CRIMINAL APPEAL NO. 228 OF 2005- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A. KAJI J.A. And RUTAKANGWA, J.A.	**AMIRI RAMADHANI Vs. REPUBLIC (Appeal from the Judgment of the High Court of Tanzania at Arusha)- HC Criminal Appeal No. 46 of 2003- Sheikh, J.**	**Caution under section 57 CPA, 1985-**Compliance with recording a caution statement under section 57 of the Criminal Procedure Act, 1985- It is not mandatory for the question and answer style to be used. Section 57 (2) (a) of the Act speaks of *"so far as it is practicable to do so",* suggesting that where it is impracticable one may dispense with that style. **Repudiation-Retraction-Confession-** To repudiate a statement is to deny ever to have made it.-To repudiate a statement is different from retracting a statement. In retracting one is not denying that one made a statement but that what was said was not true or that one was forced to say what is in the

		statement, or one is revoking or unsaying what one previously said. **Trial within trial-** In a trial with the aid of assessors (in the High Court), where the admissibility of any evidence is doubtful, e.g. a statement imputed to an accused person, assessors are asked to retire temporarily and a trial within a trial is held during which the admissibility or otherwise of the disputed evidence is decided.-If it is decided that the evidence is not admissible because, for example, it was obtained through torture of the accused, then such evidence is excluded and the assessors will not hear it. If, however, it is found to be admissible then the assessors will be called back into court and the evidence will

		be given in their presence. It is said that the reason for holding the trial within a trial in order to decide on the admissibility or otherwise of disputed evidence is that assessors should not hear inadmissible evidence because, being lay people they might not be able to exclude it from their minds when addressing the court on the guilt or otherwise of the accused person. The judge can hear such evidence during the trial within a trial and if he rules it inadmissible, being a legally trained mind, he is capable of excluding it from influencing his decision in the case. **Trial within trial where Court sits without Assessors-** normally the procedure of a trial within a trial is used in trials in which

		assessors sit. It is not normally used in trials in which a magistrate or a judge alone sit. We are not saying that in a trial in which assessors who are lay people do not sit a court is absolved from the responsibility to ensure that an alleged confession which is sought to be put in evidence was made voluntarily before it is admitted as evidence. What we are saying is that such a magistrate or judge does not have to conduct a trial within a trial as it is usually understood. Where a Confession is retracted when the accused is giving his evidence, the trial court has the duty to satisfy itself from the circumstances in which the confession was made that it was voluntary. **Corroboration where a confession**

		is retracted-having been retracted, the procedure is to look for corroboration.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MROSO, J.A. KAJI J.A. And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 228 OF 2005

AMIRI RAMADHANI ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Sheikh, J.)

dated the 22nd day of September, 2005
in
HC Criminal Appeal No. 46 of 2003

JUDGMENT OF THE COURT

10 & 30 October, 2007

MROSO, J.A.:

The appellant was convicted on three counts by the District Court of Arusha. On the first count, which was of armed robbery, he

was sentenced to a term of thirty years imprisonment. The second count was of attempted suicide for which he was sentenced to seven years imprisonment. A sentence of two years imprisonment was given for causing grievous harm, which was the third count. He appealed to the High Court against both conviction and the sentences which were imposed on him. The convictions were upheld but the sentence for the offence of suicide was found to be illegal. It was reduced to one of two years imprisonment, which was the legal sentence.

The appellant still felt aggrieved and has appealed to this Court, filing five grounds of appeal which were drawn up by Mr. John Lundu, learned advocate, who also appeared for him at the hearing of the appeal. The respondent Republic was represented by Mr. Mzikila, learned State Attorney.

The five grounds of appeal are briefly as follows – **First,** that in recording a caution statement from the appellant, section 57 of the Criminal Procedure Act, 1985 henceforth the Act, was not complied with. **Second,** that the caution statement did not amount to a

confession as the first appellate court held. **Third,** that the first appellate court erred when it held that the repudiation of the caution statement by the appellant was an afterthought. **Fourth,** that the first appellate court erred in holding that the evidence of PW3, PW4 and PW5 corroborated the repudiated caution statement. Finally, in the **fifth** ground the complaint is that no reasons were given for disbelieving the defence evidence. Before we discuss those grounds of appeal we will give a summary of the evidence that led to the appellant being convicted for the three offences with which he was charged.

