IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KOROSSO, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 223 OF 2019

KHALID MOHAMED KIWANGA.....1ST APPELLANT

RAMADHANI MAGOGO @ ANDAZI .....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mgonya, J.)

Dated 20th day of May, 2019
in
Criminal Appeal No. 40 of 2019

JUDGMENT OF THE COURT

29th June & 14th September, 2021

KENTE, J.A.:

The appellants Khalid Mohamed Kiwanga and Ramadhani Magogo @ Andazi (henceforth the first and second appellant respectively) were charged with and convicted by the District Court of Kibaha of the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E. 2002] as amended by Act No. 3 of 2011. They were sentenced to the mandatory thirty years imprisonment. Dissatisfied with the decision of the trial District Court, they appealed

to the High Court of Tanzania sitting at Dar es Salaam where, as it turned out, their appeal was dismissed and the conviction and sentence sustained. Undaunted and defying all the odds, they appealed to this Court to challenge the decision of the High Court.

During the trial, it was the prosecution case that, on the 13th January, 2017 at about 9:00 pm, some robbers made a raid at the home of one Gabriel Kalengela (PW1). They were armed with iron-bars, bush-knives and a firearm which they used to shoot PW1 as they demanded him to give them money. It was the evidence of PW1 that the robbers got away with the items particularised in the charge-sheet. According to PW1 following a gunshot he fell down and in order to avoid further trouble, he disguised himself as dead. He told the trial court that however, he was able to identify some of his assailants including the appellants as he lay down, apparently in torment. PW1 told the trial court that visibility was supported by some light from electricity bulbs and a television set both of which were allegedly on.

Having accomplished their mission, the robbers vanished in thin air and, as the evidence shows, nobody was suspected nor arrested

immediately thereafter in connection with the said crime. For the purposes of exactness, whereas the incident was reported to the police at Kibaha immediately after its occurrence, the first appellant was arrested on 2nd March, 2017. The second appellant was arrested on 25th February, 2017 apparently in connection with some other criminal incidents which were then rampant in Kibaha District. It is in the course of interrogation that the appellants are alleged to have confessed as having been involved in the robbery incident the subject of the present appeal.

The case for the appellants during the trial was more or less similar. They firmly distanced themselves from the charged offence by presenting an **alibi** defence. The first appellant told the trial court that, he could not remember well where he was on 13/1/2017 and he blamed the police for a frame up. He complained that the police held a grudge against him after he refused to give them a bribe in connection with some other charges.

The second appellant for his part, was not specifically led by the trial magistrate to tell the court where he was on the fateful day. Instead, he said that, he was arrested at Kibaha along with some

other suspects on 25/2/2017 and whisked to Maili Moja Police Station where he stayed in custody for nine days, after which he was taken to the Justice of the Peace. Likewise, he blamed the police for being vindictive after he allegedly told them he had no money to grease their palms. Just like the first appellant, he claimed that he had been framed up by the police.

Despite the above complaints, the learned trial magistrate was satisfied that the case against them was proved to the hilt. She found them guilty of the offence of armed for which they stood charged and convicted them. In accordance with the dictates of the law, she sentenced them to thirty years imprisonment. As it was before the first appellate court, the present appeal is against both the conviction and the sentence.

The appellants have fronted eighteen (18) grounds of appeal with a view to faulting the decision of the learned appellate Judge of the High Court. In a nutshell, the cumulative effect of the said eighteen grounds of complaint is that, there was no sufficient evidence upon which to base a conviction against them and that, taken as a whole, the evidence led by the prosecution did not

measure up to the required threshold of proving the case beyond reasonable doubt. Accordingly, they strongly maintained that the offence of armed robbery of which they were convicted was not committed by them.

At the hearing of the appeal, the appellants were unrepresented hence fending for themselves. The Republic (Respondent) was represented by Ms. Jenipher Masue, learned Senior State Attorney, together with Ms. Ester Martin learned State Attorney.

When called upon to expound on their grounds of appeal, the appellants had nothing substantial to say. They only adopted their memorandum of appeal and implored the Court to allow the appeal, quash the conviction and set aside the custodial sentence which was imposed on them.

