IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 365 OF 2018

ANDREA AUGUSTINO @MSIGARA.....1ST APPELLANT
JESSE KAJUNA @MWEMERO.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Aboud, J)

dated the 14th day of March, 2018
in
Criminal Session No. 12 of 2016

JUDGMENT OF THE COURT

12th & 28th February, 2020.

KEREFU, J.A.:

The appellants, Andrea Augustino @ Msigara and Jesse Kajuna @ Mwemero were jointly charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE. 2002. The prosecution alleged that, on 13th September, 2014 at 3rd Street, Makoko Road within Tanga Region the appellants jointly and together did murder one Blandina Samwel @ Bendera, the deceased.

In a nutshell, the prosecution case found on the record of appeal leading to the appellants' conviction stated that, the appellants were regular customers of Viwalo Classic Wear Shop located at 3rd Street, Makoko Road within Tanga Region, where the deceased worked as a sales woman. On the fateful date, 13th September, 2014 morning hours the appellants visited that shop to purchase different items including clothes and shoes, where they found the deceased and his brother Peter Samwel Bendera (PW1) inside the shop. They started negotiating prices of those items with the deceased. PW1 left the shop at around 08:30am leaving the appellants inside the shop with the deceased. At around 09:00am PW1 received a phone call from her sister Theresia Samwel Bendera, who informed him that Blandina had been killed inside the shop. PW1 rushed to the scene of crime where he found many people outside the shop. Muharamu Abdallah (PW4), a neighbour who was also at the scene of crime reported the incident to the police. Among the police officers who arrived at the scene of crime included E.6958 D/CPL Innocent (PW3), F.7215 D/C Andelile (PW15) who entered inside the shop and found the deceased body lying on the floor with her legs tied up with black shoe lace, mouth covered with a T-shirt and her neck strangled with white shoe lace

(exhibit P3). The family members, who were at the scene of crime informed the police that the deceased was Blandina Samwel Bendera. PW15 drew the sketch map of the scene of the crime (exhibit P11) and the deceased`s body was taken to Bombo Hospital. On 15th September, 2014 Dr. Francis Theophil Ngowi (PW7) conducted an autopsy on the deceased's body and revealed that the death was due to fracture of cervical spine (exhibit P7). It was further alleged that while inside the shop, the appellants attacked the deceased, tied her legs with a shoe lace and strangled her to death. Thereafter, the appellants stole different items from the shop which included clothes, shoes, bags, and deceased's mobile phone NOKIA Brand handset No. 0652 650 865 with IMEI No. 35204059630380.

The police mounted an investigation with the aid of cybercrime officers at the RCO's office where it was discovered that the deceased's Mobile Phone (exhibit P4) was in use by another person. The police arranged a strategic trap and managed to arrest the first appellant on 10th October, 2014 at Bombo Hospital. Upon search, the first appellant was found in possession of the deceased mobile phone and a black bag containing trousers, jeans, two pence clothing with drafts together with

two pairs of shoes alleged to have been stolen at the deceased's shop. The black bag with the said items was admitted in evidence as exhibit P1 and the seizure certificate prepared by PW2 exhibit P2. On 15th September, 2014 WP 5054 D/SGT Wema (PW13) from the cyber crime unit wrote a letter to TIGO a Mobile Phone Company in Dar es Salaam requesting them to avail information on the registered owner of the mobile phone with number 0652 650 865. Yahaya Zahoro (PW16) a manager from TIGO Company confirmed to have received the said request and testified that they have worked on it and found that, mobile phone 0652 650 865 with IMEI No. 359204059630380 belonged to the deceased. PW16 added that they had further discovered that from 20th September, 2014 the said IMEI number had a different mobile phone number which was 0713 129142 the property of the first appellant. He further testified that they submitted the Report on the said findings to the office of the RCO Tanga. PW16 tendered the said Report in court and it was admitted in evidence as exhibit P12.

It was further alleged that, on 10/10/2014 during interrogation by E.7015 SSGT. Gustaph (PW12), the first appellant confessed in his cautioned statement (exhibit P9) to have killed the deceased in the company of the second appellant. Thus, the second appellant and his

brother Cuthbert Robert Kajuni were arrested at Moshi on 11th October, 2014 and brought to Tanga. Upon interrogation, the second appellant orally confessed in front of his brother Cuthbert Robert Kajuna to have participated in the killing of the deceased and stole some items from the deceased's shop. DC Innocent (PW14) recorded the statement of Kajuna which was admitted in evidence as exhibit P10 under section 34B (1) (2) of the Evidence Act, Cap 6 RE 2002 (the Evidence Act) as the prosecution failed to trace him.

On 14th October, 2014 Florence Odo Ndunguru (PW5) the owner of the shop inspected her shop in the company of the police officers and managed to identify the stolen items together with the deceased mobile phone. PW5 testified that, the deceased phone had a mark *'BL'* which was inserted by the deceased to differentiate it with her friend's phone which is similar to hers. The testimony of PW5 was corroborated by Lucy Shaban Mohamed (PW9).

On 15th October, 2014 Inspector Josephat Albert Mapande (PW8) conducted identification parade at Chumbageni Police Station where PW1 identified the appellants as the persons who killed the deceased though he also testified that he saw them for the first time at the shop. Christom

Edward (PW11) and Nuru Juma (PW17) testified to have participated in the said identification parade. PW8 tendered the identification parade report which was admitted in evidence as exhibit P8.

In their defence, the appellants under oath denied any involvement in the alleged murder. They raised a defence of alibi to the effect that, none of them was at the scene of crime.

After a full trial the appellants were all convicted and sentenced to suffer death by hanging. Aggrieved, the appellants have appealed to the Court with two sets of memoranda. The first one was lodged on 19th September, 2019 and the additional memorandum on 21st September, 2019 with a total of eighteen (18) grounds which raised six (6) main complaints:- **one,** that, the visual identification of the appellants and the Identification parade were not properly done. **Two,** the statement of Cuthbert Robert Kajuna was tendered and admitted in evidence contrary to section 34B (2) (a) and (b) of the Evidence Act. **Three**, the trial judge wrongly acted on the retracted cautioned statement of the first appellant. **Four,** the certificate of seizure on the stolen items was procured contrary to the law. **Five,** the doctrine of recent possession was wrongly invoked

and **Six,** the prosecution failed to establish the chain of custody of the items alleged to have been stolen.

When the appeal was placed before us for hearing, the first appellant was represented by Mr. Warehema Kibaha, learned counsel, the second appellant was represented by Mr. Switbert Rwegasira assisted by Mr. Mathias Nkingwa, both learned counsel and the respondent had the services of Mr. Peter Mauggo, Principal State Attorney assisted by Ms. Elizabeth Muhangwa, State Attorney.

Upon taking the floor to expound on the grounds of appeal, Mr. Kibaha sought leave, which we granted for him to abandon the first memorandum of appeal and submit only on the additional memorandum of appeal which raises similar grounds as highlighted above.

As for the first ground, Mr. Kibaha submitted that the visual identification of the appellants was not watertight, as PW1 did not give proper descriptions, such as their attire and any special marks. He added that, since the appellants were not known to PW1 prior to the incident, PW1 was expected to give further descriptions on how he managed to identify them to avoid mistaken identity. To support his position, Mr. Kibaha cited cases of John **Paulo @ Shida and Paulo Joakim v. the**

Republic, Criminal Appeal No. 335, Tanga Registry (unreported) and **Rex v. Mohamed Bin Allui** [1942] 19 E.A.C.A 72.

On the identification parade, Mr. Kibaha argued that it was unprocedurally conducted as there is nowhere in the record of appeal suggesting that, prior to the identification parade the appellants were informed of their rights to have their advocate or friends present during the parade. He further argued that there is nowhere indicating that, prior to the parade PW1 gave to the police or any other person, the proper descriptions of the persons he saw at the scene of crime. In addition, Mr. Kibaha argued that, there were no photographs taken during the parade as required by Police General Orders (PGOs) No. 231, Order 2 and 5. He referred us to **Rex v. Mwango Manaa** [1936] 3 E.A.C.A 29. He further faulted the identification parade register/form (exhibit P8) filled by PW8 that it does not contain general descriptions of the appellants given by PW1 that, the appellants were tall and black.

As for the second ground, Mr. Kibaha submitted that it was wrong for the trial court to admit the statement of Cuthbert Robert Kajuna as exhibit P10 under section 34B (1) (2) (a) of the Evidence Act without proof of service such as an endorsed summons or even affidavit of the court

process server to confirm that Cuthbert Robert Kajuna is out of reach. On the basis of the pointed shortcomings, Mr. Kibaha urged the Court to expunge the statement of Cuthbert Robert Kajuna from the record.

On the issue of the first appellant's cautioned statement, Mr. Kibaha argued that it was wrong for the trial Judge to act on the cautioned statement which was retracted. In addition and upon being probed by the Court if the said statement was read out and explained in court after its admission, Mr. Kibaha referred the Court to page 98 of the record of appeal and submitted that, the cautioned statement of the first appellant was not read out after its admission. He insisted that, the statement ought to have been initially cleared for admission, admitted and then read out before the Court. With that omission, Mr. Kibaha prayed the Court to also expunge the first appellant's cautioned statement from the record.

Arguing the fourth ground, Mr. Kibaha submitted that, the certificate of seizure of items alleged to have been stolen from PW5's shop was issued unprocedurally as there was no receipts issued by PW2 and PW3 the seizing officers as required by section 38 (3) of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA). Apart from that, Mr. Kibaha added that there was no independent witness who witnessed the searching exercises. To

buttress his position he cited **Selemani Abdallah and 2 Others v. Republic,** Criminal Appeal No. 384 of 2008 (unreported) at pages 18 to 20 and insisted that it was mandatory for the seizing officers to issue receipts after the search. He further argued that, it is even not clear as to whose custody the seized items were kept, because there was no register submitted to the court to prove the custody and labels assigned to those items. He thus questioned the chain of custody on those items as the same was not established by the prosecution.

On the last ground, Mr. Kibaha argued that the doctrine of recent possession was improperly invoked by the trial Judge. Mr. Kibaha argued further that it is settled that properties suspected to have been found in possession of accused persons must be identified conclusively by the owner. He referred us to page 46 of the record and argued that, PW5 did not establish ownership of the allegedly stolen items. He said, PW5 only said in general terms that the said properties were hers without producing concrete evidence to prove the same. In this regard, Mr. Kibaha cited **Magesa Chacha Nyakibali and Another v. Republic,** Criminal Appeal No. 307 of 2013 (unreported) at page 6. On the basis of the pointed shortcomings in the proceedings and on the weakness of evidence adduced

before the trial court, Mr. Kibaha prayed for the first appellants' conviction to be quashed, the sentence imposed against him be set aside and the first appellant be released from the prison.

On his part, Mr. Rwegasira supported the submission made by his colleague Mr. Kibaha and also urged the Court to allow the appeal and release the appellants.

In response Mr. Mauggo resisted the appeal. Arguing for the identification parade, Mr. Mauggo submitted that the same was conducted in accordance with the law and there was no any miscarriage of justice. He further added that, PW1 managed to identify the appellants due to the time he spent with them at the shop. As such, he disputed the claim that there were no photographs by arguing that the same is not a mandatory requirement. He challenged the appellants for failure to raise those issues or even cross examined witnesses during the trial. It was the strong argument of Mr. Mauggo that what the appellants are doing is only an afterthought. Mr. Mauggo insisted that failure to cross examine a witness during the trial cannot entitle the appellant to raise that issue as a ground of appeal. To buttress his position he cited **George Maili Kemboge v. Republic,** Criminal Appeal No. 327 of 2013 (unreported).

On the admission of the statement of Mr. Cuthbert Robert Kajuna, Mr. Mauggo submitted that the trial court was satisfied that the said witness could not be brought before the Court. He equally challenged the counsel for the appellants for failure to object to the admission of that statement during the trial and submitted that what they have raised is also an afterthought.

As regards the certificate of seizure, Mr. Mauggo submitted that it is a duty of the seizing officer to make sure that the certificate of seizure for the properties seized is signed by all actors. According to him the certificate of seizure in this case was properly signed. As to the issue of issuance of receipts, Mr. Mauggo argued that, the word receipt is not defined anywhere in the CPA and due to that lacuna, he said, the copy of seizure Form given to the appellants can as well be considered as a receipt in that context.

In respect of doctrine of recent possession, Mr. Mauggo submitted that the same was proved beyond reasonable doubt, as witnesses managed to identify the deceased's mobile phone via an IMEI number. To buttress his position he cited **Mustapha Maulid v Republic**, Criminal Appeal No. 241 of 2014 (unreported).

On the issue of chain of custody of the properties found in possession of the first appellant, Mr. Mauggo challenged the submission by Mr. Kibaha by arguing that the custody of the stolen items was properly handled. He clarified that, the personal search was done on the first appellant's body, the certificate of seizure properly filled and issued to the appellants. He added that, the deceased's mobile phone the main strong exhibit in this case was under the custody of the police officer who testified before the trial court. Mr. Mauggo submitted further that, though the first appellant stated that he bought the said mobile phone from one Isaya, but he did not summon the said person (Isaya) to come to and testify before the trial court. In conclusion, Mr. Mauggo urged the Court to dismiss the appeal for lack of merit.

In rejoinder, Mr. Kibaha reiterated what he submitted in chief and insisted that the registered owner of the mobile phone was not established during the trial. He clarified that, exhibit P12 admitted by the trial court as Report from the TIGO Company to verify the registered owner of the said mobile phone number 0652 650865 with IMEI number 359204059630380 was actually not a Report from TIGO, but only a request from the OCS's office addressed to TIGO Company. He said, in the entire record there is

no report from TIGO Company which proved that the alleged mobile phone found with the first appellant was the property of the deceased. It was his strong argument that, the ownership of the said mobile phone was not established before the trial court and therefore this Court cannot assume that the same belonged to the deceased. He also challenged the interpretation of the word receipt given by Mr. Mauggo and argued that the certificate of seizure or Form cannot be equated to a receipt. To this end, Mr. Kibaha invited the Court to re-evaluate the evidence on record and allow the appeal. Mr. Nkingwa also rejoined by urging the Court to consider all issues raised by the appellants, as he said, they are pure points of law and not an afterthought as claimed by Mr. Mauggo.

We have carefully considered the rival arguments by the counsel for the parties in the light of the record of appeal before us and the main issue for our determination is whether the appeal has merit. We shall deal with the grounds of appeal in the manner they have been argued by the counsel for the parties.

Before doing so, it is crucial to state that, this being the first appeal it is in the form of a re-hearing, therefore the Court, has a duty to re-evaluate the entire evidence on record by reading it together and

subjecting it to a critical scrutiny and if warranted arrive at its own conclusion of fact. See **D.R. Pandya v. Republic** [1957] EA 336.

Starting with the issue of visual identification and identification parade, we wish to commence with the celebrated principles relating to visual identification articulated in the case of **Amani Waziri v. Republic** [1980] TLR 250 and reiterated in the case of **Raymond Francis v. Republic** [1994] TLR 100 that:-

> *"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance."*

The guiding factors to be taken into account by courts in establishing whether the identification of an accused at the scene of crime was watertight were stated by the Court in the case of **Waziri Amani** (supra). The conditions include:-

> *"...the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night –time; whether there was good*

or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not."

In the case at hand, PW1 claimed to have identified the appellants at the scene of crime and tried to describe their physique, size and attire, but his testimony was in general terms. This can be found at page 20 of the record of appeal where PW1 testified that:- *"One man had a black bag pack and the other one was a tall man."* It is obvious, as stated by the counsel for the appellants that, the descriptions given by PW1 to identify the appellants was not watertight to eliminate possibilities of mistaken identity. This Court has always reiterated that caution should be exercised before relying solely on the visual identification evidence. For instance in **Chokera Mwita v. Republic,** Criminal Appeal No. 17 of 2010 (unreported) the Court, among others held that:-

> *"The law on visual identification is well settled. Before relying on it,* ***the court should not act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight."*** [Emphasis added].

In addition, in **Raymond Francis** (supra) the Court, among others, held that:-

> *"Since all the* ***witnesses admitted seeing the appellant for the first time during the incident that day, it was necessary in their evidence of identification to describe in detail*** *the identity of the appellant when they saw him at the time of incident."* [Emphasis added].

In the case at hand, PW1 who identified the appellants testified to have seen them for the first time at the scene of crime. Therefore, given the general descriptions of the appellants by PW1, we are in agreement with the counsel for the appellants that the appellants were not properly identified by PW1 to rule out the possibility of mistaken identity.

As for the identification parade, there is no doubt that procedures were flawed. It is common ground that, the conduct of identification parade is governed by the PGO. Order 231 (2) (c) (d) (s) and (k) of the said PGO requires the officer conducting the parade to inform the suspects, prior to the parade, their rights to have advocate or friend present when the parade is taking place. In addition, the officer is required to fill in the Identification Parade Register any identification or degree of identification

made. It is also a requirement that persons selected to make up the parade should be of a similar age, height, general appearance and wear same clothes.

Apparently, in the case at hand, all these were not done and even the exhibit P8 does not indicate the degree of identification made by PW1. To make matters worse, PW11 who participated in the parade testified, at pages 65 – 66 of the record of appeal, that *"...we were 10 in number. The police officer brought two suspects and they joined us...I was number eight, as they arranged the parade. The suspects had no numbers."* On the account of the pointed omission, we are unable to agree with Mr. Mauggo that the identification parade was conducted properly. We thus appreciate the authority in **Rex** (supra) referred to us by Mr. Kibaha. The effect of contravening the procedures for identification parade renders the same to be of little probative value. Consequently, we expunge exhibit P8 from the record of this appeal. In the circumstances, we find the first ground of appeal to have merit.

With regards to the complaint on the admission of statement of Cuthbert Robert Kajuna, we have examined the record of appeal and it is clear at pages 106 -109 that the trial court admitted that statement as

exhibit P10 on the ground that the witness could not be found. Section 34B (1) and (2) of the Evidence Act lays down conditions to be complied with before a statement of that nature is admitted in court. The said section provides that:-

> *"(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.*
>
> *(2) A written statement may only be admissible under this section–*
>
> *(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;*
>
> *(b) if the statement is, or purports to be, signed by the person who made it;*
>
> *(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for*

perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence; and

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read.

It is a mandatory requirement of the law that, for a statement of that nature to be admitted in court in lieu of oral direct evidence under section 34B (1) of the Evidence Act, all conditions stipulated in sub-section (2) (a) to (f) must cumulatively be complied with. See **Mhina Hamisi v. Republic**, Criminal Appeal No. 83 of 2005 and **Fred Stephano v. Republic**, Criminal Appeal No. 65 of 2007 (both unreported).

In the case at hand, as eloquently argued by the counsel for the appellants the above conditions were not complied with, as the Notice was

given on the very same day when the statement was about to be tendered and there was no proof of service by an endorsed summons or even affidavit of the court process server. With respect, we find the trial Judge misdirected herself in admitting that statement while the laid down conditions were not met. In **Twaha Ali & 5 Others v. Republic,** Criminal Appeal No. 78 of 2004, CAT at Dar es Salaam (unreported) when this Court was dealing with section 34B(2) of the Evidence Act, stated that:-

> *"We believe that it is now a common knowledge that all conditions in this subsection are cumulative and must be satisfied by prosecution before the statement is admitted in evidence"*

We are mindful of the fact that, Mr. Mauggo had since challenged this ground of appeal by arguing that since the appellants did not cross examine a witness during the trial on this point are not entitled to raise the same as a that ground of appeal. We do appreciate the principle referred to us by Mr. Maugo, but this being a pure point of law it can be raised at this stage, as this Court has the duty to examine if the law was applied appropriately. In the event, we are again in agreement with the counsel for the appellants that exhibit P10 deserves to be expunged from the record, as we hereby do.

As regards the first appellant's cautioned statement (Exhibit P9), we hasten the remark that, we are at one with Mr. Kibaha that failure to read out the first appellant's cautioned statement after it was admitted as an exhibit in evidence was a fatal irregularity. We say so, because it is a well established principle founded upon prudence that, whenever it is intended to produce any document in evidence, it should first be cleared for admission and be actually admitted before it can be read out. See **Robinson Mwanjisi and Others v. Republic** [2003] TLR 218 and **Omari Iddi Mbezi v. Republic**, Criminal Appeal No. 227 of 2009 (unreported). The essence of reading out the document is to enable the accused and other parties to understand the nature and substance of the facts contained therein to make an informed defence. Since in the case at hand the first appellant's cautioned statement was not read out after its admission, we hereby expunge it from the record.

The other complaint by the counsel for the appellants is on the certificate of seizure on the items alleged to have been stolen from PW5's shop that was conducted contrary to the requirement of section 38 (3) of the CPA. It was their strong argument that there were no receipts issued by PW2 and PW3 the seizing officers to that effect. Mr. Mauggo disputed

this ground by arguing that the word receipt is not defined under the law and according to him a Seizure Form can be as well considered as a receipt. We find the argument of Mr. Mauggo to be misconceived. Section 38(3) of the CPA is very clear on this aspect and provides that:-

> ***"Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing,*** *being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises,* ***and the signature of witnesses to the search, if any."*** [Emphasis added].

Following the above section and taking into account that in the case at hand there were no receipts issued by PW2 and PW3, there is no doubt that the procedure was flawed. Again, as rightly put by Mr. Kibaha, the interpretation of the word receipt given by Mr. Mauggo is unfounded as there is no way the certificate of seizure or Seizure Form can be equated to a receipt.

As for the fourth ground, we are alive to the fact that, the learned trial Judge relied purely on the doctrine of recent possession and circumstantial evidence to ground the conviction of the appellants. It is

trite law that for the doctrine of recent possession to be invoked, the stolen properties must be identified by the complainant as held in the case of **David Chacha and 8 Others v. Republic,** Criminal Appeal No. 12 of 1997 (unreported) that:-

> *"It is a trite principle of law that properties suspected to have been found in possession of the accused persons should be identified by the complainants conclusively. In a criminal charge, it is not enough to give generalized description of the property"*

In the case at hand, the said stolen properties which were found in possession of the first appellant were not conclusively identified. PW5 did not testify with respect to any mark or symbols on the items which would differentiate them from other items of that category. It even raises doubt as whether the items the complainant purported to identify were actually the ones stolen from her shop. In her testimony she simply stated at page 44 of the record of appeal that:-

> *"I went to police on 15/9/2014 and we went together to my shop. I was told to inspect what was missing in my shop. I found two bags were missing, blue and black bags, number of jeans, shorts, pence and cadets. All were in different colours"*

It is apparent from the above excerpt that PW1 did not testify on any mark, let alone distinct marks of the items allegedly stolen. It is also clear that PW5 did not establish ownership of the allegedly stolen items, as she did not tender any receipt to show satisfactorily that she once owned the said properties.

Turning to the mobile phone, which is the vital exhibit in this case. It is on record that PW16 did not prove the registered owner of the said phone. At page 113 of the record of appeal, PW16 testified that they have conducted a search and found that the deceased was the registered owner of the said phone. To verify his findings, PW16 tendered a Report which was admitted in evidence as exhibit P12 as Report from TIGO to prove the ownership of the said phone. We have examined exhibit P12 and as eloquently argued by Mr. Kibaha and supported by Mr. Rwegasira, the same is not a Report from TIGO, but rather a letter from the office of the RCO requesting TIGO to provide information on the registered owner of the mobile phone No. 0652-650865. As such, there is no evidence on record to prove that the said mobile phone belonged to the deceased. What said by PW16 remained to be only a mere statement with no evidential value.

We have as well considered the mark *'BL'* used by PW5 and PW9 to identify the said mobile phone. It is our considered opinion that, as it stands now that the ownership of the said mobile phone was not proved, evidence by PW5 and PW9 is insufficient and equally with no evidential value. Besides, apart from mentioning the mark *('BL'),* which is not official, PW5 and PW9 did not assign any meaning to it. We are therefore at one with the counsel for the appellants that, in this case where the chain of custody of the stolen items was not established, *'BL'* being a simple mark, could have been inserted and tampered by anyone. See our decision in **Julius Mwanduka @ Shila v. Republic,** Criminal Appeal No. 322 of 2016 (unreported) at pages 16 -18.

We wish to emphasize that, in cases of this nature, identification and proof of ownership of the allegedly stolen items is of paramount importance. A mere mention of the items stolen, as in the case at hand, is not sufficient. The items being of general nature which did not have any distinct marks to differentiate them from others of similar category, it cannot be safely concluded that they are the ones stolen from the shop of PW5. It is therefore our findings that ownership of the allegedly stolen properties in this case was not established. We thus agree with the counsel

for the appellants that the case against the appellants was not proved beyond reasonable doubt.

The totality of the foregoing leads us to the conclusion that the prosecution case was tainted with doubts which in our criminal jurisprudence requires us to decide in favour of the appellants. As such, we are constrained to, and hereby allow the appeal, quash the appellants' convictions and set aside the sentence. Consequently, we order for immediate release of the appellants from prison unless they are being held for some other lawful cause.

Order accordingly.

DATED at **TANGA** this 20th day of February, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 28th day of February, 2020 in the presence of Mr. Mathias Nkingwa, counsel holding brief for Mr. Warehema Kibaha, counsel for the 1st Appellant, Mr. Switbert Damian Rwegasira, counsel assisted by Mr. Mathias Mkingwa, counsel for the 2nd appellant and Ms. Tussa Jackson Mwaihesya, State Attorney for the Respondent is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL

THE COURT OF APPEAL OF TANZANIA