On 2nd March, 1998 at 10:00 hours in the morning, one Mashaka Waziri (PW2) who was a taxi driver, driving a peugeout car with registration number TZ 50528, was hired by a person whose name was not mentioned. He took that person to an area in Arusha Municipality popularly known as Esso. Suddenly, a person wielding a pistol appeared together with two other people. These people took over the car and put him in the back seat. He raised alarm but they drugged him and drove away. He lost consciousness and the next

thing he knew was that he was admitted at Mount Meru Hospital in the Municipality.

Later, PW3 – Joackim Minja saw a peugeout car coming from the Ngaramtoni direction. It diverted from the road to what appears to be a mere path just as a police car was approaching from the Arusha direction and heading to Ngaramtoni. Minja, probably together with other people for he used the term "we", followed the peugeout car. It stopped somewhere and four occupants got out and started to run on foot, two of them each holding a pistol. He was able to identify one of those who had a pistol to be the appellant. The appellant was said to have fired his pistol in the air and before he was arrested by the people pursuing him, he allegedly shot at himself. Two of the remaining three people who were fleeing were killed, apparently by the pursuers.

Omari Hussein (PW4) who participated in chasing after the four bandits said he was shot in the leg by the appellant. Another witness, Fredrick Ismail (PW5), claimed he saw the appellant shoot

"PW3" and then the appellant allegedly shot at "me", presumably meaning that the appellant also shot PW5.

The appellant was hospitalized at Mount Meru Hospital. Detective Staff Sergeant Pius, PW1, recorded a caution statement from the appellant on 6th March, 1998 – Exhibit P2. According to that police witness, the appellant ***"admitted to commit the offence"***. This witness also tendered in evidence as exhibits the peugeout car with plate number TZ 50528, the pistol which the appellant was said to have used to shoot at PW4 – Omari Hussein and at himself.

In his defence evidence the appellant said he was on his own errand when he saw four people being chased by many people. He joined the chase. Two of the people being chased had pistols and one of them shot at him in the chest. He was subsequently hospitalized. He denied making any statement to the police.

Although Mr. Lundu submitted five grounds of appeal he decided to argue the first ground separately and then argued the remaining grounds together. On the other hand, Mr. Mzikila argued

all the grounds separately but did not follow any order. He simply argued a ground of appeal as he found convenient.

In arguing the first ground of appeal Mr. Lundu contended that section 57 (2) (a), (3) and (4) of the Criminal Procedure Act, 1985 were not complied with. According to him, the police officer who recorded the appellant's statement did not use the question and answer format but used the narrative form, contrary to the dictates of paragraph (a) of subsection (2) of section 57 of the Act. Furthermore, the recording officer did not write a certificate at the end of the recorded statement and did not indicate if the statement was read over to the appellant, certified as correct and signed by the appellant. The statement, therefore, should not have been admitted as evidence at the trial. Even so, responding to a question from the Court, Mr. Lundu agreed that even if all those alleged defects relating to the statement were found to exist, there was no indication that the appellant was thereby prejudiced.

Mr. Lundu then argued grounds 2, 3, 4 and 5 together, the centre of his complaint being the caution statement, Exhibit P2. He

said that although the trial court did not base its decision on the caution statement, the first appellate court did. Yet the appellant had repudiated that statement. Having repudiated it, the trial court should have conducted a trial within a trial in order to decide on its admissibility, even though the repudiation was done at the appeal stage. He cited two decisions of this Court in support of that proposition. These are **Shihobe Seni and Another** v. **The Republic** [1992] TLR 330 and **Hilku Mehi** v. **The Republic**, CAT Criminal Appeal No. 77 of 2006 (unreported). He argued that it did not matter that the appellant did not object to the admissibility of the statement when it was being tendered as evidence. He submitted that the High Court erred when it held that the repudiation of the statement was an afterthought. He asked the Court to allow all the grounds of appeal, from ground 2 to ground 5, because even if it were assumed that the appellant made the statement, it did not amount to a confession because it was exculpatory.

Mr. Mzikila supported the judgments of the two courts below. Although he did not follow any particular order in responding to the grounds of appeal, he nevertheless appeared to respond to all the

grounds of appeal. For orderliness, we will refer to his arguments following the grounds of appeal seriatim.

Regarding the first ground he contended that since the appellant repudiated the caution statement he could not turn round and say that the recording of it did not conform to section 57 of the Act. Even so, it was his submission that the caution statement was in fact recorded from the appellant and that the repudiation was an afterthought as found by the High Court. On the authority of **Tuwamoi** v. **Uganda** [1967] E.A. 84 and **Michael Luhiye** v. **R.** [1994] TLR 181, it was his view that the statement was properly admitted as evidence at the trial and the court could convict the appellant because of it even though it might not have been corroborated by other evidence. This qualification in the submission was made after second thoughts that in his opinion there was no corroboration for the caution statement.

In dealing with the second ground of appeal the learned State Attorney said that the caution statement (Exhibit P2) was squarely a confession under section 3 (1) (a) of the Law of Evidence Act, 1967

where one of the definitions of the term ***"confession"*** is given. On what appears to have been second thoughts, the State Attorney said that the words of the appellant in the caution statement together with his conduct were capable of a different inference. They were not incompatible with innocence.

Specifically referring to the complaint in the third ground of appeal, Mr. Mzikila, reiterated that the repudiation of the caution statement was an afterthought because if it were true that the appellant did not make a statement to Detective Staff Sergeant Pius (PW1), he would have refuted it immediately he started to give his defence evidence. He would not have waited until he was cross-examined on it by the prosecutor and then repudiate it. The learned State Attorney cited the decision of this Court in **DPP** v. **Nuru Mohamed Gulamrasul,** [1988] TLR 82 to support that argument.

As regards grounds 4 and 5 of the appeal the learned State Attorney agreed with Mr. Lundu that PW3, PW4 and PW5 did not corroborate the repudiated caution statement. Ground 5 was not

addressed specifically but it was submitted that the two convictions should be upheld and the appeal was to be dismissed in its entirety.

In discussing the grounds of appeal we think that we need to answer four questions. **First,** we need to answer the question whether the appellant made a caution statement to the police. **Second,** whether in recording the statement the police officer – PW1 – complied with section 57 of the Criminal Procedure Act, 1985. **Third,** whether the caution statement amounted to a confession in law. **Fourth,** whether the confession was corroborated. All this is because the conviction was mainly founded on the caution statement.

The two courts below found that the appellant made a caution statement. The trial court did not make an express finding but such finding can be inferred when that court said of the statement that PW1 ***"took accused's caution statement … which accused did not dispute".*** Similarly, the High Court did not make a specific finding but judging from the discussion by the High Court of the relevance of the statement as incriminating evidence, it is certain the

court was satisfied the appellant had made the statement – Exhibit P2.

We believe, like the two courts below, that the appellant did in fact make the caution statement. His repudiation of it when he was being cross-examined by the prosecutor was indeed an afterthought. We also doubt the seriousness of Mr. Lundu in supporting the repudiation of the statement by the appellant. To repudiate a statement is to deny ever to have made it. In our view, to repudiate a statement is different from retracting a statement. In the latter one is not denying that one made a statement but that what was said was not true or that one was forced to say what is in the statement, or one is revoking or unsaying what one previously said. In this appeal what the appellant was probably trying to do was to retract the statement. Indeed if the appellant never made a caution statement to the police and Mr. Lundu believed him, he would not have spent time and energy to argue that section 57 of the Act was not complied with during the recording of the statement. This leads us to a discussion of the manner the caution statement was recorded.

We will say that section 57 of the Act was not meticulously followed. For example, the question and answer format was not adopted. Instead the narrative style was adopted. But it is not mandatory for the question and answer style to be used. Section 57 (2) (a) of the Act speaks of ***"so far as it is practicable to do so",*** suggesting that where it is impracticable one may dispense with that style.

It is not indicated in the statement if the appellant was illiterate or that he knew how to read and, in that connection, whether or not the appellant was given opportunity to read the statement himself after it was recorded. It seems here the recording officer followed subsection (4) of section 57 without laying the basis for resorting to it.

Subsection (4) of section 57 reads –

> "(4) Where the person who is interviewed by a police officer is unable to read the record or the interview or refuses to read, or appears to the police officer not to read the record when

> it is shown to him in accordance with subsection (3) the police officer shall –
>
> (a) read the record to him, or cause the record to be read to him;
>
> (b) ask him whether he would like to correct or add anything to the record;
>
> (c) permit him to correct, alter or add to the record, or make any corrections, alterations or additions to the record that he requests the police officer to make;
>
> (d) ask him to sign the certificate at the end of the record; and
>
> (e) certify under his hand, at the end of the record, what he has done in pursuance of this subsection".

