IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 68 OF 2023

(Originating from the Judgment of District Court of Mpwapwa at Mpwapwa in Criminal Case No. 27 of 2022)

MOHAMED SHABANI MAWANJA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 04/12/2023

Date of Judgment: 08/02/2024

LONGOPA, J:

The Appellant, Mohamed Shabani Mawanja together with one Welosi Joctani Lusito stood charged with an offence of armed robbery contrary to c/s 287A of the Penal Code, Cap 16 R.E. 2019. Particulars of the offence simply are that on 12th April 2021 at Kimagai Village within Mpwapwa District in Dodoma Region, the appellant and his then co-accused did steal one motorcycle with registration number MC 164 CMN make Haujoe black in colour valued TZS 2,400,000/= the property of Abdallah Jumanne and immediately at the time of stealing of the said property did use actual violence and piece of iron rod by hitting the Complainant/victim at the head

to retain the said property. The District Court of Mpwapwa found the Appellant guilty of the offence of armed robbery, entered conviction and sentenced the appellant to serve a 30 years' imprisonment. One Welosi Joctani Lusito was acquitted by trial court for lack of cogent evidence to find culpability against him.

The appellant being dissatisfied by both conviction and sentence, appeal to this Court challenging the findings by the District Court of Mpwapwa on a total of 21 grounds of appeal. On 7th June 2023, the appellant filed a total of 12 grounds of appeal and subsequently on 18/7/2023 he prayed before this Court to file supplementary grounds of appeal. That prayer was granted. The following are the grounds of appeal: -

1. *That the trial court erred in law and in fact in basing and/or sustaining the conviction for armed robbery while prosecution witness did not prove their case beyond all reasonable doubts against the appellant.*
2. *That, the learned trial magistrate erred in law and fact by convicting the appellant basing on evidence of visual identification which was not watertight to ground conviction.*
3. *That, the trial court grossly erred in law and in fact when convicted the appellant in absence of corroboration*

evidence from the person who alleged to assist the victim after the commission of the offence.

4. *That, the trial court erred in law and in fact when failed to notice that the evidence of PW 1 was more suggestive than reality due to the fact that PW 1 alleged the accused person now the appellant went to the place where he used to park his motorcycle and being hired by the appellant but there was no evidence from his colleagues at the bodaboda centre who came to testify that on material time the appellant hired the victim for bodaboda services.*
5. *That, the trial learned magistrate grossly erred in law and in fact by convicting the appellant without considering there was no evidence from any prosecution witness evidencing that that on material time the appellant was seen together with the victim as alleged by the victim.*
6. *That, the trial court erred in fact when received evidence of PW 2 basing on procedural irregularities since PW 2 did not sworn (sic) when giving evidence as per section 198(1) of the Criminal Procedure Act, Cap 20 R.E. 2020 and section 4(a) and (b) of the Oaths and Statutory Declaration Act, Cap 34 R.E. 2019.*
7. *That, the trial magistrate grossly erred in law and in fact when received evidence of PW 3 during trial within trial the same he adduced his evidence without swearing as*

per section 198(1) of the Criminal Procedure Act, Cap 20 R.E. 2020 and section 4(a) and (b) of the Oaths and Statutory Declaration Act, Cap 34 R.E. 2019.

8. *That, the trial magistrate Court grossly erred in law and fact when wrongly received the caution statement after trial within trial while the trial Court did not provide or give ruling of the court with point or points of determinations after to have been heard both side in absence of the ruling the caution statement was received in court basing on procedural irregularities.*
9. *That, the trial court erred in law and in fact by failure to properly evaluate and analyse the evidence before the trial court without considering the possibility of another person other than the appellant having committed the offence.*
10. *That, the trial magistrate erred in law and in fact on the import of caution statement admitted as exhibit since the trial court improperly admitted as there was no certification that the statement was read over to the appellant so as to confirm with correctness of the contents as required by section 57(3) of the Criminal Procedure Act, Cap 20 R.E. 2019 basing on caution statement should not accord it any value.*
11. *That, the learned trial magistrate erred in law and in fact when convicted the appellant for not concluded that the appellant culprit was not named at the earliest stage by*

the alleged witness who purported to know the robberer after the commission of the offence and the record is silent that there is no anywhere indicating that the appellant was named at earliest stage whether to the people responded the alarm, at Mpwapwa hospital before the victim to have admitted in the Ward or to any other person at the earliest stage.

12. *That, the trial court erred in law and in fact when convicted the appellant without considering the appellant defence.*
13. *That the trial court erred in law and in fact to convict the appellant while the facts which are not in dispute were not read out in Court contrary to section 192(3) of the Criminal Procedure Act, Cap 20 R.E. 2019.*
14. *That, the trial magistrate erred in law and in fact for failure to notice that identification of the appellant was a dock identification only.*
15. *That, the trial magistrate erred in law and in fact for admitting the alleged caution statement as exhibit PE 3 without any certificate from prosecution indicating appellant readiness to waive his right to have a relative or a lawyer of his choice during interrogation and that the said caution statement was supposed to be in question and answers format as per requirements of Section 57(2)(a) and (b) of the Criminal procedure Act, R.E 2019.*

16. *That, the trial court erred in law and in fact by failure to evaluate the credibility of prosecution's witnesses regarding timing of the incident and the condition of victim on speech.*
17. *That, the trial magistrate erred in fact and in law for failure to appreciate that the victim/complainant failed to provide detailed description of the appellant's identity.*
18. *That, the trial magistrate erred in law and in fact by convicting and sentencing the appellant without adhering to section 312(2) of the Criminal Procedure Act, Cap 20 R.E. 2019.*
19. *That, the trial magistrate erred in law and in fact to convict the appellant based on failure to note the differences between the charge and preliminary hearing together with the Penal Code.*
20. *That, the trial court erred in law and in fact for failure to remind the appellant of his offence during all early stages of the hearing of the case.*
21. *That, the trial magistrate erred in law and in fact by hearing the case unprocedurally for defence case evidence in chief was adduced on 8/3/2023 while cross examination of the case was done on 24/3/2023 without any justification.*

The Appellant prayed that on strengths of these grounds of appeal the Court be pleased to allow the appeal by quashing a conviction and setting aside 30 years imprisonment sentence imposed on the appellant and order immediate release of the appellant from custody.

On date set for hearing, that is, 4th December 2023, the appellant appeared in person while the Respondent was represented by Ms. Magreth Tlagray, State Attorney.

In support of the appeal, the appellant adopted all grounds of appeal as set forth in the Petition of Appeal and filed supplementary grounds. He submitted that the trial magistrate erred in law and fact by convicting the appellant without considering that there was no proof of the case against the appellant beyond reasonable doubts. The appellant submitted that there were a lot of gaps on evidence of the prosecution to warrant his conviction.

According to appellant, there were irregularities on identification of the appellant. According to the appellant, the prosecution did not bring any witness to provide description of the accused person contrary to requirements of section 135(d) of the Criminal Procedure Act, Cap 20 R.E 2019. The appellant argued that there was no description of the suspect as required by the law. It was his further argument that the trial magistrate erred to convict him by the magistrate's failure to recognise and appreciate that evidence of PW 1 was a dock identification.

It was further stated that there was no corroboration of the evidence of the prosecution especially testimony of PW 1. This is despite the assertion that there were number of members of the family who assisted the victim after incident, but none testified before the trial court. The appellant reiterated also that the Village or local government leadership did not testify to corroborate that alleged incident of commission of the offence happened within their vicinity.

Further, appellant submitted that PW 1 informed the Court that there was a person who allegedly identified the accused person and gave the information, but that person was not called to testify. Furthermore, Mr. Chedi who is allegedly to have been called after the victim was assisted did not testify before the Court of law.

Accordingly, as per appellant's submission, there was no corroboration at all that anyone from the victim's place of work appeared to testify to validate a story that Victim/Complainant was hired to carry the Appellant. There was no truth on the evidence of PW 1 as he only managed to identify the appellant on dock and there was nothing of truth in testimonies adduced in court.

Appellant urged this court to critically examine Exhibit D2 which is the statement by the PW 1 who is a victim. It indicates that description of the suspect was not availed by the victim before the police station including appearance, names of the suspect etc.

It was appellant's submission that the trial magistrate failed to consider the contents of Exhibit D 2 which clearly show that the Complainant/ victim did not identify the appellant. Appellant prayed that the testimony of PW 1 should be expunged from record due to weaknesses identified.

Regarding testimony of PW 2, it was appellant's view that trial court erred in law and in fact by relying on this evidence as the witness did not take oath or affirm prior to adducing evidence before the trial court. This was contrary to the provision of section 198(1) of the Criminal Procedure Act, Cap 20 R.E 2019. This was also contrary to the provision of section 4(a) and (b) of the Oaths and Statutory Declarations Act, Cap 34 R.E 2019. He prayed that this Court should expunge testimony of PW 2 from record as the same was admitted against requirements of the law.

Furthermore, the appellant attacked evidence of PW 3 that it was bad in law as it was unsworn/unaffirmed evidence especially on inquiry contravening section 198(1) of the CPA, Cap 20 R.E. 2019 and section 4(1) (a) and (b) of the Oaths and Statutory Declarations Act. Thus, appellant prayed that the evidence of PW 3 should also be expunged from the record.

It was submitted that another aspect of error by the trial magistrate is on conviction of the appellant relying on Caution Statement which was wrongly admitted in court. It was argued that the weaknesses of Caution

statement include: (a) absence of determination of inquiry as there was no ruling on inquiry/ trial within trial on whether the statement was obtained voluntarily or not; (b) the Caution statement was not read to the appellant to validate its contents as a result, the trial magistrate erred in deciding on the fate of inquiry; and (c) the Caution statement was procured beyond time limit prescribed by the law i.e. within four hours of the restraint of the appellant. This is contrary to sections 50(1) and 51(1) of the CPA, Cap 20 R.E 2019. It was argued that Police never sought and obtained consent from the nearby Court to allow recording of the Caution statement beyond four hours of arrest.

The appellant further submitted that the prosecution did not tender any certificate to indicate that appellant waived his rights to have a relative or lawyer of his choice at the time of recording the Caution statement. Moreover, the Caution statement violated the provisions of section 52(2) of the Criminal Procedure Act, Cap 20 R.E. 2019 which require a questions and answers format of the caution statement, but the current caution statement is in a narrative form.

In addition, it was argued that the trial court erred in its failure to consider the credibility of witnesses. PW 1 testified that the incident happened on 12/4/2021 at around 19:00 hours while PW 4 who is the doctor who received and treated the victim stated to have received PW 1 at 13:00 hours of 13/4/2021. It was the evidence of PW 1 that he was rushed/taken to hospital on the same day of the incident. It was PW 4 who

was on duty on material date, and he is the one who filled in the Police Form No. 3 (PF 3). To cement his argument, the appellant cited a case of **Mashala Njile vs Republic**, Criminal Appeal No. 179 of 2014 CAT Shinyanga District Registry as illustrative on this point.

It was submitted further that in cross examination of PW 1 as reflected in pages 20 to 21 of the proceedings, PW 1 indicated that he could not speak on the fateful date of incident. PW 4 stated that on arrival at the hospital PW 1 informed her (PW 4) that he was feeling pain - headache, nausea etc. The Appellant wondered how the same person who could not speak on incident would have been able to inform PW 4 on how he was feeling.

The appellant argued that another defect is on sentencing and the differences between the charge and Preliminary Hearing. The trial magistrate failed to pronounce the section he relied upon in sentencing the appellant to custodial sentence of 30 years imprisonment. It is claimed that the failure to state the law is against the rights of the appellant and it is against humanity.

It was further averred that there was difference between the preliminary hearing and the charge on the statement of the offence. The section in Penal Code relating to the offence of armed robbery is different from that stated in Preliminary Hearing (PH).

Also, the appellant submitted that the trial magistrate failed to remind the accused person of the charges he was facing throughout the hearing of the case. Additionally, there was an error on part of trial magistrate to allow cross examination to be conducted on a different date than that of the evidence in chief of the defence witness i.e. the appellant.

It was the appellant's submission that he was not identified anywhere throughout the proceedings as there was no proper identification including appearance, height, clothing as well as his voice.

According to the appellant, this reflects that the prosecution failed to prove the case beyond reasonable doubt as required by the law. The source of the case ought to have been identification not otherwise. There was inadequate identification by the prosecution to validate existence of watertight evidence against the appellant. PW 1 was required to state about description of the suspect at the police station and the effects of failure of the victim to identify the accused is demonstrated in the case of **Selemani Yassin Rasul and Another vs R,** Criminal Appeal No. 310 of 2007 TZCA Arusha Registry (Unreported).

It was the appellant's submission this Court should expunge evidence of PW 2 and PW 3 for being unsworn/unaffirmed evidence as well as expunge the caution statement for violating the law. He argued that the only testimony remaining on record as a result would be that of PW 1 alone which cannot stand. The appellant cited the case of **Tinga Kalele vs**

Republic [1974] LRT 6 as relevant to indicate principle of law that it is dangerous to convict the accused person on single evidence of the prosecution without corroboration.

In rebuttal, Ms. Magreth Tlagray, learned State Attorney argued that appellant stood charged of the offence of armed robbery c/s 287A of the Penal Code, Cap 16 R.E 2019. The District Court of Mpwapwa convicted and sentenced the appellant to serve 30 years imprisonment. It was submitted that the most important aspect to note is that there must be a proof beyond reasonable doubts by the prosecution as per law that the appellant committed the offence.

According to the respondent, the offence of armed robbery was proved by demonstrating through evidence all three main aspects as demonstrated in **Kisandu Mbonje vs Republi**c, Criminal Appeal No. 353 of 2018 where the Court of Appeal of Tanzania stated that: (a) there must be proof of theft/stealing (b) proof of use of dangerous weapons during the commission of the stealing/theft or immediate thereafter, (c) that the use of the dangerous weapons was directed to the victim of the stealing/theft incident.

It was respondent's argument that on the first aspect, it was evidence of PW 1 that the appellant when asked what appellant wanted on the fateful night, he responded that he wanted the motorcycle. The same motorcycle was not seen thereafter. On the second aspect, PW 1 informed

the Court that he was beaten at the back of the head by an iron rod. PW 4 corroborated this testimony to have treated the victim (PW 1) who was beaten at back of the head. On third aspect, the dangerous weapons were directed to the victim. This is the iron road which was used to hit the victim on back of the head on material day. It was argued that the case was proved beyond all reasonable doubts thus this appeal lacks merits.

The respondent argued that on first ground the prosecution proved the case against the appellant beyond all reasonable doubts for reasons that: First, there was proof stealing/theft of the victim's motorcycle. Second, there was proof of use of dangerous weapon during the commission of the theft/stealing incident, and third, that use of the dangerous weapons was directed to the victim of the crime. It is evidence of PW 1 that appellant attacked PW 1 using iron rod on the incident day to retain the motorcycle.

On the second ground of visual identification, it was submission of the respondent that it is the evidence of the person who saw the incident that is on record. PW 1 testified to have carried the appellant to different places on that day including carrying him to NMB bank, to Postal bank and return the appellant to his home and that PW 1 remained with appellant change as appellant informed victim that appellant would be picked to some other place latter on that day. At all material times, PW 1 was using the motorcycle with registration number MC 164 CMN make Haujoe.

The respondent submitted further that it is on record that PW 1 was called by the appellant during the same evening to pick him to another place. In the circumstances, it was impossible for the victim to forget the appearance of person who he served the whole day by carrying him to various places using his motorcycle.

Also, it was submitted that with respect 3rd and 4th grounds relating to absence of corroboration of the PW 1 evidence, section 143 of the Evidence Act, Cap 6 R.E. 2022 provides for no number of witnesses that is required to prove the case. Evidence of a single person may be sufficient to establish a case. In the instant case, there were a total of four witnesses for prosecution who testified and proved the case beyond all reasonable doubts.

Moreover, on 5th ground of appeal, it was submitted that there was no need for identification of the accused/appellant as the victim who was PW 1 was able to identify the appellant having served him for the whole day. There was no need to call any other witness who saw the appellant and the victim together.

Additionally, on 6th ground on unsworn statement/ evidence of PW 2, respondent note that it is true that PW 2 did not affirm or take oath before testifying during the trial. The rest of the witnesses' testimonies for PW 1, PW 3 and PW 4 was adequate to prove the offence against the appellant.

On 7th ground regarding unsworn evidence of PW 3 during the inquiry, it was submitted that it was not true. It is on record that PW 3 testified upon being reminded to be on oath thus the inquiry was properly conducted as PW 3 was still on oath.

On 8th ground, Caution Statement admissibility without a ruling of the trial magistrate on the same, it was submitted that that such admission did not affect the trial. The appellant informed the court that he was contesting to show that he was beaten by police. DW 1 stated that he had no reasons to contest about caution statement.

Regarding the 9th ground on the trial court failure to consider possibilities of other person having committed the offence, it was submitted that the court considered all evidence tendered in Court. The court dealt with evidence against the person brought before it whether the same touched the appellant to have committed the alleged offence.

On 10th ground, cautioned statement was not read to the appellant for validating correctness of the contents, it was submitted that it on record that PW 3 testified to have read the caution statement and that appellant signed thereafter upon being satisfied with contents.

Regarding 11th ground on failure to mention the appellant at the earliest stage, it was submitted that if victim is able to identify the accused person it was not necessary to name the accused at the earliest stage. The

victim can state about the accused at any time during the investigation of the alleged commission of the offence.

It was submitted that in respect of 12th ground on failure to consider evidence of defence that pages 15 to 26 of the judgement reflect analysis of evidence by trial court including evidence of defence throughout. The evidence of defence was taken on board in the decision of the Court.

In respect of supplementary grounds, it was argued that the 1st ground (13th ground) is reflected on page 8 of the proceedings where the Memorandum of undisputed facts is presented. There is no discussion on the disputed facts. There are only undisputed facts that are found there because of Preliminary Hearing results into memorandum of facts that are not disputed.

It was submitted that on 2nd supplementary ground (14th ground) of identification, the respondent has argued that PW 1 was with appellant for the whole day thus was able to identify him with easiness. The law does not require that identification should be by description of all those aspects.PW 1 stated about the name of the appellant and the place where he lived to show that appellant was known to the victim. That tallies with ground 5 of the supplementary grounds (17th ground) of appeal.

In respect to 3rd supplementary ground (15th ground) regarding caution statement, it was submitted that section 58(4) and 57(2) of the

Criminal Procedure Act, Cap 20 R.E. 2019 state on possibility of the caution statement being in either questions and answers' format or in form of narrative statements. It was argued that the instant matter caution statement took a narrative form thus within the ambits of the law.

Regarding 4th ground of supplementary grounds (16th ground), it was submitted that timing of incident is clear with no contradictions as the appellant wished the court to believe. According to respondent's State Attorney record indicates the happening of the incident regarding the victim as PW 1's is to the effect that he found himself at the District Hospital of Mpwapwa at 09:00 hours of 13/4/2021 the same day when he was attended by PW 4. That ground of contradiction between PW 1 and PW 4 lacks merits.

In respect of 6th ground of supplementary grounds (18th ground), it was argued that it is on record at page 38 of the judgement that trial magistrate did not specify the section for which the sentence was imposed. It was argued by respondent that such failure to mention the section does not affect the sentence as the conviction categorically mentioned the section and law on which the appellant was found guilty and convicted thereon.

On 7th additional ground (19th ground), it is argued that during the Preliminary Hearing there was a minor misquotation of section of the law. However, it is argued that such minor citation mistake does not affect the

case as throughout the proceedings the citation of law is well adhered to. It is just a human error that is clerical in nature.

On 8th supplementary ground (20th ground) in respect to failure to remind the accused person of his offence, it was argued that it is not true. According to learned State Attorney, the appellant was reminded and asked to enter plea at every moment where it was so required including prior to commencement of hearing of the prosecution's case as indicated on page 15 of the trial court's proceedings.

On 9th supplementary ground (21st ground) regarding cross examination on a different date, the respondent State Attorney took note of that fact. It is true that the cross examination was done on two different dates. It was argued that it did not affect the testimony. In totality, the prosecution reiterated that instant appeal be dismissed for lack of merits.

In rejoinder, the appellant briefly stated that provision of section 135(d) of the Criminal Procedure Act, Cap 20 R.E. 2019 is very necessary to be adhered to by the prosecution on identification. That section requires the description of accused person.

Also, there was no certificate tendered by the prosecution indicating that the appellant had consented to be interrogated in absence of his relative or lawyer of his choice. Further, timing of arrest and interrogation is stated on record to reflect that the allowable four hours had lapsed.

I have keenly considered grounds of appeal, the submissions made by the parties in support and in opposition to the appeal respectively and the trial court's record. To determine this appeal, analysis shall be done by grouping together grounds of appeal into main aspects falling under the broad aspects of failure by the prosecution to prove the case to the required standard of proof; irregularities of caution statement; reliance on uncorroborated evidence; irregularities on admission of evidence; and issues of illegalities for non-adherence to legal requirements.

The task ahead of me is essentially a re-assessment of the evidence on the record to ascertain whether, in the light of the grounds of appeal the findings of the trial court was proper and in accordance with the law.

I shall commence with irregularities on issues surrounding the caution statement. This ground combines three main aspects: first, that no ruling was made by the court to determine validity or otherwise of the caution statement. Second, that the caution statement was not read out to the suspect to validate its contents before signing. Third, the caution statement was taken beyond prescribed time.

Upon perusal of the record of trial Court, it is my observation that an inquiry was conducted by the trial court to determine whether the caution statement was made or not. The appellant denied having made any statement whatsoever. He also denied having been detained at Chamwino Ikulu Police Station and that the signature was not his. It was therefore a

repudiated statement. The trial court on a ruling dated 24/01/2023 did determine the validity of the caution statement and admitted the same as **Exhibit PE.3**. At pp 34-52 of the proceedings, the contents and decision of the inquiry is reflected. It is on record that ruling on admissibility of the caution statement was delivered on 24/01/2023.

The trial Court having considered the evidence of PW 3 who was investigation officer on the matter, evidence of DW 1 who was 1st accused (appellant) and **Exhibit PE 1** - the Letter from the OCCID Chamwino to OCCID Mpwapwa regarding submission of detention book and **Exhibit PE 2** - a Detention Book at Chamwino indicating that the appellant was detained at that station on material date concluded that the caution statement was made by the appellant. Trial Court overruled the objection for being baseless and thus admitted the cautioned statement as **Exhibit PE 3**. The first limb of the grounds on cautioned statement therefore collapses as there is conclusive evidence on record that trial court did hear both sides on the admissibility of the repudiated cautioned statement and delivered a ruling which is on record dated 24/01/2023.

It is evidence on record that upon being informed of the arrest of the appellant and detention at Chamwino Ikulu Police Station, PW 3 did travel from Mpwapwa District and arrived in Chamwino in the same morning and proceeded to cause the cautioned statement to be recorded within few hours. It was PW 3's testimony that the cautioned statement recording was done timeously within prescribed hours. PW 3 arrived at Chamwino around

11:00 hours and proceeded to recording the cautioned statement. According to trial court record, the recording of the cautioned statement was finalised at 11:30 hours. The question that the appellant was arrested in a previous day cannot apply to invalidate the cautioned statement. Reasons for so finding are that appellant was arrested and detained at Chamwino Ikulu Police Station for a different offence altogether not the one he has been interrogated on material date. Also, it is on record that PW 3 proceeded to record the caution statement immediately upon arrival at Chamwino from Mpwapwa.

In the case of **Chacha Jeremiah Murimi & Others vs Republic** (Criminal Appeal 551 of 2015) [2019] TZCA 52 (4 April 2019), the Court of Appeal was faced with a situation where cautioned statement was recorded beyond time limitation of four hours from the arrest of the accused person. The Court stated to the effect that not every contravention of the provisions of Criminal Procedure Act amounts to discarding the evidence so obtained. At page 17-18 of the judgement, the Court of Appeal stated that:

> *What was contravened was procedural matter which does not affect the weight attached to the substance in the cautioned statements. Also, we looked as whether the failure to record the said cautioned statements within a period of four hours prejudiced the appellants. In* ***Nyerere Nyague v.R.,*** *Criminal Appeal No. 67 of 2010 (unreported), this Court was faced with similar*

*predicament but after being satisfied that the trial court in admitting the cautioned statement of the accused took into consideration and was satisfied that the investigation of the case was complicated, the benefit of public interest and that the rights and freedom of the accused was not unduly prejudiced, the Court had this to say:- "**It is not therefore correct to take that every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence in question.** "*

Relying on the above authority we think that the complaint pertaining to this ground is of no merit, the same is dismissed.

It is my considered opinion that the second limb on statement being recorded beyond prescribed time does not hold water. It is on record that such cautioned statement was recorded on time. Further, given the nature of the alleged offence to have been committed at Mpwapwa District while the accused person was arrested in Chamwino District, time would be reckoned from when the investigation officer from Mpwapwa arrived at Chamwino Ikulu Police Station to interview the appellant.

On the third limb that the statement was not read to the accused person should not detain the Court. It is on record the accused person was availed all rights including the right to call a relative or advocate or friend

when the statement is recorded but the appellant stated that he knew nobody thus the statement should be recorded while he is alone. It is the evidence of PW 3 that the accused person stated that he knows to read and write. It is on record that PW 3 read over the statement he recorded, and the appellant signed after being satisfied of the contents therein. Thus, the aspect of failure to read the cautioned statement prior to signing of the statement lacks basis. Pages 34 and 42 of the proceedings reflect conspicuously that cautioned statement was read over to the accused person and that the accused appended his signature in person upon validating contents of the statement.

Also, **Exhibit PE 3** indicates in explicit terms that prior to recording the statement, the accused person was informed of his rights to call a relative, friend or advocate of his own choice and signed the cautioned statement. The accused person signed the Caution Statement after being informed about his rights to call a relative, or friend or advocate of his choice.

Given the objection by the appellant that he made no statement, these two limbs of cautioned statement that it was not read over prior to signing and that there was no certificate from the prosecution that accused waived his right to have a relative or friend or advocate of his own choice to attend the interrogation seem to be an afterthought. These aspects ought to have been raised at the trial for the parties to address them in evidence. In **Mushimba Dotto @ Lukubanija vs Republic** (Criminal

Appeal 317 of 2013) [2014] TZCA 211 (22 October 2014), the Court of Appeal guided that:

> *Ideally, under section 169 (1) of the Criminal Procedure Act (CAP 20 R.E. 2002) (the Act) objection regarding the admissibility of the statement on that aspect ought to have been raised at the trial in order to give the prosecution the opportunity to discharge the burden mandated to it by virtue of the provisions of sub-section (3) thereto.* ***As it is, since objection to the admission in evidence of the statement based on the above point was not raised at the trial it would be futile and out of place to raise it at this late stage where this Court is not seized with the jurisdiction to determine the admissibility or otherwise of the statement in question****.*

I am bound to adhere to this guidance by the Court of Appeal. The main point of contention before the trial court was neither that the accused person was availed rights to call a relative or friend or lawyer of his own choice on one hand, nor that the cautioned statement was not read out to the accused person before signing the statement. There was a total denial that the cautioned statement was not made at all. That is the reason the prosecution had to bring **Exhibits PE 1** and **PE 2** to establish that accused

was detained at Chamwino on material date when the statement was made at the same place.

Further, I am satisfied that available evidence on record reflects that two aspects were ably and satisfactorily demonstrated during trial by the prosecution. It is my findings that caution statement of the appellant was proper and adhered to tenets of the law.

Having found that Caution Statement was admitted properly in accordance with the law, its effects to case cannot be underestimated. It forms part of the crucial evidence to establishing the guilty of the appellant. It is regarded as best evidence. This was demonstrated in the case of **Chande Zuberi Ngayaga & Another vs Republic** (Criminal Appeal 258 of 2020) [2022] TZCA 122 (18 March 2022) where at pages 13-14, the Court of Appeal stated that:

> *Being guided by the above authorities,* ***it is our considered view, and as rightly found by the trial court, that the appellants' statements provided overwhelming evidence of their participation in the commission of the offence.*** *In the said statements both appellants clearly admitted that they were the ones who transported the trophy on 20th January, 2018 for sale on a hired motorcycle. That, upon seeing the motor vehicle of the game reserve officers, they abandoned the trophy and*

the motorcycle and ran away. ***It is settled that an accused person who confesses to a crime is the best witness.***

Admission/confession by the appellant through Caution Statement to have committed the offence cemented the prosecution's case as it corroborated the evidence of PW 1 and PW 3. Indeed, I am satisfied that having adhered to the legal procedures on admissibility of caution statement of the appellant, **Exhibit PE 3** is valid evidence with probative value. There was no faulty on part of the trial court in admitting this evidence. I proceed to find that eighth, tenth and fifteenth grounds of appeal are devoid of merits thus they are hereby dismissed.

The second set of grounds is on irregularities on the admission of evidence. These range from identification of the appellant/accused, unsworn/unaffirmed testimony and failure to consider contradictory evidence that impair credibility of witnesses.

On identification, the appellant attacked prosecution's evidence that he was never identified by the victim at any material time during investigation and hearing of the case against him. The respondent argues that the accused was properly identified as the victim served the accused for most of the daytime of that fateful day.

It is evidence on record that PW 1 served the accused throughout the day. Pages 16-18 of the proceedings of the trial court reflect that PW 1

demonstrate that he carried the appellant on that material date during daytime from Ng'ambo area to Mpwapwa town centre, to NMB bank, Postal bank and returned the appellant to his place of residence. It is on record that the two exchanged phone numbers on agreement that appellant would use services of PW 1 at latter on that day.

It is on such ground that trial court at pages 35 to 36 of the judgement, found that PW 1 had sufficient time to observe the appellant during the daytime and informed the police as to the place of residence of the appellant. This was a proper identification to remove all possibilities of mistaken identity.

It is true that visual identification is one of the types of evidence that should be carefully considered before relying on it for conviction. In **Chacha Jeremiah Murimi & Others vs Republic** (Criminal Appeal 551 of 2015) [2019] TZCA 52 (4 April 2019), the Court of Appeal stated as follows:

> *Admittedly, evidence of visual identification is of the weakest kind, and no court should base a conviction on such evidence unless it is absolutely watertight; and that every possibility of a mistaken identity has been eliminated. To guard against that possibility the Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. 'The most commonly fronted are: How long did the witness have the accused under observation? At what distance?*

What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it.

Indeed, circumstances of the case fall within four corners of the criteria set forth in the case of **Waziri Amani vs Republic [1980] TLR 250** in which the Court laid down several factors to be considered by a court to satisfy itself on whether evidence on visual identification is watertight. Such factors include **one**, the time the witness had the accused under observation; the distance at which he observed him; **two**, the conditions in which such observation occurred; if it was day or night-time; whether there was good or poor lighting at the scene; and **three**, whether the witness knew or had seen the accused before or not.

I entirely agree with the submission by the respondent that given the fact that the victim spent most of the daytime carrying the appellant from one place to another in broad day light and having informed the police as

to the appellant's residence is sufficient to establish that PW 1 had adequate time to observe the appellant at a close distance.

Further, in the case of **Salum Said Matangwa @ Pangadufu vs Republic** (Criminal Appeal 292 of 2018) [2020] TZCA 1814 (9 October 2020), CAT at pp. 10-11 observed that:

> *The incident took place in broad daylight. The distance between the witnesses and the appellant was short for easy identification. PW1 and PW2 who said they knew the appellant before explained how they identified him among others, they explained how he took an active role in the crime. Precisely, PW2 explained how he saw the appellant taking PW1's bicycle and setting it on the fire. This evidence proves that the witnesses were credible and reliable and there is no good reason given for not believing them. In* ***Goodluck Kyando*** *(supra), the Court emphasized at page 367 that: "It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness." We are thus satisfied that in view of the evidence of PW1 and PW2 who knew the appellant before the incident, there could not have been any possibility of mistaken identity.*

PW 1 having carried the appellant during most of daytime in his motorcycle, made him to familiarize with the appellant. It is on record that

PW 1 was called by the appellant during the evening earlier agreed during the daytime. Further, it was the testimony of the defence that there is no dispute between PW 1 and the appellant which could have led PW 1 set-up the appellant. Indeed, there is no valid solid reason to disbelieve the testimony of PW 1. I find the complaint on failure to identify the appellant lacks merits. Therefore, the second, fourteenth and seventeenth grounds of appeal are disposed off in the negative.

In respect to contradiction of prosecution witnesses namely PW 1 the victim and PW 4, the clinical officer at Mpwapwa District hospital, it was submitted that evidence of PW 1 indicated that he was not able to speak following the incident and that he was taken to hospital immediately on 12/4/2021 while PW 4 stated that she did attend PW 1 on 13/4/2021 at around 1300 hours and PW 1 was able to narrate that he felt nausea and vomiting. It was PW 1 testimony that he had pains on the neck and was injured at his back side of the head.

Perusal of the record indicates that PW 1 testimony is to the effect that sometimes after the incident he lost conscious and found himself at Mpwapwa District hospital on 13/4/2021 at around 0900hours. There is no contradiction whatsoever of the testimonies of PW 1 and PW 4. The treatment was done on the same day that PW 1 recalls to have found himself at Mpwapwa District hospital where PW 4 works and testified to have attended the PW 1 on that material date. Evidence of DW 4 tallies with that of PW 1 that PW 1 as a victim of the armed robbery was injured

on his back head on the incident day. In respect of ability to speak, PW 1 stated that at 0900hours he was still unable to speak until later in the day when his health started to stabilize thus regained the speech. It is on record that PW 4 treated PW 1 after several hours PW 1 having found himself at Mpwapwa District hospital. There are no cogent reasons to find out that there were any contradictions of evidence between PW 1 and PW 4. As a result, sixteenth ground of appeal is disposed off in the negative as it lacks merits.

The other aspect on this tier of grounds is in respect of unsworn or affirmed testimony where the appellant complained that PW 2 did not take oath or affirmation prior to adducing evidence before the Court. Similarly, it was alleged that PW 3 did not take oath or affirmation before testifying during an inquiry regarding admission of the caution statement.

For PW 3 one F1739 D/SGT John, it is indicated that he was sworn before commencing adducing evidence as reflected on page 32 of the proceedings. During an inquiry regarding cautioned statement, the witness gave evidence on oath as reflected in page 39 of the proceedings. Therefore, the complaint against evidence of PW 3 is frivolous and has no merits. Thus, seventh ground collapses.

However, evidence of PW 2 was recorded without an oath or affirmation as the record is silent both typed and handwritten proceedings. The silence of the record on whether or not the witness took oath or affirm

prior to recording his evidence is an indication that such evidence did not comply with the legal requirements.

I agree with the submission by the appellant that failure to take oath or affirmation prior to testifying contravenes the provision of section 198(1) of the Criminal Procedure Act, Cap 20 R.E. 2019. It states that:

> *198.-(1)* ***Every witness in a criminal cause or matter shall****, subject to the provisions of any other written law to the contrary,* ***be examined upon oath or affirmation*** *in accordance with the provisions of the Oaths and Statutory Declarations Act (****Emphasis added****).*

Having found that evidence of PW 2 was taken without oath or affirmation, the evidentiary value of that testimony is negligible. It should be disregarded. In the case of **Godi Kasenegala vs Republic** (Criminal Appeal 10 of 2008) [2010] TZCA 5 (2 September 2010), at page 30, the Court of Appeal stated that:

> *In the light of these clear statutory provisions, unsworn evidence of a child witness received outside the ambit of the provisions of section 127 (2) is as good as no evidence at all in a criminal trial. It should always be discarded or discounted.*

On basis of the requirements of the Criminal Procedure Act, Cap 20 R.E. 2019 regarding the requirement for oath or affirmation prior to adducing evidence and the authoritative precedents from the Court of Appeal, I expunge the evidence of PW 2 for contravening the mandatory provisions of the law. I find merit on the sixth ground of appeal.

Another set of grounds falls on the ambit of reliance on uncorroborated evidence. The appellant challenged that no witness was called to corroborate evidence of PW 1 that appellant hired him to carry him using the motorcycle on that fateful day. The focus of lamentation was on the aspect that none from the vctim's place of work or relatives who assisted victim after the incident testified about occurrence of the incident. On the other side, respondent argued that evidence of PW 1 was corroborated by that of PW 4 and urged this Court to rely on section 143 of the Evidence Act, Cap 6 R.E.2022 which requires no specific number of witnesses to establish or prove existence of a fact.

It is on record that PW 1 evidence is that he was attacked by the assailant during stealing of his motorcycle, and he was injured at the back of his head. It was further evidence of PW 1 that it was the appellant who hit the victim. This evidence is corroborated by PW 4 that she treated PW 1 at Mpwapwa District hospital on 13/4/2021 following the incident that happened on 12/4/2021.

Also, testimony of PW 3 was to the effect that the appellant admitted having committed the offence of armed robbery against the victim (PW 1). **Exhibit PE 3** which is a cautioned statement was admitted and formed part of the evidence of the prosecution in this case. All these testimonies point to one and same direction that it is appellant who committed the offence against the victim. There was no need to have any further evidence regarding persons who might have seen the appellant with victim on that material date of the incident. I find that third and fifth grounds of appeal on lack of corroboration are devoid of merits and they are dismissed.

The fourth set of grounds is based on illegalities that for non-adherence to legal requirements. These relate to failure to read out the facts not in dispute during preliminary hearing, failure to comply with provision of section 312(2) of the CPA, differences between charge and preliminary hearing, failure to remind the accused about the charges he was facing and cross examination of defence witness done on a subsequent date after examination in chief.

The issues surrounding the preliminary hearing shall be addressed jointly. It is on record that on 12/4/2022 was the day when Preliminary hearing was conducted. There are few aspects available from the record. **First**, the accused persons were reminded of the charge and required to plea. They did plea that it was not true thus Plea of Not Guilty was entered for both accused. **Second**, facts were read to the accused persons and each of them was called to state which facts are admitted and which facts

are not admitted. **Third**, appellant and his co-accused only admitted to personal particulars, fact that they stood charged of armed robbery and that there were brought to court to answer the charge on armed robbery. **Fourth**, it is indicated that the Memorandum of agreed facts was read out to the appellant thus section 192(3) of the CPA was complied with. These are reflected on pages 5 to 8 of the trial court proceedings.

In respect of difference between charge and preliminary hearing, I have found nothing on record to that effect. The offence stated is armed robbery c/s 287A of the Penal Code, Cap 16 R.E. 2019. That is what the contents of the charge reveals as well. The only minor defect that appear in typed proceedings by referring to the section as 278A of the Penal Code, Cap 16 R.E. 2019. My perusal of both handwritten and typed proceedings reveals that difference is a just clerical error on typed proceedings. It was slip of the hand. The handwritten proceedings correctly cited the contravened section as 287A of the Penal Code.

On the circumstances, I am satisfied that eventhough there would have been misquotation of the relevant provision, yet the offence was stated categorically to be armed robbery. There is nothing that would have prejudiced the rights of the accused persons as they knew that they were answering a charge of armed robbery. That is the reason on pages 7 and 8 of typed proceedings the 1st accused who is the appellant stated that "...I deny to commit offence of armed robbery, I deny to have been interrogated and I deny to have confessed to commit offence..." Indeed,

this denial was categorically to the offence of armed robbery and not any other offence.

The Court of Appeal has set a criterion applicable where there are allegations of defectiveness of the charge. This is in the case of **Joakim Mwasakasanga vs Daniel Kamali & Others** (Criminal Appeal No. 412 of 2020) [2023] TZCA 55 (24 February 2023), where it was stated as follows:-

> *Normally it is the accused who would raise the complaint of a defect in the charge, be it during trial or on appeal. Courts have dealt with such complaints in two ways depending on the circumstances of each case. One, by sustaining the complaint where they take the view that the accused will be prejudiced by the defect. See the case of* ***Antidius Augustine v. Republic****, Criminal Appeal No. 89 of 2017 (unreported).* ***The other way is by treating the defect as curable and inconsequential where they are satisfied that it does not occasion a miscarriage of justice or prejudice the accused. The latter is a more contemporary position of the law, but always depending on the circumstances****. See the case of* ***Abubakari Msafiri v. Republic****, Criminal Appeal No. 378 of 2017 (unreported).*

I have no doubts in my mind that the appellant knew exactly the charge he was facing and categorically denied the particulars of the offence

of armed robbery not otherwise. Challenging the section at this stage, is a clear an afterthought. Further, the complaint is not on defective charge but rather that Preliminary hearing referred it as section 278A which does not exist or deal with armed robbery.

Further, in recent decision in the case of **Daktari Jumanne vs Republic** (Criminal Appeal No. 602 of 2021) [2023] TZCA 18020 (28 December 2023), the Court of Appeal stated that:

> *From settled case law in this jurisdiction, a trial of a case will not be vitiated for failure to conduct a preliminary hearing or for conducting it improperly. In the case of* ***Benard Masumbuko Shio v. Republic****, Criminal Appeal No. 123 of 2007 (unreported), the Court held that a trial will not be vitiated by a defective preliminary hearing. Same position was held in decisions in* ***Mkombozi Rashid Nassor v. Republic****, Criminal Appeal No. 59/2003;* ***Joseph Munene and Another v. Republic****, Criminal Appeal No. 109/2002 and* ***Christopher Ryoba v. Republic****, Criminal Appeal No. 26 of 2002 (all unreported).*

As such, record revealing clearly that appellant understood what the charge was all about, it is my settled view that there was no miscarriage of justice in the circumstances as the appellant understood and responded

with clarity to a specific offence of armed robbery. Thus, this aspect of complaint on difference on the section for which the appellant was charged during the Preliminary Hearing fails for being destitute of merits.

Also, regarding failure to comply with provision of section 312(2) of the Criminal Procedure Act, Cap 20 R.E. 2019 is a far-fetched aspect with no signs of truth in it. The perusal of the judgement of the trial court indicates that learned trial magistrate did adhere to the tenets of the law. I shall reproduce the provision for clarity. It states that:

> *312(2) In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.*

This provision requires that conviction should be entered, and it must state the offence and the section upon which the conviction is based. The second aspect is that punishment must also be stated. What requires the specific provision of the law is a conviction. The appellant lamentation lacks basis as the judgement contains all the aspects that law requires. The judgement on pages 37 and 38 partly reads as follows:

> *With the evidence adduced before this Court,* ***the prosecutions have proved their case beyond all reasonable doubt against the 1st accused.*** *And*

second accused is not found guilty of the offence, and he is hereby acquitted. ***I therefore find the 1st accused guilty of the offence of Armed Robbery c/s 287A of the Penal Code Cap 16 R.E. 2019 (Now R.E. 2022). He is hereby convicted accordingly*** *(Emphasis is mine)*

Also, on part of the sentence, the trial magistrate stated that:

SENTENCE

COURT: *I have considered that the convict is the first offender. The minimum punishment for the offence he has been convicted is 30 years imprisonment but since the accused person is the first offender, he is sentenced to a minimum sentence of 30 years imprisonment.* ***Therefore, I hereby sentence the accused to 30 years imprisonment.***

These extracts of the judgment reveal that that there was compliance with the requirements of section 312(2) of the Criminal Procedure Act, Cap 20 R.E. 2019. There is nothing at all that contravened the provisions of the law as alleged by the appellant.

Indeed, the decision of the District Court of Mpwapwa is in line with the provisions of the law. The trial magistrate convicted the accused person as charged i.e. under section 287A of the Penal Code. In the case of

Abdallah Ally vs Republic (Criminal Appeal 253 of 2013) [2015] TZCA 55 (16 July 2015), the Court of Appeal stated that:

> *In terms of the clear, mandatory language used in sections 235(1) and 312(2), there is no valid judgment without a conviction having been entered, as it is one of the prerequisites of a valid judgment.*

I have revisited the provision of section 287A of the Penal Code, it provides for minimum sentence of 30 years imprisonment. That is what the trial magistrate imposed on the accused person upon being satisfied that the accused was guilty of that offence. It follows that once the conviction is entered by stating section of law upon which conviction is entered, there is no need to repeat the provision on the sentence. The specific provision relates to the conviction.

In the case of **John s/o Charles vs Republic** (Criminal Appeal 190 of 2011) [2014] TZCA 251 (16 June 2014), the Court of Appeal stated that:

> *It is clear that both provisions of the CPA require that in the case of a conviction, the conviction must be entered. It is not sufficient to find an accused guilty as charged; because the term "guilty as charged" is not in the statute; and the legislature may have a reason for not using that term; but instead, decided to use the word "convict".*

The trial magistrate was aware of legal position entered a conviction first prior to sentencing the accused person. The trial magistrate convicted the accused as required by the law. There is nothing to doubt the procedure adopted by trial magistrate in handling the judgment of this case especially in conviction and sentencing as required by the law.

Regarding failure to remind the accused person on the charge he was facing, I am of the view that this aspect is a sheer afterthought. It has no iota of truth in it. On page 1 of the typed proceedings, it reveals that on 17/2/2022 the accused persons were called upon to enter plea after the charge was read over and explained to the accused persons. Both accused pleaded not true and Plea of Not Guilty was entered (EPNG) to both accused persons. On 12/4/2022 when the case was scheduled for Preliminary Hearing the charge was read over and the accused persons were reminded to plea thereto whereas PNG was entered to both accused having stated that it is not true. On 4/8/2022, when the matter came for hearing, the charge was read over and reminded the accused persons to plea thereto. The PNG was entered. This was before any prosecution witness commenced adducing evidence.

In the circumstances, I find no merits of this aspect that appellant was not reminded of the charges he was facing. I therefore find that aspect devoid of merits. Having demonstrates that all the aspects under this category do not have iota of truth, I proceed to dismiss thirteenth,

eighteenth, nineteenth, twentieth and twenty first grounds of appeal for being destitute of merits.

In respect of proof of case to the legal standard applicable to criminal case, I am aware of the mandatory duty of the prosecution to discharge this duty. As the position of law stands in our country, in criminal law the burden to prove a criminal charge lies on the prosecution, and it never shifts to the accused. In the case of **Maliki George Ngendamkumana vs. Republic,** Criminal Appeal No. 353 of 2014 [2015] TZCA 295, the Court of Appeal held that:

> *It is a principle of law that, in criminal cases the duty is two folds, one to prove that the offence was committed and two, that it is the accused person who committed the offence.*

However, the standard of proof in criminal case is beyond reasonable doubt. Section 3 (2) (a) of the Evidence Act Cap. 6 R.E 2019 provides:

> *A fact is said to be proved in criminal matters except where any statute or any law provides otherwise the court is satisfied by the prosecution beyond reasonable doubt that the fact exists.*

Proof of the offence of armed robbery depends on existence of three ingredients. One, there was stealing; two, that immediately before or after stealing the invader had a dangerous or offensive weapon; third, that the invader used or threatened to use actual violence to obtain or retain the stolen property.

In recent case of **Amosi Sita @Ngili v. Republic**, Criminal Appeal No. 438 OF 2021 [2023] TZCA 17697(3 October 2023) the Court of Appeal reiterated its earlier decision in the case **Shaban Ally v. Republic**, Criminal Appeal No. 270 of 2018 when discussing ingredients of armed robbery. I quoted the holding for easy of reference: -

> *From the above position of the law in order to establish an offence of armed robbery, the prosecution must prove the following: (1) There must be proof of theft; See the case of* ***Dickson Luvana v. Republic****, Criminal Appeal No. 1 of 2005 (Unreported); (2) There must be proof of the use of dangerous or offensive weapon or robbery instrument against at or immediately after the commission of the offence; and (3) That, the use of dangerous or offensive weapons or robbery instrument must be directed against a person; see* ***Kashima Mnandi v. Republic****, Criminal Appeal No. 78 of 2011 (Unreported).*

In the instant matter, there is no doubts that offence of armed robbery was committed against the victim. First, the victim's motorcycle

made Hajoue with reg no. MCC 164 CMN was stolen. Second, that the offender used dangerous or offensive weapons at the time of stealing or immediately thereafter to retain the stolen goods. In this case, a piece of iron rod was used to hit the victim at the back of the head. Third, the dangerous or offensive weapons were directed to the victim of the incident of stealing as he was hit on the head by iron rod. All elements of armed robbery exist in the circumstances of the case.

This is as result of evidence of PW 1 and PW 3 established that that the offence of armed robbery was committed by the appellant. Evidence of PW 4 corroborated that it true that PW 1 was attacked and injured on back side of the head by being hit with a blunt object. That tallies well with evidence of PW 1 that he was hit by appellant using iron rod.

The burden never shifts to the accused as he need not prove his innocence. All what the accused needs to do is to raise reasonable doubts on the prosecution case. It is the strength of the prosecution's evidence that proves the commission of a criminal offence. In the case of **Mohamed Haruna @ Mtupeni & Another vs Republic** (Criminal Appeal 259 of 2007) [2010] TZCA 141 (4 June 2010), the Court of Appeal observed that:

> *Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be convicted on the strength of*

the prosecution case and not on the basis of the weakness of his defence. But as the learned first appellate judge rightly observed in his judgment, "if the accused person in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take into account such evidence of the accused in deciding on the question of his quit." After all, the very best of witnesses in any criminal trial is an accused person who freely confesses his guilt.

The evidence of PW 1, PW 3 and PW 4 in their totality established the offence of armed robbery against the appellant beyond all reasonable doubt. The evidence was watertight to warrant conviction by the trial court as it established that offence of the armed robbery was committed. It pointed out that it is the appellant who committed the offence. Therefore, I quash the first, fourth, nineth, eleventh and twelfth grounds of appeal for being devoid of any merits.

In the case of **Edson Simon Mwombeki vs Republic** (Criminal Appeal 94 of 2016) [2016] TZCA 266 (18 October 2016), the Court of Appeal was of the settled view that where the appellate court is satisfied that the criminal case against the appellant was proved beyond all reasonable doubts that appellate court is entitled to dismiss the appeal before it in its entirety.

I am of the considered opinion that this appeal should fail for reasons that except for a single ground regarding evidence of PW 2 being recorded in contravention of the law the rest of the grounds are destitute of merits. Expunging of testimony of PW 2 has not shaken the evidence of the prosecution against the appellant. All other evidence on record remains intact and I find nothing else to fault the District Court of Mpwapwa in this case.

In the final analysis, I dismiss the appeal, uphold both the conviction and sentence imposed against the appellant for the offence of armed robbery as entered by the District Court of Mpwapwa in Criminal Case No 27 of 2022. The appeal stand dismissed in its entirety.

It is so ordered.

DATED at **DODOMA** this 8th day of February 2024.

E.E. LONGOPA
JUDGE
08/02/2024