For her part, Ms. Masue did not support the conviction of the appellants and we think correctly so as we shall later on demonstrate. She submitted that the prosecution did not lead sufficient evidence to prove the appellants' guilt beyond reasonable

doubt. With regard to the complaint by the appellants that the charge was defective for having omitted to disclose the actual time when the charged offence was committed, the learned Senior State Attorney was of the view that, the question of time was not a legal requirement and that the victim (PW1) had told the trial court in no ambiguous terms that the robbery incident occurred at about 9:15pm. As to the complaint that, going by the charge it was not clear whether the robbery was committed at a place known as Umweleni or Kwa Mathias, Ms. Masue submitted that, that is misconceived as the charge shows clearly that the charged offence was committed at Umwelani area Kibaha District. All in all, the learned Senior State Attorney was convinced and she therefore urged the Court to hold that the charge had met the requirements of the law.

Needless to say, in view of the appellants' complaint, section 135 (a) (iii) of the **Criminal Procedure Act (Cap 20 R.E. 2002 now R.E. 2019)** was then the applicable law. We think that, it will be eminently proper at this juncture, to quote the provisions of the

above-cited law so far as it is applicable to the present appeal. It provides thus:-

> *"135. The following provisions of this section shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section-*
>
> *(a) (i) N/A*
>
> *(ii) N/A*
>
> *(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary, save that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required;"*

We wish to state that, having read the above quoted law with the attendant attention, it is our view that the actual time at which the offence charged was allegedly committed is not one of the ingredients of the offence of armed robbery as to require to be specifically indicated in the particulars of the offence. Moreover, should it be deemed necessary, the evidence of the complainant (PW1) shows very clearly that the robbery incident occurred at about 9:15 pm after he arrived home from work. (See also **Jamali Ally Salim v. Republic,** Criminal Appeal No. 52 of 2017 (unreported). It is therefore our respectful view that, the impugned charge was perfectly in order and the complaints by the appellants are clearly misconceived.

Having found that the charge was quite in order, we shall now proceed to consider the evidence of identification of the appellants by PW1 at the scene of the crime. On this aspect, Ms. Masue submitted that, the identification evidence by PW1 was rather wanting. She said that, not only that the robbers were total strangers to PW1 but also the conditions obtaining at the scene of the crime were not favourable for purposes of a correct identification. She therefore

submitted that, given the above mentioned facts and circumstances, the evidence of visual identification by PW1 was unreliable. As can be gleaned from the evidence on record, the fact that PW1 was robbed of his property on the fateful day does not attract any controversy between the appellants and the respondent. Moreover, the parties are not in dispute on the fact that PW1 was shot and seriously injured by the robbers as they pressed him to give them money. The crucial question to be determined is whether or not it was the appellants or one of them who committed the said robbery.

Dealing with the question of identification of the appellants by PW1, the learned first appellate Judge of the High Court had the following to say:-

> *"From the record, there is no doubt that the crime was committed at the PW1's home and it was during night. The controversial issue is who the bandits were and if at all they were well identified as stipulated in the case of* ***WAZIRI AMANI V. R.*** *(1980) TLR 250.*
> *The record of the trial court via PW1 at page 12 of the proceedings reveals that: "There was enough light which in my sitting room.*

There are electrical bulbs which were on and the TV was also on. The light is so clear as even my children uses the same light to read."

Thereafter the learned appellate judge concluded that:-

"Under the circumstances, PW1 proved the identification of the offenders in line with dynamics stipulated in ***WAZIRI AMANI V. R.*** *(supra) which states as follows: "The following factors have to be taken into consideration, the time the witness had the accused under observation, the distance at which he observed him and the condition in which such observation occurred, for instance whether it was day or night (whether it was dark if so was there moonlight or hurricane lamp)".*

The next point for consideration and decision is whether it was correct, both in law, and in fact, for the learned Judge of the High court to find and hold that, the appellants were sufficiently and correctly identified by PW1 at the scene of the crime.

The issue as to whether or not the appellants were adequately identified by PW1 is essentially a question of fact. Both the trial and the first appellate court were of the concurrent view that the appellants were so identified. This being a second appeal, the question that poses for determination at this stage is whether or not we can interfere with that concurrent finding of fact.

On this point, it is now settled law that, in a second appeal, the Court would normally only deal with questions of law and rarely interfere with concurrent findings of fact provided that those findings of fact are based on the correct appreciation of the evidence. However, if there are any mis-directions or non-directions or misapprehension of the nature, substance and quality of the evidence on record, resulting into an unfair conviction, this Court is duty bound to intervene. (See **Shihobe Seni and Another v. Republic,** [1992] TLR 92, **Salum Luhando v. Republic,** [1993] TLR 170 and **Kasim Said and two others v. Republic** Criminal Appeal No. 308 of 2013 (unreported). Since the learned first appellate Judge was enjoined by law to re-evaluate the evidence of visual identification by PW1 and as such she did not do so, it is now our duty to do what she failed to do.

Over the years, the Court has developed a number of guidelines to the trial courts when determining the question of visual identification of criminal suspects. The said guidelines include, but are certainly not limited to the following, that:

i. Evidence of visual identification is of the weakest kind and most unreliable and should not be acted upon unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight. See **WAZIRI AMANI v. REPUBLIC.** (1980) TLR 250. In the above-cited case it was held by the Court that questions of duration of incident, distance, time of the day, familiarity, and existing impediments to sight are among the relevant factors to be considered.

ii. That is so, even if that evidence is of recognition (See **HASSAN JUMA KANENYERA v. REPUBLIC.** (1992) TLR.

iii. The ability of a witness to name suspect at the earliest opportunity is an all-important assurance of his reability; in the same way as unexplained, delay or complete failure to do so

should put a prudent court to inquiry. (See **MARWA WANGAI AND ANOTHER v. REPUBLIC.** (2002) TLR 39.

iv. When it comes to issues of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable the identifying witnesses to identify the accused person. Bare assertions that "there was light" would not suffice (see **MAGWISHA MZEE AND ANOTHER V. REPUBLIC.** Criminal Appeal No. 465 and 466 of 2007 (unreported).

v. Even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on the source of light, and its intensity is of paramount importance. This is because even in recognition cases mistakes are often made (see **ISSA MGARA @ SHUKA v. REPUBLIC.** Criminal Appeal No. 37 of 2005 (unreported).

vi. The fact that a witness knew the suspect before that date is not enough. The witness must go further and state exactly how he identified the appellant at the time of the incident,

say by his distinctive clothing, height, voice (see **ANAEL SAMBO V. REPUBLIC.** Criminal Appeal No. 274 of 2007 (unreported).

vii. The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all prevailing conditions to see if, in all the circumstances there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful, identifying witness.

viii. In every case in which there is a question as to the identity of the accused, the fact of there having been a description and the terms of that description are matters of the highest importance of which evidence ought always to be given, first of all of course by the person who gave the description or purports to identify the accused, and then by the person

to whom the description was given. (**R. vs ALLUI** (1942) EACA. 72.

ix. In matters of identification it is not enough merely to look at the factors favouring accurate identification. Equally important is the credibility of witnesses. Favourable conditions for identification are no guarantee against untruthful evidence. (see **JARIBU ABDALLAH V. R.** (2003) TLR 271.

x. Naming a suspect is in itself a description.

xi. Where a suspect is arrested at the scene of crime or pursued from there and arrested immediately thereafter, the question of identification does not arise.

xii. Dock identification is worthless unless this has been preceded by a properly conducted identification parade (see **FRANCIS MAJALIWA AND TWO OTHERS V. R.** Criminal Appeal No. 139 of 2005 (unreported).

According to this Court in **Kasim Said's** case (supra), the above- outlined list of tests is not all inclusive. But the above mentioned are some of the most dominant features that one is bound

to encounter when dealing with evidence of identification and the particular circumstances obtaining in each case would dictate which test or tests to apply.

Reverting to the case now under consideration, it is apparent that, while the trial Magistrate appears to have glossed over the crucial issue of the appellants' identification, the learned Judge of the High Court was satisfied that PW1 had sufficiently identified them for the sole reason during the commission of the said crime, that there was enough light in PW1's sitting room.

With due respect, we do not think that, that single test would be sufficient to support the finding that the appellants were sufficiently identified. There was no evidence as to the intensity of the light and in our respectful view, a bare assertion of there being light as it was asserted in this case, is by itself, inadequate. Some of the remaining tests would have been relevant if PW1 was led to address them. But then we are going astray because PW1 was not asked for instance, to estimate the time the robbery incident lasted; if he knew the appellants before the incident and the average

distance between him and the appellants who were definitely moving around as they ransacked his home.

In the light of the above observation, we uphold the grievances of the appellants which were supported by the learned Senior State Attorney to the effect that, both the trial and the first appellate court fatally erred in law in relying on the evidence of visual identification by PW1 which, as amply demonstrated, was materially wanting.

Having done away with the evidence of visual identification of the appellants by PW1, the next question is on the evidential weight to be accorded to the second appellant's cautioned statement to the police which was admitted in evidence as exhibit P3. Submitting on the validity of the said statement, Ms. Masue maintained that it was not read out in court as required by law and on that account, the learned Senior State Attorney urged us to expunge it from the evidence on record.

For our part, unhesitatingly, we are of the view that the stance of the law is as exhibiting no ambiguity as submitted by Ms. Masue. It is settled law that, failure to read out the contents of any

documentary exhibit after its admission into evidence as happened in this case, is very fatal. According to case-law, such an exhibit ceases to have any evidential value and is liable to be expunged from the record. (That is the position expounded in **Sebastian Michael v. The DPP Criminal Appeal No. 145 of 2018, CAT – Mbeya** (unreported), **Issa Hassani Uki v. Republic. Criminal Appeal No. 129 of 2017 CAT- Mtwara** (unreported) which we were ably referred to by the learned Senior State Attorney. We would therefore agree with the correct appreciation of the law by Ms. Masue and we accordingly expunge Exhibit P3 from the record.

Still in progression, we are of the view that the same fate would befall the certificate of seizure which was tendered by Pius Gervas Alfonce (PW12) and admitted in evidence as exhibit P7. The record of the proceeding is silent as to whether after admission the same was read out in court.

We have a long line of authorities on the legal proposition that, the omission to read out in court the contents of a documentary exhibit after its admission in evidence constitutes a fatal irregularity as it deprives the parties the opportunity of appreciating the nature

of the evidence presented in court. (See the unreported cases of **Jumanne Mohamed & Two others v. Republic**, Criminal Appeal No. 534 of 2015, **Sunni Amman Awenda v. Republic,** Criminal Appeal No. 393 of 2013 and **Sijali Shaaban v. Republic,** Criminal Appeal No. 538 of 2017). As stated earlier, in the case at hand, this requirement of the law was not observed and, for the same reason, we hereby expunge Exhibit P7 from the record.

Now, assuming but in digression that, exhibit P7 was read out in court after it was admitted in evidence, the question would be whether or not it would have advanced the prosecution case any further. As correctly submitted by Ms. Masue, we think the answer would have been in the negative. The learned Senior State Attorney submitted in support of her tenor of argument that there was no connection between the firearm allegedly found in the possession of the first appellant and the armed robbery incident. She thus concluded, that even if exhibit P7 had been read out in court, it would not have been of any help to the prosecution as far as the charges against the appellants were concerned.

As it will be apparent from the record, the need to establish a linkage between exhibits P7-P15 which were tendered by PW12 and the robbery incident was very crucial but it appears to have escaped the attention of the learned judge of the first appellate court despite the fact that, the appellants had raised a serious complaint on that aspect. (vide ground No. 6 in the petition of appeal).

With regard to the firearm which was not even exhibited in court, PW12 had the following to say immediately before tendering the seizure note.

> *"By then we had many cases against the accused persons hence the seizure note had connection to other cases .....as it is known a gun can be used on as many incidents as possible."*

If we have to go by the evidence of PW12, it is certainly clear that there was no direct linkage between the firearm(s) allegedly seized from the first appellant and the specific robbery incident of which the appellants were convicted. It seems to us that, whether the said firearm was really used by the appellants in the perpetration of the charged offence, that was rather a matter of conjecture by

PW12. We shall now seek to determine the evidential value which should have been accorded to the evidence of PW12 on that aspect.

Having carefully considered the evidence of PW12, with due respect we are not prepared to set a dangerous precedent to the effect that, an inference by a prosecution witness which is based on conjecture as it was the case here, may be used to make a legal determination. If that were the case, so many criminal suspects would have been unfairly convicted on the basis of speculative or farfetched conjecture evidence. In the present case, one would have expected the police investigators to have gone further and sent the firearm(s) allegedly found in the possession of the first appellant together with the spent cartridges collected from the scene of the crime if any, to the ballistic expert for forensic analysis and determination as to whether there was any visible or microscopic similarities between the signs and impressions found on say the spent catridges and the catridges collected after a fire-testing exercise. Such circumstantial evidence would, though remotely, form the linkage between the said firearm and the disputed robbery incident. Since that was not done, it is our opinion that, without the

necessary linkage between the two, it was not open for the trial court to make a finding which was impliedly given a blessing by the first appellate court that the first appellant was found in possession of the firearm which was used to perpetrate the offence with which he stood charged.

Next for discussion are the first appellant's cautioned statement (exh. P4) and the second appellant's extra-judicial statement (exh. P5) which would have been the best evidence for the prosecution, save for what we shall hereinafter observe.

It is worthy of note that, when PW6 who had interviewed the first appellant sought to tender his caution statement into evidence, the first appellant opposed contending, among other things that, the said statement was recorded on 3/3/2017 at 9:00 am when he was yet to be arrested. Then, apparently being doubtful of the first appellant having really made the said statement and, being alive to the requirements of the law, the learned trial magistrate correctly halted the main trial and ordered for a brief inquiry to be conducted with a view to determining whether the confessional statement in question was really made by the first accused. However, as it turned

out, not being cognizant, or perhaps being forgetful of the fact that such an inquiry in the subordinate court is a complete process within the substantive trial in which the burden of proving that the confessional statement was really made by the accused and was obtained voluntarily, is on the prosecution, the learned trial magistrate went on first receiving evidence from the first appellant before she received evidence from the prosecution side. As a result, the status, and most probably, the role of the prosecution in any criminal trial was changed into that of the defence. With this kind of approach, we are afraid and we cannot rule out the risk of the trial magistrate, being human and therefore error-prone, having shifted the burden of proof onto the appellants and having lowered the standard of proof cast on the prosecution in criminal trials from proof beyond reasonable doubt to proof on a balance of probabilities. To us this was a serious procedural irregularity to be wary of and we are reasonably apprehensive that, it might have influenced the trial magistrate in forming her final opinion about the appellants.

It is for this reason that we think and find that, it was quite unsafe to rely on the first appellant's cautioned statement which, as

we have amply demonstrated, was admitted in evidence after a fatally flawed inquiry. The net effect of this is that, one cannot safely say, with utmost certainty that, having swapped the status and role of the parties during the inquiry and finally, when deciding to admit the impugned statement into evidence, the trial magistrate had not shifted the burden of proof onto the first appellants contrary to the requirements of the law. In fine, we are of the respectful view that if the first appellate Judge had discovered this procedural anomaly, she would most probably not have reached to the conclusion that the appellants were positively identified at the scene of the crime.

With regard to exhibit P5, the second appellant is recorded to have confessed to wrong-doing when he was taken before the Justice of the Peace (PW9) one Adelina Nyamizi, a Primary Court Resident Magistrate based at Maili moja Kibaha. That was on 7th March, 2017. The question that we are required to determine here is whether or not, the said extra judicial statement could by itself ground a conviction against its maker or the first appellant inclusive.

In this connection, the most important question that we have to pose and determine is whether or not, the extra-judicial statement in

question was recorded in accordance with the Chief Justices Instructions as contained in "the Guide for Justices of Peace" which was issued by the Chief Justice pursuant to section 56 (2) of the now repealed **Magistrates Courts Act, 1963 Cap 537.** For the avoidance of doubt the said section 56(2) is in *pari materia* with section 62 (2) of the **Magistrates' Court Act Cap 11 R.E. 2019** popularly known by its acronym as the **MCA.** The Guide by the Chief Justice became operational on 1st July, 1964 and, after the repealing of the MCA 1963, the Guide was saved by section 72 (3) of the current **MCA** which provides that:

> *"Any applicable regulation made under the magistrates' Court Act, 1963 and in force prior to the date upon which this Act comes into operation shall remain in force as if they have been made under this Act until such time as they are amended or revoked by rules made under this Act."*

It follows therefore that, pursuant to the saving section, the Guide is still part and parcel of our laws which have to be observed by all Magistrates and Justices of the Peace.

According to this Court in the case of **Japhet Thadei Msigwa v. Republic, Criminal Appeal No. 367 of 2008** (unreported):-

> *"....when Justices of the Peace are recording confessions of persons in custody of the police, they must follow the Chief Justice's instructions to the letter."*

And in the most recent case of **Peter Charles Makupila @ Askofu v. Republic, Criminal Appeal No. 21 of 2019** (unreported), we instructively observed that:

> *"Justices of the Peace are enjoined to ensure the following details from the accused persons are reflected when recording confession which in legal arena is termed as extra-judicial statement:-*
>
> *i) The time and date of his arrest.*
>
> *ii) The place he was arrested.*
>
> *iii) The place he slept before the date he was brought to him.*
>
> *iv) Whether any person by threat or promise or violence has persuaded him to give the statement.*
>
> *v) Whether he really wishes to make the statement of his own free will.*

vi) *That if he makes a statement the same may be used as evidence against him."*

The next question then is whether, in recording the second appellant's extra-judicial statement, the Justice of the Peace had fully observed the instructions of the Chief Justice. To set the record straight, we have found it necessary at this point in time, even at the risk of making this judgment excessively long, to produce the first part of the said statement to see if it measured up to the Chief Justice's mandatory guidelines.

"KATIKA MAHAKAMA YA MWANZO

MAILI MOJA

TAREHE 07/03/2017 saa 12:10 mchana Mbele ya Adelina Nyamizi, Hakimu Mahakama ya Mwanzo

1. *Ramadhani Magogo ameletwa kwangu na Askari F4323 DC Tamimu na tuhuma ya makosa ya unyang'anyi wa kutumia silaha.*
2. *Nimemuweka ofisini kwangu Ramadhani Magogo na askari ametoka nje ya ofisi mbali na jengo.*

3. *Ramadhani Magogo anaongea lugha ya Kiswahili*
4. *Nimemfahamisha Ramadhani Magogo kuwa yuko mbele ya mlinzi wa Amani wa Wilaya ya Kibaha.*
5. *Ramadhani Magogo amenieleza kuwa alikamatwa tarehe 25/2/2017 maeneo ya Bagamoyo.*
6. *Nimemuuliza Ramadhani Magogo kama yuko tayari kutoa maelezo mbele yangu amekubali pia nimemueleza kuwa maelezo anayotoa yanaweza kuchukuliwa ushaidi endapo kesi yake itapelekwa mahakamani nae amekubali kuwa yuko tayari.*
7. *Mtuhumiwa ni mwanaume na mimi ni mwanamke nimemuuliza kama ana majeraha au maumivu sehemu yoyote na ameeleza kuwa anaumia mguuni, mgongoni na mdomoni.*
8. *Baada ya kumuhoji Ramadhani Magogo nimeridhika yuko tayari kutoa maelezo yake."*

Having gone through the first part of the extra-judicial statement of the second appellant to PW9, we entertain no doubt whatsoever that, by any standards, it did not satisfy the requirements of the law. Obviously, it disclosed neither the time the second appellant was arrested nor the place where he slept before he was taken to the Justice of the Peace. It is upon the above short comings that we find in the first place that it was wanting.

With regard to the most important part of the said statement, the question is whether or not the second appellant had really confessed to wrong-doing when he was presented to the Justice of the Peace? In determining the above posed question, it is important in our opinion, to have regard to the applicable law.