There is no indication in the recorded statement that the appellant was the kind of person envisaged in subsection (4) quoted above. That is why we said earlier that section 57 of the Act was not fully complied with.

We are satisfied that despite the above mentioned shortcomings, section 57 of the Act was substantially complied with. The police officer introduced himself by name, mentioned his rank, warned the appellant that if he made a statement it may be given as evidence, that the appellant could have a relative or advocate present when making a statement, whether the appellant was ready to make a statement, the appellant signed by a thumbprint every page of the statement; there was a certificate *(Uthibitisho)* at the end of the statement which was signed by both the recording officer and the appellant (again by a thumbprint). There is no claim that the few imperfections in the manner the statement was recorded in any way prejudiced the appellant. We dismiss the first and third grounds of appeal. We now wish to discuss the second, fourth and fifth grounds of appeal together.

We start with an attempt to answer the question whether the caution statement, Exhibit P2, was a confession.

Section 3 of the Law of Evidence Act, 1967 defines a confession as –

"(a) words or conduct, or a combination of both words and conduct, from which, whether taken alone or in conjunction with the other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence; or

(b) a statement which admits in terms either an offence which the person making the statement has committed an offence (sic); or

(c) a statement containing an admission of all the ingredients of the offence with which its maker is charged; or

(d) a statement containing affirmative declaration in which incriminating facts are admitted from which, when taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making the statement has committed an offence".

In the statement, Exhibit P2, the appellant said that three other named persons asked him to go with them to Namanga for an undisclosed task. They all got into a car which was hired by one Babuu whom he knew before. He was not familiar with the other two. As they were being driven in the car one of these people, Njoroge, ordered the driver to stop. The person wielded a pistol. The driver was then thrown to the back seat and the said Njoroge took over the driving. They took the driver to a coffee area in Ngaramtoni, drugged him and abandoned him in what appears to be a coffee farm.

As they drove back to Arusha Municipality to refuel they saw a police car from the Ngaramtoni direction which appeared to be chasing them. They turned away from the main road and took a road which led to a quarry. The road was obstructed by a lorry. So, they jumped from the car thinking the police were still pursuing them. Soon people started to shout ***"thieves, thieves"***. They ran, dispersing. Two among them took out pistols and started to fire at the pursuing people who succeeded to surround them. During the shooting episode he was himself shot in the chest. He dropped down

and lost consciousness until he regained it in hospital where he found himself admitted.

We learn from this narration that the appellant whether with or without prior arrangement was with a group of three other persons who robbed a driver of his car at pistol point. With this same group the driver of the car was drugged and abandoned; the group tried to flee from police whom they thought were chasing them. At no point in time the appellant attempted to dissociate himself from this group. He did not even suggest that he wanted to dissociate himself from those he claimed wielded pistols. We think that so far his own words and conduct show that he was party to the robbery incident. Those words and conduct amounted to a confession in terms of section 3 (1) (a) of the Law of Evidence Act, 1967. Was the confession properly admitted as evidence?

The first appellate court did not directly address this question. But it is known from the evidence that when the prosecutor sought to put in evidence the caution statement which contained the confession referred to above, the appellant did not raise any objection, not even

when its contents were read out in court and PW1 – Detective Staff Sergeant Pius – said that the appellant had admitted in the statement to have committed ***"the offence"***. In all those circumstances there would have been nothing to raise doubt in the mind of the trial magistrate that the caution statement could be admitted as evidence. There was no claim by the appellant that he made the statement following any form of inducement.

We know that when the appellant was being cross-examined, apparently on his caution statement, it was then he said ***"I have never written any statement".*** Construed literally, he would be correct. He did not himself write Exhibit P2. It was Detective Staff Sergeant Pius who recorded it. But he may have meant to say that he never made the statement which was written by Detective Staff Sergeant Pius. We already found that he actually made it but he was trying to retract it. But he did not give any reasons for retracting it.

There was some legal argument during the hearing of this appeal whether a statement which is a confession could be retracted after it was admitted as evidence and at the defence stage of the

proceedings. Mr. Lundu cited some case law authorities, one of them the **Hilku Mehi** case. It was contended by Mr. Lundu, and Mr. Mzikila conceded, that a trial within a trial can be held in a district court trial where assessors do not sit, in order to decide on the admissibility of an alleged confession.

In **Hilku Mehi** at issue was whether a supposed confession was voluntarily made. This Court said the trial court which was a District Court, should have held a trial within a trial and that the fact that the appellant in that case had not objected to the admission of the statement ***"did not make any difference with regard to the voluntariness of the statement".***

It is common knowledge that in a trial with the aid of assessors (in the High Court), where the admissibility of any evidence is doubtful, for example a statement imputed to an accused person, assessors are asked to retire temporarily and a trial within a trial is held during which the admissibility or otherwise of the disputed evidence is decided. If it is decided that the evidence is not admissible because, for example, it was obtained through torture of

the accused, then such evidence is excluded and the assessors will not hear it. If, however, it is found to be admissible then the assessors will be called back into court and the evidence will be given in their presence. It is said that the reason for holding the trial within a trial in order to decide on the admissibility or otherwise of disputed evidence is that assessors should not hear inadmissible evidence because, being lay people they might not be able to exclude it from their minds when addressing the court on the guilt or otherwise of the accused person. The judge can hear such evidence during the trial within a trial and if he rules it inadmissible, being a legally trained mind, he is capable of excluding it from influencing his decision in the case.

It is true that in **Hilku Mehi** v. **The Republic** cited earlier this Court said obiter that a trial within a trial could be held in a trial in a District Court. In that case a caution statement had been tendered and admitted in evidence without objection. Like in our present case, the accused person in that case retracted the statement when he gave his defence. This Court said –

> "In the absence of a trial within a trial, it remained doubtful whether the statement was freely made by the appellant if at all".

But even having said the words quoted above the Court said –

> "In this case, the crucial issue is the truthfulness of the alleged confession in the caution statement".

What is implied here is that the failure to hold the trial within a trial was not critical in that case but rather the truthfulness of the statement.

In **Michael Luhuye** v. **R** [1994] TLR 181, a confession was made as a result of violence on the accused. The statement was adjudged involuntary. The accused in that case retracted the confession but the trial court relied on it without any corroboration. It was held by this Court that such an involuntary confession which was retracted needed corroboration. Here the statement was not rejected merely because there was no trial within a trial.

We will say that normally the procedure of a trial within a trial is used in trials in which assessors sit. It is not normally used in trials in which a magistrate or a judge alone sit. We are not saying that in a trial in which assessors who are lay people do not sit a court is absolved from the responsibility to ensure that an alleged confession which is sought to be put in evidence was made voluntarily before it is admitted as evidence. What we are saying is that such a magistrate or judge does not have to conduct a trial within a trial as it is usually understood. We therefore dismiss that argument.

In this case the appellant's caution statement was admitted in evidence without objection. However, the appellant having retracted it when giving his evidence the trial court still had the duty to satisfy itself from the circumstances in which the confession was made that it was voluntary. We think that the statement was voluntary because there was nothing in all the evidence to suggest that it was obtained through undue influence. But having been retracted, the procedure is to look for corroboration.

We think the confession was corroborated by the evidence of Mashaka Waziri (PW2) and Omari Hussein (PW4). PW2 said the appellant and others ***"threw"*** him in a coffee *shamba*. PW4 said he saw four people who were being chased by other people who were crying "thieves, thieves". Among those four people was the appellant who shot the witness in the leg with a pistol. The accused was then arrested. It may be added that Joackim Minja – PW3 – gave even more incriminating evidence corroborating the appellant's confession. He saw the peugeout car diverting into the path in the coffee *shamba*. This witness was one of the people who chased the car crying thieves, thieves. He saw that the appellant had a pistol. According to this witness the appellant shot at himself and was thereby arrested.

We are satisfied that the trial court was entitled to find on the strength of the confession and the corroborating evidence that the appellant was one of the bandits who committed the robbery and shot at PW4 causing him grievous harm. He was therefore properly convicted for those two offences and was duly sentenced.

Regarding the conviction for attempted suicide we think there was doubt whether in fact the appellant shot at himself. There was no reason for him to do so. He said he was accidentally shot by one of his colleagues who was trying to shoot at the pursuing people. We think that was more probable and we quash the conviction on that charge and set aside the sentence of two years imprisonment which was imposed by the High Court for that offence.

In conclusion, the appeal against the conviction for armed robbery and for causing grievous harm is dismissed. The sentences were lawful and are upheld.

DATED at ARUSHA this 29th day of October, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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

(I. P. KITUSI)
DEPUTY REGISTRAR