IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And GALEBA, J.A.)

CRIMINAL APPEAL NO. 195 OF 2017

YUSUPH NDATURU YEGERA @ MBUNGE HITLER ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Maliaba, J.)

dated the 25th day of April, 2017
in
Criminal Appeal No. 277 of 2016

.....

JUDGMENT OF THE COURT

30th April & 18th October, 2021

MWARIJA, J.A.:

In the District Court of Nzega, the appellant, Yusuf Ndaturu Yegera @ Mbunge Hitler together with another person, who was the 2nd accused at the trial, Japhet Kija Mnada (hereinafter referred to by his first name of Japhet) were jointly charged under Anti-Money Laundering Act, No. 12 of 2006 (the Act). The appellant was in addition, separately charged under the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019] (the Penal Code). He was charged in the 1st count, with the offence of armed robbery contrary

to s. 287A of the Penal Code. It was alleged that on 21/4/2009 at Lusu village within Nzega District in Tabora Region, he stole from the Golden Pride Project's Lusu Mine, six and a half bars of gold value at TZS 4,093,534,137.00, one short gun No. R 659634 and one radio call make Motorola with serial No. 672 TGUG 559, the properties of Resolute (T) Limited (hereinafter "the company") and at or immediately after such stealing, he used actual violence by shooting and injuring two persons, Vitalis Kagose Bernad and Joseph Haule, who were the company's security guards, in order to obtain and retain the stolen properties.

In the 2nd count, the appellant and Japhet were jointly charged with the offence of money laundering contrary to s. 12 (e) and 13 (a) of the Act. It was alleged that on divers dates between 21/4/2009 and 5/1/2012 at different places within Shinyanga, Mwanza and Dar es Salaam Regions, with intent to conceal or disguise illicit origin of the stolen gold, they participated in the commission of the offence of money laundering by converting the stolen gold into cash, movable and immovable properties, knowing that the gold in question was the proceed of a predicate offence of armed robbery.

They both denied their respective counts and as a result, the case proceeded to a full trial at which, whereas the prosecution relied on the

evidence of 13 witnesses, the appellant and Japhet were the only witnesses for defence.

Having heard the evidence from both sides, the learned trial Resident Magistrate found that the evidence tendered by the prosecution was insufficient to prove the 2nd count against Japhet. He found however, that the evidence had sufficiently proved the two counts against the appellant. Consequently, while Japhet was found not guilty and thus acquitted, the appellant was found guilty as charged in both counts. He was, as a result, sentenced to an imprisonment term of thirty (30) years and corporal punishment of twelve strokes of the cane on the 1st count and a fine of TZS 100,000,000.00 or seven years imprisonment in default on the 2nd count. It was ordered that the terms of imprisonment should run concurrently. Aggrieved by the decision of the trial court, the appellant unsuccessfully appealed to the High Court hence this second appeal.

The background facts leading to the trial which resulted into conviction and ultimate imprisonment of the appellant may be briefly stated as follows: On 21/4/2009 in the night at about 8:00 p.m. a group of armed bandits intruded into the company's mining site after they had cut the double wire fence at the eastern part of the mine. It was at that

direction of the mine, at the area known as Village, where the company's officials resided. They included Les Taylor, the Operations Manager, Nicholaus John Globler, the Loss Control Manager and Overall Security Leader. Ursula Ruiners, the Systems Trainer who was also one of the officers responsible for storage of the gold which was produced by the company also resided at that area.

The bandits who, from the circumstances under which the offence was committed, appeared to be acquainted with the site plan of the mine, went straight to the residence of the Operations Manager. When the intrusion into the mine was noticed, the security guards were alerted. They then divided themselves into two groups and one group moved to the Operations Manager's house and encountered the intruders using short guns. They were however, overcame by the bandits who, according to the evidence, were heavily armed with SMG, short gun and a hand grenade. They shot and injured the security guards including, Hamilton Robert Misanga, Vitalis Kagosi, Joseph Haule and Karmal Thapa.

In his testimony, Nicholaus John Globler who gave evidence as PW5, said that on the material date at about 8:45 p.m. he received telephone call from the Operations Manager that some persons were trying to break his door. When he went to the Operations Manager's

house, the witness said, he saw some people standing near the door of the said house. One of those persons raised a gun and shot at PW5 but fortunately the bullet missed him. He testified further that he ran to a dark place and while at that point, he saw the company's Security specialist, Karmal Thapa and Vitalis Kagosi (PW3) going on the direction where the bandits were standing. They exchanged fire with the bandits and saw PW3 falling down after having been shot.

On his part, Hamilton Robert Misanga who gave evidence as PW1 also sustained bullet injuries as a result of being shot by the bandits. He testified that, while on duty with among other security guards; Mathias Mwaminifu (PW2), Peter Mataba (PW6) and PW3 who was their supervisor, he heard through a radio call that some persons suspected to be bandits were seen entering into the mines' areas after they had cut the fence. He was assigned the task of tracing the bandits by joining the group which went to the Operations Manager's house. As they approached, he heard bullets being shot at that house. Shortly thereafter, he was hit by a bullet on his hand causing him to fall down and become unconscious. He was treated at the company's Dispensary and later referred to Bugando Hospital and later to Muhimbili National Hospital.

The witness tendered his PF3 which was admitted in evidence as exhibit P1.

Another security guard who was on duty on the material date, PW3, testified that he was also in the group which went to the Operations Manager's house. According to his evidence, he found the lights having been switched off. He fired a bullet in the air but in retaliation, the bandits shot him on the leg twice. He had to be taken to Bugando Hospital where he was admitted for treatment until on 25/6/2009 when he was discharged. His PF3 was admitted in evidence as exhibit P3. He testified further that, another person, Joseph Haule who was also one of the security guards on duty sustained bullet injuries.

Having overcame the security guards, the bandits went on firing bullets at the Operations Manager's door thereby compelling him to heed to their demands. Having negotiated with them, he opened the door and after being taken hostage by the bandits, he communicated with PW5 so that he could inform those who were responsible with the opening of the gold room to join him as the bandits had the intention of stealing gold.

The bandits had also taken hostages one Ettiene Rossow, the Manager of African Explosives Ltd (AEL), the entity which was contracted by the company to provide services on matters concerning explosives for

mining activities. The bandits had hijacked the AEL motor vehicle (the motor vehicle) for the purpose of using it in the commission of the offence. After the arrival of PW5 and some of those who were responsible for gold storage, that is, those who were authorised to open the gold room doors; OM Pun, the company's security Specialist and Christopher Killey, the gold room Supervisor, they were ordered to enter into the motor vehicle to join the Operations Manager.

The bandits appeared to have also known the operative activities of the mine. They required to be shown the residence of PW4 who was responsible with keeping of the records of incoming and outgoing gold and thus one of the officials who had the key of the gold room. They were informed that, being one of the persons without whom the gold room would not be opened, arrangement had been made for her to accompany the team to go to the gold room. From the Operations Manager's house, the motor vehicle was driven to PW4's residence and after having arrived there, PW5 asked her to get out of her house and enter into the motor vehicle. The officials and the bandits then headed to the gold room.

What took place in the gold room was testified to by PW4, PW5 and PW6 who was at the material time the Closed Circuit Television (CCTV)

Operator. In her evidence, PW4 said that, after having followed the procedure of opening the three doors leading to the gold room (opened in turns by OM Pun and Christopher Lilley), they all entered into the said room with three bandits. They were then ordered by the bandits to kneel down. The safe was opened, first by Christopher Lilley and then by her. The bandits then took 6 bars of gold and gold drills (small pieces). They took the gold to the motor vehicle and left with all the officials except Ettiene who was locked in the gold room. They drove to the Village area where the motor vehicle stuck in the mud. At that point, after they had cut both the inner and the outer wire fences, except for PW5 whom they left with, apparently as their shield, all other officials remained between the two fences. It was PW4's evidence further that the three bandits whom she saw at the gold room had put on face masks and could not therefore, identify any of them.

PW5 supported the evidence of PW4 as regards what happened at the gold room. He added that after the bandits had taken gold, they instructed him to communicate with PW6 to direct that all gates should be opened otherwise any security guard found at any of gates would be killed. He had to heed to the bandits directive using his Motorola radio which the bandits had taken its control. It was PW5's evidence further

that he identified the appellant who had put on a yellow rain coat. He explained that he managed to do so after he had watched the CCTV footage and compared that person with the one whom he saw at the scene of crime. He tendered the USB stick and the same was admitted in evidence as exhibit P10.

Testifying on how he observed the incident through CCTV, PW6 told the trial court that, after the motor vehicle had arrived outside the gold room, the bandits who were armed, disembarked together with PW4, PW5 OM Pun and Ettiene. He went on to state that, all the bandits except the one with a black jacket, had put on face masks. Another one, he said, had put on a yellow rain coat. It was PW6's further evidence that although in the gold room, one of the bandits tempered with the CCTV camera, he used a remote camera and went on to observe the incident. He witnessed the bandits taking gold from the gold room and carried it to the motor vehicle. As they were leaving, the bandits locked Ettiene in that room. Shortly after the motor vehicle had left the gold room area, he received instructions from PW5 to require the security guards to leave all the gates open so as to avoid any harm which the bandits would cause. He finally saw the motor vehicle being driven towards the Village area until it arrived at the place where the CCTV camera could not capture.

Following police investigations, the appellant was arrested on 11/1/2012 at Morogoro. He was arrested by among others, No. F 352 D/Cpl Abdi who testified as PW10. In his evidence, PW10 said that after his arrest, the appellant was taken to Dar es Salaam in the police motor vehicle and was one of the police officers in that trip. According to the witness, on 12/1/2012 while on that journey, the appellant narrated the whole story on how the robbery was committed. He admitted that he had a gun and that after the robbery, he was given one gold bar as his share of the loot.

It was the prosecution's evidence further that the appellant confessed orally to have used the proceeds of the stolen gold to buy a motor vehicle make, Toyota Noah Reg. No. T. 483 BXG with chassis No. SR 400120714 (the Noah motor vehicle) and that he purchased it for his concubine, one Martha Meriot Fish. The evidence to that effect was tendered by the hitherto OC/CID, Kahama, ASP Twaha (PW11), who was at the material time of investigation of the case, stationed at the CID Headquarters, Dar es Salaam. He conducted a search at the residences of the appellant and that of the appellant's concubine, the said Martha Meriot Fish. The certificate of seizure of the Noah motor vehicle was admitted in evidence as exhibit P8. PW11's testimony was supported by

that of No. F. 4953 D/C Ally (PW13) who was present during the search of the appellant's residence. In his evidence, PW13 added that he drove the Noah motor vehicle to Nzega and handed it over to the OC/CID. The same was later tendered in the trial court and admitted in evidence as exhibit P11.

The evidence to the effect that the appellant confessed to have participated in the commission of the offences was also given by Sirili John Mboya (PW9). The witness, who was at the material time a Primary Court Magistrate stationed at Nyasa Primary Court, Nzega, testified that he recorded the appellant's extra-judicial statement on 20/1/2012. It was his evidence that the appellant gave his statement voluntarily. Although the appellant objected to the admission of the statement on account that the same was obtained through threats, after the trial court had conducted an inquiry, it found that the appellant did so on his own accord. The statement was thus admitted in evidence as exhibit P7.

In his defence, the appellant testified that after having being arrested at Morogoro, he was taken to Dar es Salaam and locked up at Mbezi Luis Police Station. On the next day, he was taken to Kamata Police Station. While there, he was taken in a room in which there were three policemen. He went on to state that those police officers asked him

about his personal particulars and after noting down his answers, they gave him a document to sign. When he refused to sign, he was slapped. He thus decided to sign the document. It was after he had signed the document, that the police told him of being suspected to be one of the persons who were involved in the robbery incident at the company.

The appellant went on to testify that, from Kamata, he was taken to Central Police Station, Dar es Salaam where he stayed for about five days before being sent to Nzega. While at Nzega, he said, he was taken before the Justice of the Peace one Kapaya, a Primary Court Magistrate to record his extra-judicial statement but decline to do so. He went on to testify that, the next day, the police threatened him and warned him of the consequences of his refusal to record an extra-judicial statement. He said that he was then taken before another person who was identified to him to be the Justice of the Peace, one Mboya but within the police station premises. Because of fear, the appellant said, he decided to confess before that person.

On the testimony of PW5 that he identified him at the scene of crime, the appellant challenged the credibility of that evidence contending that the witness did not give that evidence during examination in-chief but rather, during cross-examination.

As stated above, the trial court was satisfied that the prosecution evidence had proved both counts against the appellant to the hilt. In convicting the appellant of the 1st count, the trial court relied on the identification evidence of PW5 and the appellant's extra-judicial statement. It also relied on the evidence of the arresting officers, to the effect that the appellant orally confessed that he participated in the robbery incident. On the 2nd count, the trial court relied on the evidence of PW7, PW11 and PW13 to the effect that, he used the money realized from the sell of the stolen gold to buy the Noah Motor Vehicle (exhibit P8).

On its part, in upholding the decision of the trial court, the learned first appellate Judge was satisfied that the appellant was properly identified by PW5 and PW6. The learned Judge was of the view that the conditions for proper identification of the appellant by the said witnesses were favourable. He cited *inter alia*, the cases of **Raymond Francis v. Republic** [1994] T.L.R 100 and **Waziri Amani v. Republic** [1980] T.L.R. 250 in support of his findings. He added that, in any case, the conviction was not solely based on identification evidence but also on the appellant's extra-judicial statement. He was of the view that the appellant's extra-judicial statement and the oral confession, sufficiently

established that he participated in the commission of the offences charged.

The appellant was dissatisfied with the decision of the High Court and therefore, lodged this appeal raising a total of nine grounds of appeal. On 3/1/2018 however, his counsel filed a supplementary memorandum consisting of the following four grounds:

> *"1. That before the trial District Court, the mandatory provisions of s. 214 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] was not complied with to the prejudice of the appellant and the Honourable trial Senior Resident Magistrate G. E. MARIKI wrongly assumed jurisdiction.*
> 2. *That the charge on both the 1st and 2nd counts was incurably defective and occasioned unfair trial on the part of the appellant.*
> 3. *That there was no fair trial on the part of the appellant [because] in convicting the appellant, [the trial court did not consider his evidence] at all and the High Court failed to address the issue.*
> 4. *That there was a misdirection by the High Court on the evidence of PW5 on exhibits P7 and P10 in holding that the appellant was properly identified."*

At the hearing of the appeal, the appellant was represented by Mr. Kamaliza Kayaga, learned counsel while Mr. Oswald Tibabyekomya,

learned Principal State Attorney who was assisted by Mr. Yamiko Mlekano, learned State Attorney appeared for the respondent Republic.

By agreement with his client, Mr. Kayaga abandoned the grounds of appeal filed by the appellant and proceeded to argue the grounds contained in the supplementary memorandum of appeal except the 1st ground which he dropped in the course of his submission.

Submitting in support of the 2nd ground of appeal, the appellant's counsel argued that the charge is defective because in the 2nd count, neither is the charge stated nor have the facts constituting the offence under ss. 12 (e) and 13 (a) of the Act, been stated. He contended that the omission contravened the provisions of ss. 132 and 135 of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2019] (the CPA). It was Mr. Kayaga's further argument that, the information on the amount of money or the value of movable or immovable properties, the subject matter of the 2nd count, have not been disclosed in the particulars of the offence. As a result of the said defects, the learned counsel argued, the charge is incurably defective.

Relying to the submission made by the appellant's counsel, Mr. Mlekano opposed the contention that the charge is defective. He argued that the 2nd count has been drawn in compliance with the provisions of s.

135 of the CPA. According to the learned Senior State Attorney, the particulars of the offence have been stated in terms of the ingredients of the offence under s. 12 (e) of the Act. Citing s. 20 of the Act, Mr. Mlekano contended that, what is required to be disclosed in the particulars of the offence are the facts depicting the acts of an accused person of using the proceeds obtained from commission of a predicate offence.

On the particularization of the movable and immovable properties and their value, it was the learned Senior State Attorneys argument that, although the same have not been stated, the omission is not fatal because, from the evidence, the appellant was properly informed and, in the circumstances, no prejudice was occasion to him. It was Mr. Mlekano's submission therefore, that this ground of appeal lacks merit.

We have duly considered the arguments made by the counsel for the parties on this ground of appeal. The nature of the defects complained of by the appellant are first, that the charge is not stated, secondly, that the facts constituting the offence are also not stated and thirdly, that the value of the properties alleged to have been obtained from the proceeds of the crime is not shown.

In determining this ground of appeal, we think it is instructive to reproduce the 2nd count. It reads as follows:-

> *"2ND COUNT FOR BOTH ACCUSED*
>
> *STATEMENT OF THE OFFENCE*
>
> ***MONEY LAUNDERING:*** *Contrary to Section 12 (e) and 13 (a) of the Anti-Money Laundering Act, Act No. 12 of 2006.*
>
> *PARTICULARS OF THE OFFENCE*
>
> *YUSUF NDATURU YEGERA @ MBUNGE @ HITLER and JAPHET KIJA MNADA, on divers dates between 21st April 2009 and 5th January 2012, at different places within Shinyanga, Mwanza and Dar es Salaam Regions, participated in committing an offence of money laundering, namely, converting gold into cash money, movable and immovable properties, while they knew the said gold was the proceeds of a predicate offence, namely armed robbery, for the purposes of concealing or disguising the illicit origin of the properties.*
>
> *Dated at Nzega this 12th day of February, 2012*
>
> *Signed*
>
> ***PRINCIPAL STATE ATTORNEY"***

It is clear from the charge as reproduced above that, in the 2nd count, the appellant was charged with the offence of money laundering.

The offence is created by s. 12 of the Act which is committed when a person involves himself in any of the acts stated under paragraphs (a) – (e) of that section. Section 12 (e) provides as follows:

> *"12. A person who –*
>
> *(a)-(d) . . . . N/A*
>
> *(e) Participates in, associates with, conspires to commit, attempts to commit, aides and abets or facilitates and counsels the commission of any of the acts described in paragraphs (a) to (d) of this section, commits offence of* ***money laundering."*** *[Emphasis added].*

With regard to the contention that the particulars of the offence have not been disclosed, we are, with respect, unable to agree with the appellant's counsel. It is alleged in the particulars of the offence that the appellant converted into cash the gold which was obtained after commission of the offence of armed robbery and used that money to buy movable and immovable properties, the purpose being to conceal or disguise the illicit origin of the converted gold. In our considered view therefore, from the contents of the 2nd count, the contention by the appellant's counsel that the charge is defective for want of statement of the offence and the particulars thereto, is unmerited.

On the contention that the charge is defective because of the prosecution's failure to show the value of the money obtained from the stolen gold as well as the value of properties which were obtained from that money, we agree with Mr. Mlekano that the omission does not render the charge incurably defective because the appellant was not prejudiced. From the record, the appellant understood from the 1st count, that the value of the stolen gold was TZS 4,093,534,137.00. He also understood from the evidence that the allegation in the 2nd count is that from that money, he purchased the Noah motor vehicle which was seized from him by the police. The said property and its registration card were admitted in evidence as exhibits P11 and P9 respectively.

For the foregoing reasons, we find that the 2nd ground of appeal is devoid of merit. The same is therefore, dismissed.

In the 3rd ground of appeal, the appellant complains that his defence evidence was not considered. Mr. Kayaga argued that, as a result of the omission, the appellant was not afforded a fair trial and therefore, the trial was vitiated. He relied on the decision of the Court in the case of **Fikiri Katunge v. Republic**, Criminal Appeal No. 552 of 2016 (unreported).

In reply, at first, Mr. Tibabyekomya, insisted that, although the record does not show clearly that the appellant's defence was considered, in their judgments, both the trial court and the first appellate court performed that duty. In the alternative however, the learned Principal State Attorney submitted that the omission, if any, is not an incurable irregularity. It was his submission that this Court has the power of stepping into the shoes of the High Court and do what that court ought to have done. To bolster his argument, he cited the case of **Mzee Ally Mwinyimkuu @ Babu Seya v. Republic**, criminal Appeal No. 499 of 2017 (unreported) which, he said is more recent than the case of **Fikiri Katunge** (supra) cited by the appellant's counsel.

Having given due consideration to the arguments made by the learned counsel for the parties and after having scrutinized the record, it is a fact that both the trial court and the High Court did not analyze the appellant's evidence. What the trial court did was merely to outline that evidence. On his part, the learned first appellate Judge did not, in the course of his re-evaluation of evidence, consider the evidence tendered by the appellant with a view of finding out whether or not it raised a reasonable doubt in the prosecution evidence used by the trial court to convict the appellant. That does not amount to consideration of the

defence. See for example, the case of **Leonard Mwanashoka v. Republic,** Criminal Appeal No. 226 of 2014 (unreported).

On the effect of the omission, it is now settled that the irregularity does not vitiate the proceedings because this Court can step into the shoes of the High Court and perform the duty of re-evaluating the defence evidence so as to arrive at an appropriate finding – See the case of **Mzee Ally Mwinyimkuu @ Babu Seya** (supra) cited by the learned Principal State Attorney and **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (unreported). In determining this appeal therefore, we shall henceforth consider the prosecution and the defence evidence with a view of finding out whether or not the evidence which was acted upon to convict the appellant was shaken by the appellant's evidence. For these reasons therefore, we do not as well, find merit in this ground of appeal.

In the 4th ground of appeal, the appellant contends that both the trial court and the High Court erred in law in finding that he was properly identified by PW5 at the scene of crime and that, the two courts erred in acting on exhibit P7 to convict him.

We wish to consider first, the appellant's complaint that he was wrongly convicted basing on the extra-judicial statement (exhibit P7) on

account that the same was wrongly admitted in evidence. In his defence, the appellant did not deny that he signed a document which was tendered by the prosecution in court and admitted in evidence as his extra-judicial statement. He contended that the document was prepared at the police station and taken to the person who was identified to him as the Justice of the Peace within the premises of the same police station and forced to sign. The appellant made that contention when PW9 prayed to tender the extra-judicial statement. Following the appellant's objection, the trial court conducted an inquiry and at the end, it found that the statement (exhibit P7) was voluntarily made by the appellant.

In his appeal to the High Court, the appellant challenged that finding of the trial court in ground 5 of his petition of appeal whereupon, in its judgment at pages 279 – 282, the High Court upheld the finding of the trial court that the statement was voluntarily made. It found also that the recording of the statement was made by PW9 in accordance with the law and procedure.

The appellant is still challenging the propriety of reliance by the trial court, on exhibit P7 to convict him. As stated above, the trial court conducted an inquiry which is akin to a trial within a trial to decide whether or not the appellant made the statement voluntarily. In doing so

it heard evidence from three prosecution witnesses and one witness for the defence who was the appellant. It found that the statement was made voluntarily before PW9 at Nyasa Primary Court. It also believed the evidence by PW9 that the statement was recorded at Nyasa Primary Court, not at the police station. The High Court upheld those findings of the trial court. Since those findings are based on matters of facts, this Court cannot interfere with them unless the lower courts had misapprehended the nature and quality of such evidence thereby causing miscarriage of justice. – See for example, the cases of **Edwin Mkando v. Republic** [1993] TLR 170, **Yohana Dionoz and Another. v. Republic**, Criminal Appeal No. 115 of 2009 (unreported) and **DPP v. Jaffari Mfaume Kawawa** [1981] T.L.R 149. We thus do not find any justifiable reasons to interfere with the finding of the learned first appellate Judge that admission of exhibit P7 in evidence was made in accordance to the law and procedure. From the record, after its admission, the extra-judicial statement was read out in court and after PW9 had finished giving his evidence, the appellant was afforded the opportunity to cross-examine the said witness. In the circumstances therefore, we find that the appellant's extra-judicial statement is a valid piece of evidence.

That having been said, the next issue arising from this ground of appeal is whether the confession evidence which was repudiated by the appellant was properly acted upon to convict him. There is a plethora of authorities to the effect that, a repudiated confession may be acted upon to convict an accused person but, by a rule of practice, it requires to be corroborated. – See for instance, the cases of **Paschal Petro Sambula @ Kishuu and 2 Others v. Republic**, Criminal Appeal No. 112 of 2005 and **Mabala Masasi Mongwe v. Republic**, Criminal Appeal No. 161 of 2010 (both unreported). A Court may however, act on uncorroborated retracted or repudiated evidence to convict an accused person if, after having warned itself, is satisfied that the confession was nothing but the truth. The requirement to observe that principle was underscored in *inter alia,* the case of **Hemed Abdallah v. Republic** [1995] T.L.R. 172. In that case the Court stated as follows:

> *"It is trite law that generally it is dangerous to act upon repudiated or retracted confession unless it is corroborated in material particular or unless the Court after full consideration of the circumstances is satisfied that the confession cannot but be true."*

Now, to answer the issue posed above, it is instructive to examine the crucial parts of exhibit P7. With regard to the appellant's involvement in the robbery incident, he is recorded to have stated as follows:

> *"Siku ya tukio tarehe 21/04/2009 mimi nilifika hapo eneo la karibu na mgodi wa Nzega majira ya saa 19:30 hrs ambapo niliwakuta wenzangu wameshafika ambao ni Mawazo s/o Saliboko 2. Edward s/o Bunella 3. Shabani s/o ? 4. Frank s/o Selemani Kabuche 5. Jumanne Makore 6. Kurwa s/o Makore na wengine siyakumbuki majina yao. Edward s/o Bunella alisema yeye na Shabani s/o ? watatuongoza hadi ndani hivyo kwa wale wenye bunduki wakabiliane na walinzi na Frank s/o Selemani Kabuche ambaye alikuwa na mabomu mawili ya mkono atakwenda moja kwa moja kwa wazungu. Tuliingia kupitia upande wa mashariki tukaelekea hadi kwenye nyumba anapolala yule mzungu anayetunza funguo za store ya dhahabu inapohifadhiwa.*
>
> *Baada ya kutangaziwa na kijana mmoja aliyekuwa anaongea lugha ya kiingereza simfahamu jina ni mwembamba, mfupi maji ya kunde akiwataka hao wazungu wakafungue haraka kwenye store ya dhahabu. Ndipo wazungu waiitoka wakafikia idadi yao sita kati yao alikuwepo mwanamke mmoja tukaondoka nao hadi mahali matofali ya dhahabu*

yanapohifadhiwa, huko tulifanikiwa kuchukua mikuo sita ya dhahabu pia kuna store ambayo ilifunguliwa ndani kulikuwa na bunduki nazo tulizichukuwa Pamoja na zile silaha za walinzi wa kwenye mgodi baada ya kukimbia tulichukua silaha zote, Frank s/o Selemani Kabuche alifyatua risasi nyingi za SMG wakati tunaingia pale mgodini. Baada ya kufanya unyangányi huo tuliondoka kuelekea nje ya mgodi ambapo tulizitupa zile silaha zote kwenye majaruba. Katika mgawo mimi nilipewa kipande kimoja cha tofali la dhahabu nikawaacha Shabani na Edward na lile kundi."

The extra-judicial statement shows also that the appellant admitted to have converted the stolen gold into cash by selling it to Japhet and used part of it to purchase the Noah motor vehicle. His statement to that effect reads as follows:

"Baada ya hapo nilianza kutafuta soko kipindi cha mwisho wa mwezi April, 2009 mimi na mzee Jumanne s/o Matondo pamoja na mdogo wangu Saada s/o Yegera tulikwenda mkoani Mwanza ambapo niliuza lile tofali kwa mtu aitwaye Japhet s/o Kija Mnada ambaye ni mnunuzi mkubwa wa dhahabu alinunua kwa bei ya Tshs.100,000,000/= . . . . Nilimpata mchumba aitwaye Martha d/o Fish ambaye mama yake ni mchagga na babu yake ni

raia wa Ujerumani alitafuta chumba cha kupanga maeneo ya Buguruni Shell ndio nikawa naishi naye . . . . Martha d/o Fish amenieleza kuwa anafanya kazi ubalozi wa Marekani hapa nchini. Nakumbuka tarehe 7/01/2012 majira ya 14:00 hrs nikiwa na mchumba wangu Martha d/o Fish tulikwenda eneo la mtaa wa Lumumba ambapo nilinunua gari aina ya Toyota Noah yenye nambari za usajili T483 BXH rangi ya Dark Green [kwa] bei ya Tshs.12,000,000/= bado sijafanya transfer naye kutoka mmiliki wa awali."

Apart from the evidence of the extra-judicial statement, the appellant also made oral confession before PW10. According to his evidence at page 120 of the record of appeal the witness stated that:

"We began our journey at 9.00 hrs. Yusuf [the appellant] was very normal and he was talking to us narrating his role in the incident. He said his friend and other men are the ones who arranged to steal gold. He told us that they had weapons and he specifically had a gun and they invaded the mine and stole six bars of gold. That he was given one bar of gold. No one between us who forced Yusuf to say anything he was saying so voluntarily while laughing."

Under s.3 (1) (a), (b) and (c) of the Evidence Act [Cap. 6 R.E. 2019] a confession to a crime may be written, oral, by conduct and/or a combination of all or some of them. It is trite law that an oral confession made to a witness, being it a police officer or a civilian may be sufficient by itself to found conviction. In the case of **Posolo Wilson @ Mwalyego v. Republic,** Criminal Appeal No. 613 of 2015 (unreported), the Court observed that:

> *"It is settled that an oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not may be sufficient by itself to found conviction against the suspect – see for example* ***Director of Public Prosecutions v. Nuru Mohamed*** *[1988] T.L.R. 82."*

See also the cases of **Patrick Sanga v. Republic**, Criminal Appeal No. 213 of 2008, **Martin Manguku v. Republic**, Criminal Appeal No. 194 of 2004 and **Rashid Roman Nyerere v. Republic**, Criminal Appeal No. 105 of 2014 (all unreported).

From the record, the appellant did not cross-examine PW10 on that evidence. The answers given by PW10 relate only to his role in the arrest

of the appellant at Morogoro and the date on which the appellant was taken to Dar es Salaam. In the circumstances, as observed by the Court in the case of **Cyprian Athanas Kibogo v. Republic,** Criminal Appeal No. 88 of 1992 (unreported), the failure to do so implies accepting as true, the evidence given by the witness. See also the cases of **Hatari Masharubu @ Babu Ayubu v. Republic,** Criminal Appeal No. 590 of 2017 and **Bashiri s/o John v. Republic**, Criminal Appeal No. 486 of 2016 (both unreported).

The appellant's confession was properly corroborated by the evidence of PW11 and PW13 who conducted a search at the appellant's residence. He was found in possession of the Noah motor vehicle which, according to his confession, was purchased by him from part of the money (TZS 12,000,000.00) obtained after converting the gold which he had robbed from the company on the date of the incident. In that respect therefore, the repudiated extra-judicial statement coupled with the oral confession of the appellant, was sufficient to found his conviction.

On the basis of foregoing reasons, we are of the settled mind that the 3rd ground of appeal is similarly lacking in merit. Since as stated above, there was cogent evidence based on the appellant's extra-judicial statement and his oral confession, his conviction on both counts was

properly upheld by the High Court. We do not therefore, find it necessary to consider the 4th ground of appeal as the findings above suffice to dispose of the appeal.

In the event, the appeal is hereby dismissed in its entirety.

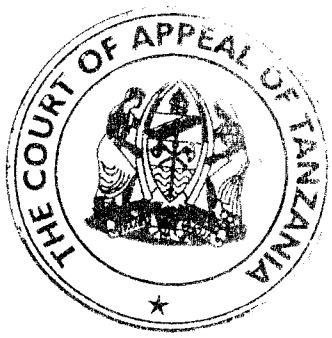
DATED at **DAR ES SALAAM** this 13th day of October, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered on this 18th day October, 2021, in the presence of Mr. Kelvin Kayaga, learned counsel for the appellant linked - via video conference from High Court Tabora and Ms. Upendo Malulu, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL