IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 129 OF 2021

LENGAI OLE SABAYA ..... 1ST APPELLANT

SILVESTER WENCESLAUS NYEGU ..... 2ND APPELLANT

DANIEL GABRIEL MBURA ..... 3RD APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Arising from the decision of the Resident Magistrate's Court of Arusha at Arusha in Criminal Case No. 105 of 2021)

JUDGMENT

21st February & 6th May, 2022

KISANYA, J.:

The appellants, Lengai Ole Sabaya, Sylvester Wenceslaus Nyegu and Daniel Gabriel Mbura, appeared before the Resident Magistrate's Court of Arusha at Arusha where they were arraigned for three counts of armed robbery, contrary to section 287A of the Penal Code [Cap. 16, R.E. 2019].

In the first count, the prosecution alleged that, on the 9th day of February, 2021, at Bondeni Street within the City, District and Region of Arusha, the appellants did steal cash money amounting to Tshs. 2,760,000, the property of Mohamed Saad and that, immediately before and after such stealing, they assaulted Numan Jasin, Hajirini Saad Hajirin,

Bakari Rahibu Msangi, Salim Hassan and Ally Shaban and used a gun to threaten them in order to obtain and retain the said property.

In the particulars of offence of the second count, it was stated that, on the 9th day of February, 2021, at Bondeni Street within the City, District and Region of Arusha, the appellants did steal cash money amounting to 390,000, the property of Bakari Rahibu Msangi and that immediately before and after such stealing, they handcuffed, assaulted and used a gun to threaten him in order to obtain and retain the said property.

As to the third count, the charge revealed that, on the dates and at the place stated in the previous counts, the appellants did steal cash money amounting to Tshs. 35,000 and one (1) mobile phone make Techno POP1, the property of Ramadhan Ayubu Rashid @Anusu and that immediately before and after such stealing, they handcuffed, assaulted and used a gun to threaten him in order to obtain and retain the said properties.

To appreciate the appeal before this Court, I find it apt to narrate, albeit briefly, the background facts which led to the appellants' arraignment. It is gleaned from the evidence adduced during trial that; PW1 Mohamed Saad Harijin runs a shop at Soku Kuu area, within the city, District and Region of Arusha. On the 9th February, 2021, the shop was

being attended by PW2 Numas Jasin and one Ally. Around 1700 hours, a group of not less than ten (11) persons entered the shop. They proceeded to the counter where they met PW2. The group leader asked him of the whereabouts of PW1. As PW1 was not found at the shop, PW2 was directed to call and inform him that wholesale customers were after him.

When called through his mobile phone, PW1 informed PW2 that he was far from the shop. He maintained that position even after being told that the people in the shop were officials of Tanzania Revenue Authority (TRA). It turned out that, PW1's answer did not amuse the group leader. He was ordered by the group leader to arrive at the shop within five minutes.

At the same time, the group leader ordered his colleagues (also referred to by the witnesses as "bodyguards" or "bouncers") to search, arrest and beat Ally (another shop attendant). The said bodyguards went on to search, beat and arrest Mzee Salim and PW3 Ramadhani Ayubu Rashid @ Anas Ayubu Rashid who entered the shop at different times and for different purposes. It was PW3's testimony that, his mobile phone make, Techno POP1 and Tshs. 35,000 were taken.

No sooner than later, Hajirin Saad Hajirin (PW4) entered the shop. He had been asked by PW1 to see what was happening in the shop. PW4

claimed to have recognized the group leader as Lengai Ole Sabaya (1st appellant) because he used to see him through television and social media. He stated on oath that he was also ordered to call PW1. Upon further interrogation and as PW1 was not reachable, PW4 was also searched, beaten and arrested.

Subsequently, PW6 Bakari Rahabu Msangi, the councillor of Sombetini Ward within Arusha Municipality entered the shop. He greeted and talked to the 1st appellant. It was not disputed that the two knew each other before the incident. PW6 informed the 1st appellant that he had been tasked by Ally Saad Hajirin (PW1's brother) to check out on what had happened in the shop. The 1st appellant informed PW6 that PW1 had committed an economic sabotage by selling goods without issuing receipt and exchanging foreign currency without licence. When PW6 informed the 1st appellant that his mandate as District Commissioner of Hai District could not extend to Arusha District, the latter instructed his bouncers to search, beat and arrest him (PW6). It was PW6's testimony that he was robbed Tshs. 390,000.

In terms of evidence of PW3, Abu Mansur, Anas (PW3), Ally, Mzee Salim and PW6 were released leaving behind PW2 and PW4 under custody of the 1st appellant and his bouncers. It was adduced further the

appellants and his bouncers collected or took documents, EFD Machine, mobile phones and Tshs. 2,679,000 from PW1's shop. Thereafter, the 1st appellant presented PW2 and PW4 to Arusha Police Station. He handed over them to PW7 ASP Gwakisa Venance Mlinga who granted them police bail. At the same time, PW6 reported the matter to the police thereby leading to the investigation and arraignment of the appellants with the foresaid counts.

Other witnesses who testified for the prosecution are, PW5 Selemani Kassim Msuya who witnessed the 1st appellant and his bodyguards entering PW1's shop; PW7 ASP Gwakisa Venace Mlinga, the then Office Commanding In Chief of Arusha District who investigated this case, PW8 Magdalena James Malya, who introduced herself as PW6's wife; PW9 Inspector Evarist Francis Mwamengo, a police officer who conducted an identification parade, in which PW6 identified the 3rd appellant; PW10 Ngiana Mtui, a medical officer who attended PW6 on 10th February, 2021; and PW11 H348 D/C James, another police officer who investigated this matter.

The prosecution tendered eight documentary exhibits to supplement the oral testimonies adduced by its witnesses. These were, Medical Examination Report (PF3) of PW6 (Exhibit P1); Identification

Parade Register (Exhibit P2); Letter dated the 16th day of July, 2021 which forwarded PW6's pictures to the Forensic Bureau (Exhibit P3); FB3 Five Still Picture (Exhibit P4); FB2 Certificate (Exhibit P5); FB3 Five Still Picture (Exhibit P4) collectively); FB 1 Covering Letter dated 25th July, 2021 (Exhibit P6); Business Licence of Muhammad Saad Hajirin (Exhibit P7); and Certificate of Registration for TIN No of Muhammad Saad Hajirin (Exhibit P8).

In their respective defence testimonies, the appellants denied any involvement in the alleged offences. The 1st appellant stated that he went to PW1's shop at Soko Kuu, Arusha after being instructed by his appointing authority. He further admitted that two people were arrested from the shop and presented to the police. However, he denied to have been involved in stealing or robbing any property from that shop. On the other hand, the 2nd and 3rd appellants raised the defence of *alibi.* While the 2nd appellant stated that the offence was committed when he was at Bomang'ombe, Hai District in Kilimanjaro, the 3rd appellant stated that he was at his home located at Shamsa. The latter (3rd appellant) disputed the names Daniel Gabriel Mbura appearing in the charge sheet to be his. He stated that his names are Daniel Laurent Mbura. He tendered his Secondary School Leaving Certificate (Exhibit D2) and Certificate issued

by Tropical Centre Institute Limited (Exhibit D3) to support his oral testimony. In addition, the appellants relied on the complainant's statement (Exhibit D1) which was recorded by PW6.

After a full trial, the trial court was convinced that the prosecution had proved the second count. As to the first and third counts, the trial court arrived at a finding that both counts were not proved. However, the learned trial magistrate was of the firm view that the evidence adduced proved a lesser offence of robbery with violence. Upon considering that the offence of robbery with violence was committed by more than one persons, the learned trial magistrate went on to convict the appellants on a substituted offence of gang robbery on the first and third counts. In accordance with the dictates of the law, the appellants were sentenced to serve thirty years imprisonment on each of count. It was also ordered that the sentences would run concurrently. Therefore, the present appeal is against both the conviction and the sentences.

The appellants have fronted fourteen (14) grounds of appeal with a view to faulting the decision of the trial court. The said grounds are reproduced hereunder: -

1. *THAT, the learned Honourable trial Magistrate erred both in law and fact when convicted and sentenced the Appellants on a defective charge sheet.*

2. *THAT, the trial Honourable trial Magistrate erred both in law and fact when erroneously concluded that Appellants were properly identified and respectively recognized.*
3. *THAT, the trial court erred in law and fact when violated the criminal procedure and eventually convicted and sentenced the Appellants based on irregular proceedings.*
4. *THAT, the trial court erred both in law and fact when convicted and sentenced the Appellants based on a poorly and improperly investigated case.*
5. *THAT, having concluded that the offence of armed robbery was not committed in respect of count No. 1 and Count No. 3; the learned Honourable trial Magistrate erred in law and fact when erroneously substituted the offence of armed robbery, and then convicted and sentenced the Appellants with the offence of gang robbery.*
6. *THAT, the trial learned Magistrate erred in law and fact when convicted and sentenced the Appellants with gang robbery and armed robbery while the charge was not proved beyond reasonable doubt.*
7. *THAT, the trial court erred in law and fact when convicted and later sentenced the Appellants despite of a great contradiction in the testimony of Prosecution witnesses.*

8. *THAT, the trial Magistrate erred in law and fact when failed to analyse and properly evaluate evidence which was tendered before the Court and eventually convicted and sentenced the Appellants.*
9. *THAT, the learned Honourable trial Magistrate erred in law and fact when erroneously concluded that the Appellants used and directed offensive weapon or robbery instrument against PW6 when stealing his money Tshs. 390,000 while inside the shop of PW1.*
10. *THAT, the trial court erred in law and in fact when relied on unreliable testimony of PW6 and eventually convicted and sentenced the Appellants with the offence of armed robbery.*
11. *THAT, the learned trial Magistrate erred in law and fact when erroneously admitted Exhibits P2, P4 and consequently relied upon the tendered Exhibits P1, P2, P3, P4, P5, P6, P7 and P8 in convicting the Appellants.*
12. *THAT, the learned Honourable trial Magistrate erred both in law and fact when erroneously concluded that Appellants used actual violence while committing offences under count No. 1, count No. 2 and Count No. 3.*
13. *THAT, the learned Honourable trial Magistrate erred in law and fact when erroneously invoked the doctrine of common intention and consequently relied upon it to convict and sentence the Appellants.*

14. THAT, the learned trial Magistrate erred in law and fact when shifted the burden of proof to the Appellants by erroneously considering and relying upon opinions, assumptions and other extraneous matters which were not supported in evidence.

At the hearing of this appeal, the appellants appeared in person. They were also represented by a team of six learned advocates namely, Mr. Majura Magafu, Mr. Moses Mahuna and Ms. Fauzia Mustafa for the 1st appellant, Mr. Edmund Ngemela and Mr. Sylvester Kahunduka for the 2nd appellant and Mr. Fridolin Bwemelo for the 3rd appellant. On the other side, the respondent, Director of Public Prosecutions had the legal services of Mr. Ofmedy Mtenga, and Ms. Verdiana Mlenza, learned Senior State Attorneys and Mr. Baraka Mgaya, learned State Attorney.

The learned counsels for both sides submitted their respective submissions for and against the appeal at hand. I commend them for the research conducted in support of their respective positions. I do not intend to reproduce their submissions and cited authorities. They are rest assured that their contending arguments will be considered in the course of determining the grounds or issues pertaining to this appeal.

Before determining the merits or otherwise of the appeal, I find it appropriate to restate the principles that govern this Court. The first

principle is to the effect that, this being a first appeal, it is in the form of rehearing. In that regard, this Court is enjoined to re-evaluate the entire evidence on record by reading the evidence and subjecting it to a critical analysis before making a decision of upholding the trial court's decision or arriving at its own conclusion. See also the case of **Napambano Michael @Mayanga vs R**, Criminal Appeal No. 268 of 2015 (unreported) in which the Court of Appeal held:

> *"The duty of first appellate court is to subject the entire evidence on record to a fresh re-evaluation in order to arrive at decision which may coincide with the trial court's decision or may be different altogether*. "

Similar position was stated in the case of **R.D. Pandya vs R** (1957) EA cited with approval in the case of **Faki Said Mtanda vs R**, Criminal Appeal No. 249 of 2014 (unreported) where it was held as follows:

> *"It is a salutary principle of law that a first appeal is in the form re- hearing where the court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to a critical scrutiny and if warranted arrive to its own conclusion.*

Another principle is to the effect that the burden of proof in criminal cases lies on the prosecution and that the standard of proof is beyond reasonable doubts. Therefore, each and every element or ingredient of

offence is required to be proved beyond reasonable doubts. Unless otherwise provided by the law, the burden of proof cannot shift to the accused person. It is also settled position that, any doubt on the prosecution case must be resolved in favour of the accused.

In determining this appeal, I propose to start with the 3rd and 11th grounds of appeal which pivot on the legality of the proceedings before the trial. Submitting in support of these grounds, the learned counsel for the appellants pointed out several irregularities in the proceedings of the trial court.

The first irregularity, according to Mr. Magafu, is on the admission of Exhibits P4, P5, P7 and P8. He contended that Exhibits P4 and P5 were admitted despite the objection on their admission. He also faulted the learned trial magistrate for failure to consider that Exhibits P7 and P8 suggest the said Exhibits P4 and P5 had been fabricated. As to Exhibits P7 and P8, Mr. Magafu contended that the said exhibits were admitted while they are not related to the case at hand. His argument was premised on the reason that, the location of PW1's shop stated in both exhibits was different from the location stated in the charge sheet.

Responding, Ms. Mlenza contended that, there was no evidence to prove that Exhibits P4 and P5 had been fabricated. She further submitted

that the said complaint was an afterthought on the reason that it was not raised during trial. The learned State Attorney referred me to the case of **Nyerere Nyagua vs Republic,** Criminal Appeal No. 67 of 2010(unreported) and **Vicent Ilomo vs Republic,** Criminal Appeal no. 337/2017 (unreported). With regard to Exhibits P7 and P8, she submitted that the said exhibits are relevant to the case at hand. Citing the case of **Robinson Mwanjisi and 3 Others vs R** (2003) TLR 218, she submitted that all documents were duly cleared for admission.

On my part, this matter should not detain this Court. It is settled law that, the mandate to determine admission of any evidence is vested in the trial court. Therefore, an appellate court cannot decide the issue of admission of evidence basing on the ground which was not raised during trial. This position was stated in **Shihoze Semi and Another vs R** [1992] TLR 330 and two case namely **Vicent Ilomo** (supra) and **Nyerere Nyagua (supra)** referred to by the learned Senior State Attorney. For instance, it was held as follows in **Nyagua's** case: -

> *"But the appellant did not object its admissibility when it was about to be tendered. So the trial court and the prosecution were not deprived of the opportunity to consider whatever objection the appellant may had, in terms of section 169(2) of the CPA. This deprives him*

of the right to complain about its admissibility at this stage"

I have shown herein, the appellants' grievance is on admission of Exhibits P4, P5, P6, P7 and P8. I agree with Ms. Mlenza, that in terms of the record, Exhibits P4, P6, P7 and P8 were admitted without being objected by the appellants. In that regard, the complaint or objection raised at this stage lacks merit. It violates the established procedure. Considering further that admissibility of evidence is not determined by its relevance, Mr. Magafu's argument that Exhibit P7 and P8 were not relevant to the charge preferred against the appellants is devoid of merits. The relevance of that argument is on the weight accorded on the said exhibits.

With regard to Exhibit P5, the record tells it all. The objection on its admission was on failure to comply with the provisions of section 18(2) of the Electronic Transaction Act, 2015 (ETA). None of the appellants' counsel addressed this Court on whether the trial court erred in deciding the ETA was not contravened. From the foregoing, the appellants' complaints on admission of documentary evidence is dismissed for want of merit.

The second irregularity is to the effect that the trial court failed to consider the 3rd appellant's defence of *alibi*. Submitting on this complaint, Mr. Magafu argued that the trial court erred in holding that the 3rd appellant was duty bound to prove the defence of *alibi*. His argument was founded on the ground that, the 3rd appellant issued the notice to rely on the defence of *alibi* as required by section 194 of the CPA. He went on to submit that it is the prosecution which was duty bound to disapprove the particulars stated in the notice of *alibi*. To fortify his argument, the learned counsel cited the case of **Abdallah Musa Mollel @Banjoo vs DPP**, Criminal Appeal No. 31 of 2008 (unreported). In that case, the Court of Appeal held that:-

> *"It is trite law that an accused person is not required to be prove his alibi. It is sufficient for him if the alibi raises a reasonable doubt."*

In her reply on this complaint, Ms Mlenza conceded that the 3rd appellant issued the notice of *alibi* in accordance with the law. However, she contended that the defence of *alibi* was duly considered by the learned trial magistrate when held that the 3rd appellant failed to call a witness who was with him on the fateful day. The learned Senior State Attorney further argued that the defence of *alibi* is required to be proved on the balance of probabilities. She cited the cases of **Maramo Slaa Hofu**

and 3 others, Criminal Appeal No. 246 of 2011, **Kubezya John vs R**, Criminal Appeal No. 488 of 2015 to support her argument. It was also her argument that the 3rd appellant's defence of *alibi* could not stand because he was identified at the scene of crime. On that position, Ms. Mlenza urged me to hold that the trial court was right in not considering the 3rd appellant's defence of *alibi.*

It is borne out of the record that the 3rd appellant's defence of *alibi* was considered by the trial court. This is reflected at page 80 of the judgment. However, the trial court did not accord any weight on that defence. That was after considering, among others, that the 3rd appellant had not called a member of his family or fellow tenant to support his defence of *alibi*.

At this juncture, I agree with Mr. Magafu that an accused person who issues the notice of *alibi* has no duty to prove it. He is only required to raise a reasonable doubt, as held in **Abdallah Musa Mollel @Banjoo vs DPP**, Criminal Appeal No. 31 of 2008 (unreported) that:-

> *"It is trite law that an accused person is not required to be prove his alibi. It is sufficient for him if the alibi raises a reasonable doubt."*

Therefore, much as the 3rd appellant's notice gave the particulars of his *alibi*, it was the prosecution duty to disapprove the same.

Nevertheless, the judgment displays that the trial court considered further that the 3rd appellant was duly identified at the scene of crime by PW6. In terms of the settled law, the defence of *alibi* dies a natural death if the accused person was identified at the scene of crime. Apart from the case of **Venance Mapunda and Another vs R.** Criminal Appeal No. 16 of 2002 referred to by the trial court, this position was stated in the case **Kubezya John** (supra). The Court of Appeal observed that:-

> "*That fact; that is, the fact that the appellant was identified at the locus in quo diminishes his alibi. See* ***Abdallah Mussa @Banjoo vs the Director of Public Prosecutions,*** *Criminal Appeal No. 13 of 2008…"*

Now, since the trial court was satisfied that the 3rd appellant was identified at the scene of crime, I find no irregularity warranting this Court to hold otherwise. The issue whether the 3rd appellant was identified at the *locus in quo* will be addressed later in this judgment. As far as the complaint at hand is concerned, it is found not meritorious.

The third irregularity pointed out by Mr. Magafu is failure by the trial court to consider that an identification parade was not conducted on the 1st and 2nd appellants. On her part, Ms. Mlenza urged this Court to consider that PW6 and PW5 knew the first and second appellants before the incident. As to other witnesses who claimed to have identified the 1st and

2nd appellants, she submitted that their evidence on identification was not considered.

In terms of section 60 (1) of the CPA, an identification parade is conducted during the investigation stage for the purpose of ascertaining whether a witness can identify the suspect of the crime. Thus, one of the purposes of an identification parade is to enable a witness to identify his/her assailant or attacker whom he/she has not seen or known before the incident. [See **Joel Watson @ RAS vs R**, Criminal Appeal No. 143 of 2010 unreported)].

In the case at hand, the trial court held the view that the 1st and 2nd appellants were identified at the scene of crime by PW6. Indeed PW6 testified that he knew the 1st and 2nd appellants before the incident. Also, PW5 testified that the 1st appellant was known to him. That being the case, there was no need of conducting an identification parade for that purpose. As to PW2 and PW3 who also claimed to have identified the 1st and 2nd appellants, the trial court's judgment shows that their evidence on identification was not considered by the trial court. In other words, appellants were not prejudiced by their evidence on identification. The said position applies to another complaint raised by Mr. Ngomelo that the learned trial magistrate erred by allowing PW2 to identify the appellants

in the dock, while he had sustained an objection leading to such identification. As a result, the complaint at hand lacks merit.

The fourth irregularity, fronted by Mr. Magafu is that, the 1st and 2nd appellants were not arrested and interrogated according to the law. I respectively disagree with him. As rightly submitted by Ms. Mlenza, the fact that the 1st and 2nd appellants were arraigned before the trial court implies that they were arrested. The contention that 1st and 2nd appellants were not interrogated is also devoid of merits. It is deduced from PW7's testimony during cross-examination that that 1st appellant was interrogated, and that he refused to record the statement. As regards the 2nd appellant, that issue was not put to the investigators (PW7 and PW11). Therefore, it cannot be raised at this stage.

The fifth irregularity is that the 1st and 3rd counts were not reported to the police as required by the law. Making reference to section 131 of the CPA, Mr. Magafu submitted that criminal investigation commences after an information on commission of crime is reported to the police. He contended that the 1st and 2nd counts were not reported thereby contravening the law. On the other hand, Ms. Mlenza replied that the whole incident was reported to the police. She contended that the 1st

count was reported by PW2 and PW4, while the 3rd count was reported by PW3.

In terms of evidence on record, PW6 was the first person to report the offence alleged to have been committed in PW1's shop. Prior to that, PW7 had interrogated PW2 and PW4 when they were presented to the police station by the 1st appellant. It was PW7's testimony that he perceived that PW2 and PW4 had not committed the economic sabotage reported by the 1st appellant. Following an information reported by PW6, the police commenced an investigation which led to detection of the 1st and 3nd counts. Much as the 1st and 3rd counts were noticed in the course of investigating the matter was reported by PW6, the irregularity fronted by Mr. Magafu lacks merits.

The next irregularity advanced by the appellants is centered on amendment of the charge sheet. Mr. Magafu submitted that the trial court erred by allowing amendment of the charge while the prosecution had closed its case. Mr. Ngemela added that the 2nd and 3rd appellants were denied the right to comment on whether they wanted the witnesses to be recalled. The learned counsel was of the view that the said irregularity goes to the root of the case. Citing the provisions of sections 234 of the CPA and the case of **Barole Simba vs Republic,** Criminal Appeal No.

525 of 2017 (unreported), he implored me to nullify the proceedings of the trial court.

On the other side, Ms. Mlenza submitted that section 234 of the CPA allows amendment of the charge sheet at any stage during trial. She admitted that the 2nd and 3rd appellant were not asked whether they intended to recall the prosecution witnesses after amendment of the charge sheet. However, she submitted that the 2nd and 3rd appellants were not prejudiced. Her argument was based on the fact that the altered charge was in respect of the name of the 1st appellant and that the 2nd and 3rd appellants were duly represented by their advocates. She bolstered her argument by citing the case of **Masamba Musimba @ Musiba Mashi Masamba vs R,** Criminal Appeal No. 138 of 2018(unreported).

The issue under consideration is governed section 234(1) of the CPA which was also cited by both parties. It stipulates:-

> *Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case*

unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just."

It is clear that the above provision provides that the charge sheet may be amended at any time during the trial stage. It is also my humble view that the defence case is part of the trial stage. In that regard, a charge sheet or information may be amended at any time before closure of the prosecution. Given the fact that the charge at hand was amended when the 1st appellant had deposed his evidence in chief, I am of the view that the appellants' complaint lacks legal basis. It is the findings of this Court that the charge sheet was amended according to the law.

With regard to the second complaint, both parties are at one, that the 2nd and 3rd appellants were not asked to comment on whether they wanted the prosecution witnesses to be recalled. According to section 234(2)(b) of the CPA, where a charge is amended, the accused person is enjoined to demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate.

In the present case, the record is silent on whether the 2nd and 3rd appellants' counsel indicated that moved the trial court to recall the prosecution witnesses to give evidence afresh or for further cross-examination. Given the undisputed fact that the amendment made to the charge was to alter the 1st appellants' sir name from "SAYABA" to "SABAYA", and as other parts of the charge remained intact, I agree with Ms. Mlenza that the 2nd and 3rd appellants were not prejudiced. This is so when it is considered that they were duly represented by their respective advocates. And guided by the position stated in the case of **Masamba Musimba @ Musiba Mashi Masamba** (supra) and **Chritian Ugbechi vs R**, Criminal Appeal No. 274 of 2019 (unreported), I am of the view that, the trial court's failure to record how the 2nd and 3rd appellant's wanted to exercise their right under section 234 (2) of the CPA is curable under section 388 of the same law (CPA).

It was also pointed by the appellants when addressing the first ground of appeal, that the case was founded on a charge sheet which was defective. In their respective submissions, Mr. Magafu and Mr. Mahuna contended that the charge sheet was defective for duplicity because all counts were committed in the same cause of transaction.

According to them, the multiplicity of charges caused double jeopardy to the appellants.

In reply, Ms. Mlenza submitted that the charge sheet separated the counts because the owners of the stolen properties are different. Referring to the case of **R. vs Mnyela** (1934) 1 EAC 152 and **Faustine Magadula vs R** (1994) TLR 98, she argued that lumping the said counts in one count would have rendered the charge defective for duplicity.

Pursuant to section 133(2) of the CPA, more than one offence may be lumped in one charge sheet or information provided the descriptions of each offence is stated in a separate count. The law is settled that a charge is defective for duplicity when its count (s) has/have more than one offence. This stance was stated in **Stanley Murithi Mwaura vs R**, Criminal Appeal No. 144 of 2019, CAT at DSM (unreported) where it was held:-

> "*So, it is settled position of law that a charge with a count containing more than one offence is a duplex charge in terms of the above section and the effect is to render it fatally defective according to this Court's decisions in* ***Issa Juma Idrisa and Another v. R****, Criminal Appeal No. 218 of 2018,* ***Director of Public Prosecutions v. Pirbaksh Ashraf and Ten Others,*** *Criminal Appeal No. 345 of 2017 and* ***Adam Angelius***

***Mpondi v. R**, Criminal Appeal No. 180 of 2018* (all unreported)."

In the light of the foregoing, the question is whether the charge at hand is defective for duplicity. It is worth noting here that the appellants' counsel did not point out whether any of the three counts has more than one offences. Having gone through the charge sheet, I am satisfied that each offence of armed robbery was set out in a separate count of the charge sheet. As rightly contended by Ms. Mlenza, each count names the victim whose properties were stolen. Since the properties involved in each count belonged to three different persons, I agree with the learned Senior State Attorney that the prosecution was justified to charge the appellants with three counts. Thus, the appellants' complaint on this point fails as well.

Before determining the last irregularity pointed out by the appellants, I find it appropriate to address the issue whether the preliminary hearing was conducted in accordance with the law. This issue was raised by the court when the respondent's counsel moved the court to consider that the 2nd appellant was a liar on the account he disputed his personal particulars during hearing while the same were agreed upon during the preliminary hearing. Ms. Mlenza was of the view that the preliminary hearing complied with the law and the memorandum of

agreed facts was read over to the appellant. She also urged me to consider that the appellants were duly represented during the preliminary hearing. On his part, Mr. Magafu, submitted that the preliminary hearing was not in compliance with the law.

This issue is governed by section 192 of the CPA which provides for the purpose of and proper conduct of the preliminary hearing in criminal trials. It reads as follows:-

> *"192 (1) Notwithstanding the provisions of section 229 and 283, if an accused pleads not guilty the court shall as soon as convenient, hold a preliminary hearing in open court in the presence of the accused and his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial.*
>
> *(2) In ascertaining such matters that are not in dispute the court shall explain to the accused who is not represented by an advocate about the nature and purpose the preliminary hearing and may put questions to the parties as it thinks fit; and the answers to the questions may be given without oath or affirmation.*
>
> *(3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the*

memorandum shall be read over and explained to the accused in a language that he understands signed by the accused and his advocate (if any) and by the public prosecutor, and then filed.

(4) N/A

(5) N/A

(6) N/A

Admittedly, in the light of the above provisions, the accused person and the public prosecutor are required to agree on the facts which are not disputed before the same are recorded as being undisputed. It is also a legal requirement that a memorandum of the matters agreed upon must be read over and explained to the accused person and signed by the accused person and his counsel, if any, and the public prosecutor.

In our case, there is nothing suggesting that a memorandum of agreed facts was read over to the appellants. The record of the trial court bear testimony to what happened after the prosecution had read the facts of the case as hereunder:-

"Accused persons reply:

1st accused*: I admit the first fact but dispute the rest.*

2nd accused: *I admit the first fact but dispute the rest.*

3rd accused: *I dispute all of the facts.*

MEMORANDUM OF MATTERS AGREED UPON

1. *That the first accused is called Lengai Ole Sabaya, aged 34 years, Maasai, Christian, politician, Resident of Arusha Municipality.*
2. *That the second accused person is called Sylvester Wenceslaus Nyegu aged 26, years, Msukuma, personal assistant of Lengai Ole Sabaya, resident of Boma Ngo'mbe Uzunguni.*

1st accused: signed 16/07/2021

2nd accused: signed 16/07/2021

Advocate for the 1st accused (signed) 16/07/2021

Advocate for the 2nd accused (signed) 16/07/2021

Senior State Attorney (signed) 16/07/2021

Section 192 of the CPA complied with.

Sgd:

SENIOR RESIDENT MAGISTRATE'

16/07/2021"

From the foregoing, it is apparent that the appellants indicated that they were not disputing "the first fact". They did not state what the said "first fact" was all about. Thereafter, the trial court recorded the memorandum of matters agreed upon before requiring the appellants, their respective counsels and the prosecutor to sign the same. It is notably that the memorandum of agreed facts had more particulars. Be as it may,

nothing shows that before signing the memorandum of matters agreed upon were read over and explained to the appellants as required under section 192(3) of the CPA. As if that was not enough, the record is silent on whether the appellants were duly informed of the nature of the preliminary hearing as prescribed under section 192(2) of CPA.

That being the case I am convinced that the preliminary hearing was conducted in contravention of the law. It is settled law that failure to read over and explain to the accused person, the memorandum of undisputed facts is an incurable irregularity. See the case of **R vs Abdallah Salum @ Haji**, Criminal Revision No. 4 of 2019 (unreported) where it was observed that:-

> *"With the above expounded procedural anomalies, it goes without saying that the Preliminary Hearing was not conducted properly and contravened mandatory provisions that is, section 192(3) of the CPA, and that the discerned procedural irregularities are fatal and incurable."*

Having observed that the memorandum of agreed facts were not read over to the appellants, I hold that the preliminary hearing contravened the law. For that reason, I proceed to nullify the proceedings for the preliminary hearing held on 16th July, 2021. This implies that the

undisputed facts recorded by the trial court are not relevant as far as the preliminary hearing held under section 192 of the CPA is concerned.

Last for consideration is the irregularity pointed out by Mr. Ngemela, that the 2nd and 3rd appellants were denied the right to cross-examine PW2. Referring me to the case of **Albanus Aloyce and Another vs R,** Criminal Appeal No. 283 of 2015, Mr. Ngemela argued that such irregularity is fatal. Ms. Mlenza conceded that the 2nd and 3rd appellants' counsel were not given an opportunity to cross-examine PW2. However, relying on the case of **Masamba Musimba @ Musiba Mashi Masamba** (supra), she submitted that the said irregularity is not fatal because the 2nd and 3rd appellants were duly represented by advocates.

My starting point is to restate the position of law on the issue under consideration. The party's right to cross-examine a witness called by an adverse party or co-party finds its basis on the right to a fair trial enshrined under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977 (as amended). Further to this, cross-examination is conducted in order to test veracity of the witness, to shake credit of the witness by injuring his character or to discover his position in life. This is pursuant to section 155 of the Evidence Act, Cap. 6, R.E. 2019 which stipulates:

> ***"When a witness is cross-examined, he may, in additional to the questions*** *herein before referred to, be asked any question which held-*
>
> *(a)* ***to test his veracity;***
>
> *(b) to discover who he is and what is his position in life; or*
>
> *(c)* ***to shake his credit,*** *by injuring his character; although the answer to such questions might tend to directly or indirectly to incriminate him, or might- expose or tend directly to expose him to a penalty or...* "(Emphasis added)

It is also a trite law that failure to give a party to the case his right to cross-examine a witness called by the adverse party is an incurable irregularity for infringing the right to be heard. This position is supported by a number of authorities. One of them is the case of **Elias Mwaitambila and 3 Others vs R**., Criminal Appeal No. 414 of 2013 (unreported) in which a trial within a trial was conducted with a view to determining the voluntariness of the statement alleged to have been made by one accused person. All accused persons were represented by one advocate. Upon observing that the trial court did not record whether the said advocate put questions to the prosecution and defence witnesses on behalf of the 2nd and 4th accused, the Court of Appeal held:-

"...as a rule of natural justice, they (the second and fourth appellants) should also have been given opportunity to cross-examine."

The Court of Appeal went on to hold that the trial of all the appellants was unfair due to the omission of giving the 2nd and 4th appellants the right to cross-examine the witnesses for both sides. In that premises, the Court of Appeal nullified the entire proceedings of the trial court.

Another case is **Charles s/o Kidaha and 2 Others**, Criminal Appeal No. 395 of 2018, in which the 2nd and 3rd accused were not afforded an opportunity to cross examine the witness for the prosecution and defence during trial within trial. When the appeal reached the Court of Appeal, it was held that:-

"Thus, in this appeal, the learned Judge breached the basic rights of the 2nd and 3rd appellants when he proceeded to hear and determine on the admissibility of Exhibit P2 without giving an opportunity to the 2nd and 3rd appellants to cross-examine the witnesses for both the prosecution and the defence. Consequently, consistent with settled law, we are of the firm view that the decision of the trial court was reached in violation of the 2nd and 3rd appellant's constitutional right to be heard and it cannot be allowed to stand."

See also the cases of **Gift Mariki and 2 Others vs R,** Criminal Appeal No. 289 of 2015, CAT at Arusha (unreported)**, Mattaka and Others v. R** [1971] E.A 495 and **Albanus Alyoce and Another** (supra), in which the trial court proceedings were nullified because the accused person was denied the right to cross-examine a co-accused who adduced an incriminating evidence.

In view of the above position, it is apparent that, the 2nd and 3rd appellants were not accorded the right to a fair hearing because they were not given the right to cross examine PW2. I am of the considered view that the case of **Masamba Musimba** (supra) relied upon by Ms. Mlenza is distinguishable from the circumstances of this case. It dealt with amendment of the charge whereby the accused was not prejudiced. In our case, the omission to give the 2nd and 3rd respondents, an opportunity to cross-examine PW2 prejudiced the appellants due to the fact that he is the sole witness who testified to have verified the amount stolen from PW1's shop as Tshs. 2,769,000/. Also, PW2 was the shop's attendant when the incident occurred and he testified to have witnessed PW6 and PW3 (victims in the 2nd and third counts) being beaten. Since PW2's testimony incriminated the appellants in all counts, the 2nd and 3rd appellants were denied the right to test the veracity of his testimony or

shake his credibility. Furthermore, if it is taken that the 2nd and 3rd appellants did not cross-examine PW2, his (PW2) testimony stood unchallenged and the 2nd and 3rd appellants taken to have admitted what was adduced by PW2.

The law is settled that, any decision premised on the proceedings in which the right to be heard is infringed cannot be allowed to stand. That position applies even if the similar finding, decision or order would have been made had the party been heard. See the case of **Abbas Sherally and Another vs Abdul Sultan Haji Mohamed Faza Iboy**, Civil Application No. 33 of 2002 (unreported) where it was held that:

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that* ***a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard****, because the violation is considered to be a breach of natural justice."* (Emphasis added)

See also the case of **the Director of Public Prosecutions vs Sabini Inyasi Tesha and Another** [1993] TLR 237 in which the Court of Appeal cited with approval the case of **General Medical Council v Spackman** [1943] AC 627, when Lord Wright stated:

> "*If principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice.* ***That decision must be declared to be no decision***."

That being the position of law, the proceedings of the trial court are vitiated because the 2nd and 3rd appellants were not accorded the right to cross-examine PW2. Consequently, the conviction and sentences meted against the appellants are a nullity for being based on the vitiated proceedings. My determination of the said complaint would have been sufficient to dispose of the appeal without considering each ground and every issue argued for and against the appeal.

However, the established general rule requires the court to make an order of retrial when the trial is nullified for being illegal. The settled position is underlined in **Fatehali Manji vs R** [1966] EA 343 and other decisions of this Court and the Court of Appeal is that, an interest of justice is the main consideration on whether or not to make an order of retrial. It is also accepted that a retrial will not be ordered in the circumstances where the evidence is insufficient or where such order will enable the prosecution to fill up gaps in its case.

Therefore, in order to determine whether this Court should order retrial of this case, I find it appropriate to address few issues raised in some grounds of appeal with a view to determining whether the evidence was sufficient as contended by the appellants' counsel.

First for consideration is the appellants' protest on the first ground of appeal that the charge is defective. Apart from the complaint that the charge defective for duplicity, Mr. Mahuna submitted that the charge and evidence adduced by prosecution are at variance. That position was also by Mr. Magafu when faulting the trial court for failing to analyse evidence given during trial. On the other hand, the respondent through Ms. Mlenza and Mr. Mgaya argued that there was no variance between the charge and evidence. They also argued that the variance, if any, did not prejudice the appellants. Each side cited authorities to reinforce its position.

It gleaned from the rival submissions and cited authorities that, section 234(1) of the CPA requires amendment of the charge which is at variance with the evidence. See for instance the case of **Issa Mwanjiku @ White vs R,** Criminal Appeal No. 175 of 2018 (unreported) in which the Court of Appeal observed that:-

> *"We agree with Ms. Kambakono that in terms of section 234(1) of the CPA the prosecution ought to have*

moved the trial court to order amendment of the charge sheet and give the appellant opportunity to plead to the altered charge."

There is a plethora of authorities to the effect that failure to amend the charge renders the charge defective. Further to this, the prosecution is taken to have failed to prove the charge. See the case of **Abel Masikiti vs Republic**, Criminal Appeal No. 24 of 2015 (unreported) in which the Court of Appeal emphasized that:-

"If there is any variance or uncertainty in the dates then the charge must be amended in terms of section 234 of the CPA. ***If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal****."*

Similar position is found in the cases of **Noel Guth aka Bainth and Another vs R**, Criminal Appeal No. 339 of 2013 and **Mashaka Bashiri v/s R,** Criminal appeal No. 242 of 2017 (both unreported).

In the present case, I have observed that the charge and evidence are at variance on the properties alleged to have been stolen. As rightly submitted by Mr. Mahuna, the first count shows that Tshs. 2,769,000 was stolen from PW1's shop. However, evidence adduced by the prosecution indicates that coins and EFD Machine were also taken from PW1's shop. As to the second count, the property named therein is Tshs. 390,000,

while PW6's testimony is to the effect that his handkerchief was also taken. On the other hand, PW4' testimony is to the effect PW6's wallet was also taken. Also, the fact that PW6's wallet was taken is reflected in his statement (Exhibit D1).

The learned State Attorneys did not dispute that the coins, EFD and handkerchief or wallet were not included in the charge. However, they were of the view that the appellants were not prejudiced. For that reason, Mr. Mgaya urged me to consider the overriding objective.

As indicated earlier, the settled law provides that failure to amend the charge is an incurable irregularity. That being, I respectfully disagree with the learned State Attorneys and the learned trial magistrate who held the view that the omission did not prejudice the appellants. Similar stance was taken in the case of **Masota Jumanne vs R,** Criminal Appeal No. 137 of 2016 (unreported). In that case items such as 4 kg of sugar, 2 bars of soap, 7kg of rice featured in evidence, while the particulars of offence of armed robbery named a bicycle and Tshs.15,000/= only. When the matter reached the Court of Appeal, it was held that:-

> *"In a nutshell the prosecution evidence was riddled with contradiction on what actually was stolen from PW1. Such circumstances do not only imply that there was a variance between the particulars in the charge*

and the evidence as submitted by the learned State Attorney. This also goes to the weight of evidence which is not in support of the charge."

In yet another case of **Kilian Peter vs R,** Criminal Appeal No. 508 of 2016 (unreported), a wallet and a bag containing medicines featured in the evidence as among the items stolen, but were not included in the charge sheet. Upon considering that the charge was not amended, the Court of Appeal held that the accused must benefit from the omission by prosecution to amend the charge.

In view of the thereof, it is apparent that the omission to amend the charge cannot be cured by employing the principle of overriding objective. It is an incurable irregularity which renders the respective charge unproven.

Another variance is on the 3rd appellant's name. While the charge sheet shows that his names are **Daniel Gabriel Mbura**, it is gathered from evidence of PW6 and Exhibit P2 that the 3rd appellant is **Daniel Bura** and **Daniel Laurent Bura** respectively. Such contradiction goes to the root of the case because the 3rd appellant insisted that he is not **Daniel Gabriel Mbura**. Even if it is considered that the 3rd appellant admitted during the preliminary hearing that his names are **Daniel Gabriel**

Mbura, the prosecution ought to have ensured that the names **Daniel Bura** or **Daniel Laurent Bura** feature in the charge sheet. As it stands, nothing suggests that **Daniel Gabriel Mbura**, **Daniel Bura** and **Daniel Laurent Bura** is one and the same person. It is also not clear whether the said names refer to the 3rd appellant who introduced himself as **Daniel Laurent Mbura.**

Second for consideration is the 7th ground that the appellants were convicted and sentenced despite of the contradictions in the evidence of the witnesses for prosecution. As good luck would have it, this issue has been discussed in a number of cases, including the case of **Dickson Anyosisye vs R**, Criminal Appeal No. 155 of 2017 (unreported), cited by Mr. Mtenga. Others are **Evarist Kachembeho and Others vs R** [1978] TLR No. 70, **Athuman James vs R**, Criminal Appeal No. 69 of 2019 and **Maramo Slaa Hofu** (supra). The principle underlined in all these cases is that, that contradictions in evidence of one witness or among witnesses cannot be avoided in any particular case. This is because the witness is not expected to recollect and tell each and everything related to the incident. For instance, in the latter case (**Maramo**), the Court of Appeal observed that:-

> *"..normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of*

observation such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence."

In view of the foregoing position, contradictions are required to be evaluated in their proper context in order to determine their gravity. The bottom line is whether the contradictions go to the root of the matter or affect the credibility of the witness(s) as held in **Maramo Slaa Hofu** (supra) that:

"It is therefore true that the existence of contradictions, inconsistencies in the evidence of a witness is a basis for a finding of lack of credibility; but the discrepancies must be serious, and must concern matters that are relevant to the issues being adjudicated, to warrant an adverse finding."

I am guided by the above decisions. One of the contradictions in this case is on the status of CCTV camera or footage of the scene of crime (PW1's shop). As rightly pointed out by Mr. Kahanduka, PW1 testified that all events were captured by the CCTV camera. I would let his testimony speaks for itself. When cross-examined by Mr. Mahuna, PW1 testified:-

"I was not in the shop when 2,769,000/= was stolen, I do not know who among the accused person ordered me to the shop within five minutes. ***All took place in***

the shop I saw in the CCTV Camera*."* (Emphasis added).

When cross-examined further by Mr. Olawa, PW1's testimony was to the effect that the CCTV camera captured the incident. His evidence went as follows:-

> *"I was told by Numan that the accused person stole shs 2,769,000/=.* ***CCTV camera as well shows those who took the money****."* (Emphasis added)

Lastly, PW1 is recorded to have adduced that he saw PW3 in the CCTV camera. See his testimony when cross-examined by Mr. Bwemelo:

> *"I was told that Ramadhan Ayubu Rashid was in the shop during the incident, as well* ***I saw him in the CCTV****.*
> *CCTV camera is controlled by Saad Ally and me."* (Emphasis supplied)

However, the above evidence is contradicted by the investigators (PW7 and PW11) who went to the scene of crime on 12th February, 2021. Their respective testimonies show that the CCTV camera was interfered with. For instance, PW7's evidence went as follows:

> *"The shop had CCTV camera but the same were intentionally interfered with that incident could not be recorded/captured. Four cameras were* ***turned to***

face a wall *while other two recorded incidents from other angle. Hence, they were not helpful…*

I checked as well DVR (digital video recorder) where there were pictures from four cameras, but it appeared blank. *"*(Emphasis added)

The said evidence was also supported by PW11. This is what happened when he was cross-examined by Mr. Ngemela:-

"***I had no chance to look at the footage of the CCTV Camera. I had no CCTV footage*** *in the case file. The CCTV Cameras in the shop were* ***turned up facing the roof****. I did not know whether they were installed so*."

He reiterated that position when cross-examined by Mr. Bwemelo as shown hereunder:-

"*CCTV hard (sic) pictures which were not useful four our investigation besides, PW1 was not around. We did inspect the scene and find out that the cameras were tampered with.*

We did not take photographs of the tempered with cameras."

In view of the above evidence, it is clear that PW1 on one hand and PW7 and PW11 on the other hand, contradicted each other on whether the theft incident which led to the offences preferred against the

appellants was captured by the CCTV camera. It is not known as to why PW7 who returned to Arusha in April, 2021 was able to see the whole incident through CCTV, while PW7 and PW11 who went to the scene of crime three days after the incident did not see what was recorded.

Reacting on the said contradictions, Mr. Mtenga and Mr. Mgaya urged me to consider that PW7's testimony that there were cameras which faced another angle. It appears that the learned Senior State Attorneys invited me to have a look at the evidence that the CCTV footage was not useful for investigation.

Given the circumstances of this case, I am of considered view that the said contradictions cannot be taken lightly and that they go to the root of the case. This is when it is considered that the prosecution case was to the effect that the offence was committed in PW1's shop. On the other hand, the 2nd and 3rd appellants denied to have gone to PW1's shop. Further, even if it is considered that the 1st appellant admitted to go to PW1's shop, he vehemently denied to have committed the offence, let alone taking the properties subject to the case at hand. In such a case, the evidence extracted from the CCTV footage would have enlightened us on what happened inside PW1's shop. It is my considered view that the contradiction on the issue of CCTV raises doubt on the prosecution case.

Another contradiction is on the time when the money, EFD machine and other items were taken from the counter of PW1's shop. In his testimony (at page 25 of the typed proceedings), PW2 deposed that the money, EFD and mobile phones were taken when other people who had been detained or arrested under the 1st appellant's order had left PW1's shop. He is recorded testifying as follows:-

> *"The leader come back to the shop thereafter, and did release, Abu Mansur, Anas, Ally, Mzee Salim, Bakari Msangi and the woman.*
>
> *The leader upon coming back did order handcuff in the hand of Abu Mansur and Bakari to be removed as they were handcuffed using the same handcuffs (sic).*
>
> *After others have left the leader continued questioning Hajirini Saad and me while bouncers were busy searching the shop. They took with them documents, EFD machine which had full memory, mobile phones taken from those who were under arrest. I did not see what they took from the counter but what was on the table. In the counter there were two drawers. The upper one used to keep documents and change (coins) and the lower one used to keep the money, On that day the lower drawer had shs 2,769,000/=."*

In view of the above evidence, it is apparent that the EFD machine and other properties were taken from PW1's shop when PW6 and others

hostages had been released. When cross-examined, PW2 went on to testify that the released persons were not re-arrested.

However, PW6 and PW4 gave evidence which suggest that the properties were stolen when PW6 was inside the shop. This is reflected at page 71 and 72 of the typed proceedings in which PW6 testified that:-

> "*At that point we remained only four people apart from general and his people, Hajirini (PW4, PW2, the woman and me. Then general ordered all things at the counter be collected. I saw the people of general taking our properties at the counter putting them in envelope, taking EFD machine and its papers. Our mobile phones were kept in the envelope.*"

Mr. Mgaya admitted that PW2 and PW6 contradicted each other on the foresaid fact. However, he contended that it was a normal discrepancy and that, the circumstances of the case were horrific. Referring the Court to the case of **Dickson Annyosisye vs R.,** Criminal Appeal No. 155 of 2017, he submitted that discrepancy did not go to the root of the case.

I agree with him on the principle stated in **Dickson Annosisye** (supra), that normal discrepancy cannot be escaped. I also agree with the learned Senior State Attorney the circumstances of this case suggest that the witnesses were in the middle of commotion. However, it is my considered view that the contradiction under consideration goes to the

root of the case. It raises doubt on whether PW6 witnessed the appellants collecting or taking properties from the counter of PW1's shop. It also discredits credibility of PW2, PW4 and PW6 who contradict each on whether PW6 was present when the appellants were taking the properties from PW1.

Another contradiction pointed out by the appellants' counsels is in respect of the amount of money stolen from PW1's shop. In terms of the record, PW1 and PW2 were not at one, on whether Tshs. 2,769,000 appearing on the charge sheet was inclusive of Tshs. 1,000,000 alleged to have been left inside PW1's shop on the fateful day. Countering this complaint, Mr. Mtenga contended that PW1 and PW2 did not contradict each other. Referring to page 32 of the typed proceedings, he contended that Tsh. 2,769,000 was inclusive of Tsh. 1,000,000.

I examined the record. In his evidence in chief and cross-examination, PW2 told the trial court the amount stolen is Tshs. 2,769,000. He was firm that the amount was known to him because the incident happened immediately after counting the sale proceeds. PW2 did not state anything about the money left in the shop by PW1. It was during re-examination when he testified to have been informed by PW1 that the latter (PW1) had left Tshs. 1,000,000 in the shop. Thus, PW2 went on to

testify that the proceeds of sale (Tshs. 2,769,000) was inclusive of Tshs. 1,000,000 left by PW1. He adduced that:

> *"On 17/02/2021 I called **PW1 who told me that he left shs 1,000,000/= in the shop which I took to be proceeds of sale.** In shs. 2,769,000/= that amount was inclusive."*

On the other hand, although PW1 deposed that he left some money in the shop, he stated on oath that the total amount was not known to him. Let his evidence gives the picture. PW1 stated:-

> *"At the time I left the shop for mosque, **I left some money** which I did not know the exact total"*

It is also my considered view that, the said contradiction is not minor and that it goes to the root of the case to wit, whether Tshs. 2,769,000/= was stolen from PW1's shop as stated in the first count.

Other contradiction is reflected in the evidence of PW6 on one hand and PW9 and Exhibit P2 on the other hand. It is related to the persons identified during identification parade which was supervised by PW9. In his testimony, PW6 stated to have identified two persons–during the identification parade. He named them as **Deogratias Peter** and **Daniel Bura**. However, PW9's testimony and Exhibit P2 show that the suspect identified by PW6 is **Daniel Laurent Bura**. The said **Deogratias Peter**

mentioned by **PW6** does not appear in the evidence of PW9 and Exhibit P2.

I also agree with the appellants' counsel that PW6 contradicted himself on how he came to know the third accused. Page 71 of the typed proceedings shows that PW6 identified the 3rd appellant in PW1's shop and that he (3rd appellant) was called by his name by General (1st appellant) and one, Andrew.

However, when examined further, PW6 changed the story. His evidence on the name of the person identified in the fifth position (i.e. 3rd appellant) went as follows:

> *"Then I told them that I had identified the person in the fifth position his name was not known to me.* ***It is when they told me that his name is Daniel Bura****."*

Even if I was to consider Mr. Mtenga's argument that PW6 was referring to one and the same person, I hold the view that the issue as to when PW6 knew the 3rd appellant's name is vital. In the cases of **Marwa Wanjiti and Another vs R** [2002] TLR 39, **Jaribu Abdalla vs R** [2003] TLR 271, **Lucas Venance Bwandu**, Criminal Appeal No. 392 of 2018 (unreported), **Chacha Jeremia Murimi and 3 Others vs R**, Criminal Appeal No. 551 of 2015 (unreported), to mention but a few, it was

underscored that, the ability of the identifying witness to name the suspect at the possible moment assures his credibility. Therefore, if it is taken that PW6 identified the third appellant and that he was made aware of his first name at the scene of crime, he was expected to have named him at the time of reporting the incident. Now that he contradicts himself on when he knew the 3rd appellant's name, his credibility is questionable. This is when it is also considered that PW6 did name the 3rd appellant in his statement (Exhibit D1). For this reason and other explanation given afore, the tenth ground of appeal which hinges on credibility of PW6 is also meritorious.

In the 4th ground of appeal, the trial court is also faulted for failure to consider that the case was poorly investigated. One of the complaints is on the prosecution's failure to call some witnesses. Mr. Magafu submitted that Mzee Salim and Ally named in the particulars of the charge sheet, and one, Feruzi named by PW8 ought to have been paraded as witnesses. He contended that they were not called for the reasons known to the prosecution.

Mr. Mgaya responded that there is no such number of witnesses required to prove certain fact, as provided for under section 143 of the Evidence Act. He further submitted that the issue or fact required to be

proved by Mzee Salim and Ally was duly proved by PW2 and PW3, whilst PW8 gave evidence to prove fact which was required to be proved Feruzi.

I am at one with Mr. Mgaya on the principle that the law does not specify the number of witnesses required to prove certain fact. What matters is the value of evidence given by the witness called by the prosecution. The general rule is that the prosecution is under duty to call those witnesses who are necessary and able to testify on the fact on issue. Where such witness is not called without sufficient reason while he is within reach, the court is enjoined to draw an adverse inference to the prosecution. [See **Sungura Athuman vs R**, Criminal Appeal No. 291 of 2016 (unreported).

In our case, the particulars of offence of the 1st count shows that, immediately before stealing PW1's money, the appellants assaulted, among others, Salim Hassan and Ally Shaban and that they used a gun to threaten them in order to obtain and retain the said property. Indeed, Mzee Salim and Ally were named by other witnesses (PW2 and PW4). However, the trial court was not informed at all as to why the said Salim Hassan and Ally Shaban were not called as witnesses. Considering that they were victims of the offence laid against the appellants, I am in agreement with Mr. Magafu that, the prosecution ought to have called

them as witnesses or account the reason for not calling them. Since this was not done, an adverse inference is hereby drawn thereby raising doubt on the prosecution case.

Given the above exposition, I am of the humble view that this is not a fit case to order a retrial. As a result, I find that organizing resources seeking to address other issues and or grounds of appeal would be a fruitless exercise.

In the final analysis, I allow the appeal to the extend I have demonstrated herein. Consequently, the proceedings of the trial court are hereby nullified, the conviction of the appellants is quashed and the sentences meted on them are set aside. It is ordered that Lengai Ole Sabaya, Sylvester Wenceslaus Nyegu and Daniel Gabriel Mbura, be released from prison unless they are being held for some other lawful cause.

DATED at ARUSHA this 6th day of May, 2022.

S.E. Kisanya
JUDGE

COURT: Judgment delivered in open court this 6th day of May, 2022 in the presence of the appellants, Mr. Moses Mahuna and Ms Fauzia Mustapha for the 1st appellant, Mr. Gabriel Rwahira holding brief for Edumund Ngemela, learned advocate for the 2nd appellant, Mr. Fridolin Bwemelo learned advocate for the 3rd appellant and Mr. Felix Kwetukia, learned Senior State Attorney for the respondent. B/C Mjuni present.

Right of appeal is well explained.

S.E. Kisanya
JUDGE
06/05/2022