to determine the voluntariness of a confession, the prosecution must negative beyond doubt any form of inducement which might have caused the accused to make a statement."

12.1 At pages R9 and R10, appearing at pages 64 and 65 ROA, the Court accepted the prosecution's evidence that the accused gave the warn and caution statement freely and voluntarily, without coercion through beatings and torture, on the basis that the prosecution witnesses were not challenged in any meaningful way. Further, the trial Court deemed the appellant's explanation highly improbable. That he told court that he was not questioned regarding the subject offence but was beaten so he could admit knowing another suspect. That he failed to describe

who assaulted him and appeared to suggest that he was assaulted by members of CCPU.

12.2 Having had sight of the proceedings in the trial-within-a trial, we cannot fault the learned Judge in the lower court for having accepted that the statement was voluntary.

12.3 That being the case, we are of the view that the second limb of the appeal falls away, in that it was argued on the basis that the confession statement was wrongly admitted. Having found that it was rightly admitted, there was evidence on which the appellant was rightly convicted.

12.4 We find no merit in this appeal. The conviction of the lower court was safe in our view, and we have no hesitation in upholding it. Appeal is dismissed accordingly.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE

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N. A. SHARPE-PHIRI
COURT OF APPEAL JUDGE