It will then be noted at once that, in the context of the present case, section 3(1) (c) of the **Evidence Act Cap R.E. 2019** defines a confession as a statement containing an admission of all the ingredients of the offence with which its maker is charged. While we are prepared, in view of the evidence on the record, to accept as a settled fact that the second appellant made a statement to PW9, we are unable to accede to the factual findings by the two courts below

that the said statement, amounted to a confession in terms of section 3 (1) of the **Evidence Act.** Reading the would be the confessional part of the second appellant's statement, it seems more probable than not that, PW9 had just recorded the statement of another suspect immediately before she embarked on recording the statement of the second appellant. Giving his statement, the second appellant is recorded to have told PW9 in general terms thus:-

> *"Katika tukio hilo tulikuwa wanne, Michael hakuwepo, nilikuwa mimi, Khalidi, Arosto na Nyundo. Kweli tulienda mpaka hiyo sehemu ilikuwa bado mapema, tulisubiri kidogo mwenye nyumba akawa ametoka kazini akawa anapiga honi afunguliwe geti. Nyundo akatwambia ni huyo hapo, nyundo alishika bunduki akatangulia mbele, Halidi, Arosto na mimi tulifuata baadae, alifunguliwa geti akaingia ndani, nyundo alipanda ukuta akatufungulia geti tukaingia, jamaa kabla hajaingia ndani nyundo alimpiga risasi, tuka search ndani Arosto akachukua TV akanipa nibebe, kuhusu hela mi sikuona niliwambia waniachie TV maana wananidhulumu kila siku nyundo akasema ana boda boda anamwita*

achukue apeleke kwa mteja wake mi nikarudi zangu mjini. Kama kuna vingine walichukua mimi sikuviona. Hayo ndio maelezo yangu."

This translates into:

"We were four persons who were involved in that incident, Michael was not among us. Those who were involved were myself, Khalid, Arosto and Nyundo. Truly we went to that place and it was still early. We waited up to the time when the owner of the house came home from his place of work. He blew the car horn to have the gate opened. That is when Nyundo told us he was the one Armed with a firearm, Nyundo led us; Khalid, Arosto and myself followed him. The gate was opened and the owner of the house drove in. Nyundo jumped over the fence wall and opened the gate for us to gain ingress. Before the owner of the house went inside, Nyundo shoot him, we ransacked the entire house, Arosto took the TV and gave it to me to carry. As for money, I did not see anything, I told them to give me the TV as they used to deceive me on almost every occasion but Nyundo maintained that he was going to call a business

motorcyclist to take the said TV to a potential buyer. I then returned back to town. If there are some other items which they stole, I did not see them. That is my statement.

While we acknowledge the fact that there cannot be a standard form of a confessional statement by a criminal suspect, we are of the settled opinion that, apart from all the essential elements of the offence, such a statement must be comprehensive, containing the necessary information and details related to the charged offence such as the name of the place where the offence was committed, the date and time it was committed, against who (if the criminal suspect can name or describe the victim) and in the context of the present case, the items or property stolen, to mention but a few.

Upon a plain reading of exh. P5, we are of the view that, the second appellant's extra-judicial statement when read within the context of a confession in a criminal trial, was by itself not a confession properly so called. For, it is apparent that it did not reflect the anatomy of the charged offence as particularised in the charge sheet. In truth, the Justice of the Peace appears to have, most probably, in the manner of quick working without paying the requisite

attention, recorded the statement of the second appellant while harbouring under a wrong assumption that, at the time of trial, the court would definitely look for the statement of another suspect which she had just recorded immediately before and make it a complement to the statement of the second appellant which, as we have clearly demonstrated, was wanting in material contents.

Given the above two defects, the following will come out at last. **One,** that in recording the statement of the second appellant, PW9 did not follow the Chief Justice's instructions to the letter as required by law and **two**, the said statement was not a confession in the eyes of the law. For our part, we wish to emphasize here that, we will not treat with kid gloves any contravention of procedural requirements of the law which are meant to promote and protect the accused person's basic right to a fair trial. We therefore find exh. P5 to have been recorded contrary to the dictates of the law, and we accordingly expunge it from the record.

It should now be clear from the foregoing analysis that, the present appeal has merit as gracefully conceded by Ms. Masue learned Senior State Attorney. The prosecution side had not led

sufficient evidence to ground a conviction. We think, in these circumstances, the decision of the learned Judge of the High Court upholding the decision of the trial court, was not supported by the evidence on record. That being the case, the appeal is found to have merit and is accordingly allowed, the conviction and sentences of thirty years imprisonment is set aside. The appellants are to be set free forthwith if they are not being held for some other lawful cause.

It is so ordered.

DATED at **DAR ES SALAAM** this 7th day of September, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 14th day of September, 2021, in the Presence of Appellants in person and Ms. Nura Manja, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL