IN THE COURT OF APPEAL OF TANZANIA

AT MOROGORO

(CORAM: MWARIJA, J. A., MASHAKA, J. A. And MAKUNGU, J.A.:)

CRIMINAL APPEAL NO. 283 OF 2022

1. ONESMO DADI @ NDISAEL.....1ST APPELLANT

2. BRIGHT ISMAIL @ HELLA .....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Ngwembe, J.)

dated the 20th day of June, 2022

in

Consolidated Criminal Appeal No. 20 & 22 of 2021

JUDGMENT OF THE COURT

2nd May & 7th June, 2023

MWARIJA, J.A.:

The appellants, Onesmo Dadi @ Ndisael and Bright Ismail @ Hella (the first and second appellants respectively) were charged in the Resident Magistrate's Court of Morogoro with armed robbery contrary to s.287A of the Penal Code Cap 16 of the Revised Laws. The prosecution alleged that, on 18/12/2017 at Togo area within Ulanga District in Morogoro Region, the appellants stole from Mohamed Arshath Kassim and Mohamed Saleeth, cash amounting to

TZS 10,450,000.00, eighteen parcels of different minerals valued at USD 5,048, NMB card for account No. 21910004710, driving licence No. 4004369212, Zahera College's identity card, two mobile phones, make; iPhone 5S Gold and iPhone 6S both valued at TZS 1,500,000.00 all properties total valued at TZS 11,950,000.00 and USD 5,048.00, the properties of the above named persons.

When they were arraigned, the appellants denied the charge, and as a result, the prosecution called a total of fourteen (14) witnesses to testify. On their part, the appellants relied on their own evidence in defence.

Having considered the prosecution and the defence evidence, the trial court was satisfied that the case had been proved beyond reasonable doubt against the appellants. They were thus convicted and sentenced each to an imprisonment term of thirty (30) years. Aggrieved by the decision of the trial court, they unsuccessfully appealed to the High Court hence this second appeal.

The facts of the case may be briefly stated as follows:

Mohamed Arshath Kassim and his cousin brother, Mohamed Saleeth (the victims) were, until the material time, living in a house situated

at Togo area within Mahenge Town in Ulanga District. It was in that house that the entity known as Shafii Gemstone Company (the company) operated its business of buying gemstones. On 18/12/2017 in the night at about 10:00, three persons arrived at the company's premises. They introduced themselves as Government officials who had gone there to conduct inspection on the company's business operations. The victims provided the said persons (the culprits) with all the documents which they required for inspection together with money, minerals and other valuables which they demanded to be shown. The properties were put on the table in the sitting room.

While still in the house on their purported mission of conducting inspection, the culprits told the victims that they were suspected of having in their possession, illegal firearms because cartridge cases had been found in the house and therefore, a search for firearms had to be conducted. The victims were taken to the dining room and after having been intimidated and threatened with a gun, they were ordered to face the wall without turning back. They obeyed and stood facing the wall for a while. When they felt that

the commotion had stopped, they realized that the culprits had left after having locked the sitting room's door behind them.

Because they were locked in, they sought the assistance of a person who was passing on the nearby road riding a motorcycle. That person went to call the victims' landlord, Jacob Muhali Kilosa (PW8) who entered the house through the main door and opened the door to the sitting room which was locked from outside. When the victims checked their properties which they had placed on the table for inspection, they noticed that the same had been stolen.

The incident was reported to the police and shortly thereafter, a team of about eight police officers led by the OC/CID, SP Hassan Salenge (PW1) arrived at the scene. Mohamed Arshath Kassim (PW2), narrated the incident to him and PW1 advised the victims to go to police station to lodge a formal complaint. While the police and the victims were about to leave, a motor vehicle, make; Alteza Reg. No. T 595 CFX which was being driven along the nearby road approached closer to the victims' residence. It abruptly changed course suggesting that the driver was suspicious of the people he saw at the victims' compound. The police pursued that motor vehicle and after about 200 metres, they managed to block it.

In the motor vehicle, there were two persons, a driver and a passenger. They were ordered by the police to get out of the motor vehicle and as they did so, PW2 identified one of them, the first appellant and informed PW1 that he was one of the culprits. The other person who was driving the motor vehicle was the second appellant. Both of them were taken to police station and after investigation, which was conducted by No. F 8943 DC Geofrey (PW12), the appellants were charged as shown above.

In his evidence, PW2 testified that, it was not his first time that the 1st appellant had gone to the victims' residence. On 15/12/2017, he went there under the pretext of selling gold. PW2 told him that the company was not dealing in gold business. He went to the victims' residence again on 16/12/2017 with other two persons and introduced themselves as Government officials who had gone there to inspect the company's business operations. The first appellant who introduced himself as Peter, demanded to be shown the victims' passports, business licence, the company projects' details, types of minerals which the company purchases and the report of the minerals which had been purchased.

Having inspected the documents, he told PW2 that the dealer's licence of the company was not in order and thus told him that they should go to Morogoro to verify that document. PW2 agreed but the first appellant demanded TZS 1,000,000.00 and when the latter maintained his stand to go to Morogoro, the first appellant reduced the amount to TZS 600,000.00. With a view to intimidate PW2, the first appellant intentionally exposed a pistol which was attached to his waistband. As a result, PW2 decided to give that amount and the said appellant left after warning the victims not to disclose to anybody that he had been bribed, lest he would ensure that they are banned from doing business not only in Mahenge but in the country at large.

On the material date, after having been ordered to produce the documents, minerals and all other valuables for inspection, each of the victims went to his room.

Before he got out of the room, PW2 was followed by the second appellant and when they were proceeding to the sitting room, the said appellant kicked the edge of the carpet on the pretext of having stumbled on it thus lifting the carpet. Underneath it, two cartridge cases became visible. He lifted it further and another

cartridge case was exposed. He then told PW2 that he was suspected of being in unlawful possession of firearms and that the house should for that reason, be searched.

The second appellant pulled out a pistol and ordered PW2 and Saleeth to put the money and all valuables on the table, and the victims obeyed. PW2, he took from his room and placed on the table in the sitting room, the following items; 18 packets of minerals, cash TZS 10,000,000.00, a black wallet containing TZS 200,000.00, identification cards, NMB's ATM card, driving licence and college identity card (exhibit P5 collectively).

It was PW2's further evidence that, after having done so, they were taken to the dining room where they were intimidated and harassed by being ordered to sit down and stand up and later, ordered to stand facing the wall whereupon, as stated above, the culprits took the mentioned properties and left, locking the dining room's door, behind them. PW2 communicated with the company's Director at Dar es Salaam who, apart from informing the police at Mahenge, called also Said Mohamed Almas (PW7) who went to victims residence to assist them.

As shown above, after the police had received information about the incident, PW1 went to the scene and after being briefed about the incident, he collected the three cartridge cases, two of which were for a pistol and the other one for a shotgun. The witness supported the evidence of PW2 on how the appellants, who were in the motor vehicle driven by the second appellant, were pursued and arrested after they had attempted to divert from the road leading to the victims' premises upon noticing the presence of police officers at the area. The witness added that, upon being searched, the first appellant was found with PW2's properties mentioned above (Exhibit P5).

According to PW1, in the motor vehicle, TZS. 721,000.00 belonging to the second appellant was found in the dashboard while the first appellant was found with TZS. 491,000.00. PW1 prepared a seizure note which, he said, was signed by him and No. J343 PC Baraka but the appellants refused to sign it. They were thereafter taken to Mahenge Police Station.

PW1's evidence was further to the effect that, the appellants, who resided in the same house, were searched of their rooms and in the first appellant's room, TZS. 2,000,000.00 was found hidden in

the toilet's flash tank while in the second appellant's room, the same amount of money was also found. The search was conducted in the presence of the Hamlet Chairman, Juma Lazaro Mponguliana (PW13). On 19/12/2017, the police went to the PCCB office to search for firearms which were suspected to have been used by the appellants in the commission of the offence.

According to Chacha Kehiti (PW9), the appellants who performed the duty of security guards at PCCB Office, Mahenge were working under his supervision. They thus had prior to their arrest, handed over the firearms which were in their possession by virtue of their duty. The second appellant had returned a pistol with 18 rounds of ammunition. A pump action gun was also taken from the store at the PCCB office and both arms and the 18 rounds of ammunition were handed over to PW1 who prepared and signed a seizure certificate. Later on, PW1 handed over the same to CPL Peter. He also received and kept the second appellant's motor vehicle (exhibit P3), exhibit P5 collectively, Huawei and iPhone mobile phones and cash which were found in possession of the appellants.

On 21/12/2017, PW1 received information from the PCCB in-charge, Gasper Bailyomi (PW14), that the minerals bearing the label

of Shafii Co. Limited were found in that office at the time when the appellants handing over the office equipment which were in their possession. PW1 and other two police officers went to PCCB office where he was handed over 18 packets of mineral's (Exhibit P11). He then handed over the packets to PW10, the exhibits keeper.

The cartridge cases, the pistol and the pump action gun which were sent to the police, Forensic Department by No. F. 1276 D/CPL Mtandu (PW5), were examined by No. F 5914 D/ CPL Hafidh (PW3). According to his evidence, whereas one of the cartridge cases was fired from the pump action gun, the other two cartridges were fired from the pistol. The report of the Ballistic expert was admitted in evidence as exhibit P15.

In his defence, the first appellant who testified as DW1, disputed the prosecution evidence that on 15/12/2017 and 16/12/2017 he went to the victims' house. He also disputed the evidence that he was involved in the robbery which took place at the victims' house on 18/12/2017. According to his evidence, on that date, at 10:00 p.m., he was at Frank Pub, Mahenge Centre. At about 10:45 p.m., he was picked by the second appellant who was driving his motor vehicle and went to Madinga Bar, Nawenge Street where

the latter had ordered pork. From Nawenge, they drove away but when they arrived at Togo junction, another motor vehicle, which they later realized to be a police motor vehicle, stopped in front of them. He recognizes the OCS, one Maige and PW1 who disembarked and ordered the appellants to go to police. In the police motor vehicle, there were other police officers including D/CPL Mkoma and PW11 who, according to DW1, asked the appellants whether they were making a surveillance on the police. They denied that they were on that duty. At the police station, PW1 moved them from the CRO and took them to a lock up telling them that he had been ordered by his superior to deal with them because of their act of keeping surveillance on the police officers. He said further that, PW11 threatened to shoot them because it was their turn to fix them for their deeds.

Later on that night, at about 2:00 a.m., PW1 and other fourteen police officers took him together with the 2nd appellant to their residence so that a search could be conducted. At their residence, he found other three police officers outside the house and noticed that the door was open although the door grill was intact. He showed the police where the key of the grill was kept and after

the same was opened, they entered into the house wherein a search was conducted. His room was searched while he was kept in the sitting room. From his room, two jackets, one belonging to his wife, were taken out by PW11. When he asked that his neighbour and a co-worker, one Ernest Gurisha be called to witness the search, that person was called but when he arrived, he was arrested for the same reason; that he was also investigating the police on allegation of collaborating with the company to conduct illegal trade in minerals.

In his further testimony, DW1 told the trial court that, on 19/12/2017 he was taken to PCCB office and a search was conducted while he was kept at the kitchen area. At the office, while a pump action gun was taken from the store, one pistol and two magazines were taken from the safe. Thereafter, he was returned to the police station together with the second appellant. Later on, he was taken out of the lock up and forced to sign a form on which the items taken from his residence were listed. On 21/12/2017, he was sent together with the second appellant to the PCCB office to hand over the documents which were under his custody. He witnessed the second appellant taking out various items from the safe and in the process, he was surprised to see some minerals and the items which

were in the safe being taken out by the second appellant. The same were in the packets labelled "*shafii Gems*". He said that, he heard Insp. Joseph saying that they had won because they had found the minerals in the possession of the appellants.

When he was cross examined about his contention, that he was investigating some of the police officers on the allegation of collaborating with the officials of the company to conduct illegal dealings in mineral, he admitted that such information was not reported to the office and therefore, his superiors did not have that information.

On his part, the second appellant, who testified as DW2, supported the evidence of the first appellant on how they were arrested and the reason for their arrest; that, it was because they were investigating some of the police officers against their involvement in corrupt acts as reported to the appellants by their informers. Like DW1, DW2 testified that, some of the police officers who were suspected, including one Mulla, realized that they were being investigated by the appellants because on 18/12/2017, they met them in suspicious circumstances at the victims' office.

As to what happened after his arrest, he also supported the evidence of DW1, adding that, when his room was searched, TZS. 2,800,000.00 which was in his brief case, was taken. He said further that, at the CRO, he handed over to the police TZS. 721,000.00. With regard to the search which was conducted at the PCCB office on 21/12/2017, it was his evidence that, he opened the safe using the keys which were given to him by PW14 and therefore, although the minerals were found, he had no previous knowledge of their presence in the safe.

Having considered the prosecution and the defence evidence, the trial court was satisfied that the appellants were properly identified by PW2 as the persons who intimidated and robbed the victims of the properties listed in the charge. The learned trial Senior Resident Magistrate found further that, the appellants were found in possession of part of PW2's properties which were admitted in evidence as exhibit P5. Applying the doctrine of recent possession, she found them guilty of the offence charged.

As pointed out above, the appellants were dissatisfied with the decision of the trial court and therefore, appealed to the High Court. On its part, the Director of Public Prosecutions (the DPP) was also

aggrieved by part of the judgment of the trial court and therefore, cross appealed. In his decision, the first appellate Judge was of the view that, the appellants, who were properly identified by PW2, were found with part of exhibit P5 collectively and although the contents of those items (the cards) were not read out after their admission in evidence, given the nature of the properties, the omission was a minor irregularity which did not prejudice the appellants. He found further that, whereas the chain of custody of the exhibits was properly established, the contradictions in the evidence of the prosecution witnesses complained of by the appellants, were minor. As to the appellants' defence, the learned first appellate Judge was of the view that, the same did not raise any reasonable doubt in the prosecution case.

In the cross appeal, the DPP complained that the learned Senior Resident Magistrate erred in failing to find that the motor vehicle (exhibit P3) was the instrument of crime liable to be confiscated and that, the money found in possession of the appellants should have been found to be the property of the victims. The learned High Court Judge found that the evidence did not prove that exhibit P3 was used in the commission of the offence or that the

money, which the appellants were found with was the same money which was stolen from PW2. He thus dismissed both the appeal and the cross appeal.

Aggrieved further by the decision of the High Court, the appellants have preferred this second appeal. They filed separate memorandum of appeal. On his part, the first appellant preferred one ground as follows:

> *"That, the Trial High Court erred both in law and fact by upholding the decision of the Resident Magistrate's Court which convicted the appellants on the basis of the prosecution case which did not prove the offence [to] the standard required by law."*

As for the second appellant, he raised the following seven grounds:

> "1. That *the learned Judge of the first appellate court erred in law and in fact in holding that the contents of exhibit P5 were not required to be read over loudly after the admission of the exhibit thus exhibit P5 being documentary evidence be expunged from the record/proceedings.*

2. *That the learned Judge of the first appellate court erred in law and in fact in failing to draw adverse inference against the prosecution for its failure to find that the prosecution had failed to prove their case to the required standard.*
3. *That the learned Judge of the first appellate court misdirected himself in upholding the 2nd appellant's conviction while the chain of custody of the alleged stolen properties and the firearms was broken and questionable.*
4. *That the learned Judge of the first appellate court and Honourable trial Resident Magistrate erred in law in relying on exhibit P1, P2, P7 and P9 which were inadmissible under the law.*
5. *The learned Judge of the first appellate court misdirected himself in re-evaluating the evidence by failing to draw adverse inference against the prosecution's failure to call as a witness, a motorcyclist who was the first [person] to reach the crime scene and [assisted the victims to] call PW8.*
6. *That the learned Judge of the first appellate court engaged himself in conjecture on the identification of the accused person after making findings that there are inconsistence*

of the prosecution witnesses PW1 and PW2 on the appearance of the accused person at the crime scene.

7. *That the learned Judge of the first appellate court erred in law in shifting the burden of proof on to the appellants."*

At the hearing of the appeal, the first appellant was represented by Mr. Remedius Mbekomize, learned counsel while the second appellant was represented by Mr. Roman Lamwai, also learned counsel. The respondent was represented by Mr. Laiton Mhesa, learned Principal State Attorney assisted by Ms. Chivanenda Luwongo, learned Senior State Attorney and Ms. Aveline Ombock, learned State Attorney.

Submitting in support of his sole ground of appeal, Mr. Mbekomize argued that the case against the appellants was not proved to the required standard. According to the learned counsel, the prosecution evidence was insufficient to discharge that burden. Making reference to the evidence of PW1 and PW2, Mr. Mbekomize contended that, the said witnesses did not specify the owner of the properties which were stolen from the victims' residence. He argued further that, since the serial numbers of the cards and the driving

licence were not stated, the evidence based on those properties is not cogent to warrant conviction of the appellants. Furthermore, he said, because their contents were not read out after their admission, the documents ought to have been expunged from the record. With regard to the evidence of the 18 packets of minerals, the learned counsel submitted that, because one of the packets (packet No. 3) did not contain minerals, the prosecution evidence to the effect that the second appellant was found in possession of the minerals which were stolen from the victims' residence was erroneous.

The learned counsel also challenged the certificates of seizure arguing that, whereas some of them are defective because they were not signed by the appellants, as for the other certificates the particular places or things which were searched, are not shown. He also challenged the evidence linking the appellants with the use of firearms arguing that, since all the 18 rounds of ammunition which were issued to the second appellant at his office were found intact, it is obvious that the cartridge cases found at the scene of crime were not fired from the firearm which was issued to him at his office.

On his part, Mr. Lamwai who abandoned his 6th ground of appeal, supported Mr. Mbekomize's submissions that the case against

the appellants was not proved beyond reasonable doubt. Submitting on his 1st ground of appeal, like Mr. Mbekomize, the second appellant's counsel implored upon the Court to expunge exhibit P5 on the ground that the contents of those documents were not read out after their admission in evidence. He stressed that, by virtue of the provisions of s.3 of the Evidence Act, Cap. 6 of the Revised Laws, the cards fall within the definition of the word "*document*". He went on to argue that, as for the second appellant, since he was not found with any of those documents, he could not have known their contents hence the omission to read out their contents prejudiced him.

On the 2nd ground, Mr. Lamwai submitted that, the offence of armed robbery was not proved because, after expungement of exhibit P5, there would be no proof of theft, which is one of the ingredients of the offence of armed robbery. This is more so, he said, because as can be gleaned from page 307 of the record of appeal, the appellants' conviction was neither based on the evidence of use of firearms nor the possession of minerals which were found at the PCCB office. Another argument by Mr. Lamwai on this ground was that, there was no evidence proving that on the material date,

the victims were having in their possession, the quantity of the minerals stated in the charge and cash amounting to TZS 10,000,000.00 which was allegedly stolen from them.

As for the 3rd ground, Mr. Lamwai argued that the chain of custody of the tendered exhibits, P5, P11, P16 and P17 was not established. On the 7th ground, it was the learned counsel's argument that the learned trial Judge shifted the burden of prove to the appellants. He referred to the judgment of the High Court at page 379 of the record of appeal where the court stated that the appellants' defence was weak.

With regard to the 4th ground, Mr. Lamwai argued that exhibits P1, P2, P7, P9 were inadmissible. The said exhibits are in respect of seizure of cartridge cases, the money which was found in possession of the appellants at the time of their arrest, TZS. 2,800,000.00 found in the second appellant's room, and the guns which were taken from the PCCB office. He contended that, the documents were inadmissible because, whereas exhibit P1 was not signed by PW2, the certificates differ as regards the amount of money which the second appellant was found with.

In reply to the arguments made in support of the 2nd and 3rd grounds of the second appellant's grounds of appeal and the sole ground of appeal filed by the learned counsel for the first appellant, Ms. Luwongo argued that, the charge was proved beyond reasonable doubt. She contended that, the evidence of PW2 as supported by PW1 proved that the company's properties as well as the personal properties of PW2 were stolen and later, those of PW2 were found in possession of the first appellant on the date of his arrest.

She argued that, the first appellate court rightly upheld the finding of the trial court which acted on the doctrine of recent possession to convict the appellants. The learned Senior State Attorney cited the cases of **Selemani Mussa @ Vitus and Another v. Republic,** Criminal Appeal No. 7 of 2019 and **Augustino Mgimba v. Republic,** Criminal Appeal No. 436 of 2019 (both unreported) to bolster her argument that, where a person is found in possession of a property which was recently stolen after commission of an offence, that person is presumed to have committed that offence. As to the certificate of seizure of the minerals from the PCCB office, Ms. Luwongo submitted that, the same was signed by the second appellant and during the trial, the

document was admitted in evidence without any objection from the appellants.

On the use of firearm, the learned Senior State Attorney submitted that, from the evidence of PW2, the appellants used a gun to commit the robbery, adding that, the pistol (exhibit P16) was admitted in evidence without any objection from the appellants. With regard to the contention that the chain of custody was not established, Ms. Luwongo argued first, that the omission to list in the charge, some of the stolen items found in the possession of the first appellant did not alone, have the effect of exonerating the appellants from the offence. Secondly, as to the chain of custody of the tendered properties, the trail was established through the evidence of the prosecution witnesses particularly PW5, PW6, PW10 and PW14. She argued also that, the gaps in the evidence of the witnesses, which the appellants relied on as having weakened the prosecution case, are minor and thus curable. She cited the case of **Abas Kondo Gede v. Republic,** Criminal Appeal No. 472 of 2017 (unreported) to support her argument.

On the 1st ground of the second appellant's grounds of appeal, Ms. Luwongo argued in reply that, the purpose of reading the

contents of a documentary exhibit is to enable the accused person to understand its contents. She submitted that, in the particular circumstances of this case in which the documents were in the possession of the first appellant and given the nature of the documents, the omission to read out their contents did not prejudice the first appellant.

Ms. Ombock replied on the submission made in support of the 4th ground of the grounds of appeal. She countered the argument that exhibits P1, P2, P7 and P9 were wrongly admitted in evidence. According to the learned State Attorney, exhibit P1 was read out after its admission. As for exhibit P2, she argued that, the fact that the same was not signed by the appellants is because they refused to do so. As for exhibits P7 and P9, it was her argument that, whereas exhibit P7 was admitted without any objection from the appellants, exhibit P9 had no defect because it was duly signed.

On the 5th ground in which the appellants contended that the two courts below ought to have drawn adverse inference on the prosecution for having failed to call the motorcycle rider who assisted the victims to call PW8, Ms. Ombock argued that, the prosecution did not find it necessary to call that person because the evidence of the

witnesses who testified and the exhibits relied upon by the prosecution, sufficiently proved the case against the appellants.

On his part, Mr. Mhesa responded to the argument made in support of the 7th ground of the second appellant's grounds of appeal that the learned first appellate Judge shifted the burden of proof to the appellants. Opposing that argument, the learned Principal State Attorney submitted that, the finding of the High Court was essentially that, after having considered the defence it found that the same did not succeed to shake the prosecution evidence.

In rejoinder, Mr. Mbekomize reiterated his point that, the prosecution did not adduce sufficient evidence proving that the properties (exhibit P5) were stolen. He argued further that, since exhibit P5 was not found in possession of the first appellant, his conviction was unfounded. He submitted also that, as regards the certificate of seizure of the properties, the same should not have been acted upon because the independent witness who signed it was known to PW2.

Mr. Lamwai also made a rejoinder submission. He argued that, since exhibits P22, P23, P24 and P2, (the registers) were expunged, oral evidence of witness should not have been used to establish the

chain of custody of the exhibits which were acted upon to found the appellants' conviction. He relied to that effect, on the case of **Jabir Okashi Ahmed v. Republic**, Criminal Appeal No. 331 of 2017 (unreported) cited by the respondent. He also reiterated his submission that, the evidence of the motorcycle rider was necessary and thus since the prosecution did not call him, the trial court should have drawn adverse inference and hold that the case had not been proved against the appellants. He finally, faulted the learned first appellate Judge for agreeing with the trial court's reliance on the doctrine of recent possession contending that, the doctrine was wrongly applied because there was nothing stolen from the victims.

Having duly considered the submissions of the learned counsel for the parties, we wish to begin by observing that, the evidence relating to the money found in possession of the appellants, the firearms taken from the PCCB office and sent to Forensic Department of the Police as well as the minerals seized from the PCCB office as the prosecution attempted to substantiate through the respective exhibits, was not acted upon to convict the appellants. However, the High Court acted on that evidence. Since the trial court was of the opinion that such evidence relating to the firearms, the minerals

taken from the PCCB office and the money found in possession of the appellants did not link them with the offence and because that finding was not appealed against, the High Court erred in using it to support its decision. For this reason therefore, in determining the appeal we shall confine our deliberations to the evidence which was acted upon by the trial court to found the appellants conviction which was subsequently upheld by the High Court.

That said, we proceed to consider the arguments made for and against the grounds of appeal, starting with the 5th and 7th grounds of the second appellant's grounds of appeal. We need not be detain much in determining these grounds. As for the 5th ground, the position of the law as provided under s. 143 of the Evidence Act, no particular number of witnesses is required to prove any fact. In the case at hand, the motorcycle rider was sent by PW2 to call the victims' landlord (PW8) who arrived and opened the door which was locked from outside by the culprits. The fact that the door to the sitting room of the victims' residence was found locked from outside and that the victims were locked in was testified to by the said PW8. In the circumstances, we agree with Ms. Ombock that the failure to call the motorcycle rider was not a serious omission such that an

adverse inference could be drawn against the prosecution case. This ground is thus devoid of merit.

With regard to the 7th ground of the second appellant's grounds of appeal, the complaint that the learned first appellate Judge shifted the burden of proof to the appellants is based on the statement by the learned first appellate judge in his judgment at page 379 of the record of appeal that:

> *"Though it is the duty of the prosecution to prove its case, there is ample evidence that before the trial court, the defence case was very weak and otherwise unable to establish doubt against the prosecution case".*

In our considered view, the above quoted passage cannot be interpreted to mean that the appellants were convicted on the basis of weakness of their defence. What was observed by the learned first appellate Judge is that their defence did not raise any reasonable doubt in the prosecution case. This ground is thus equally devoid of merit.

Next for our consideration are the 1st, 3rd and 4th grounds of the second appellant's grounds of appeal and the sole ground of the first appellant, which is a general ground. As stated above, the

conviction of the appellants was based on the evidence of PW2 who testified that he identified the appellants at the scene of crime. His evidence was that, whereas it was the third time for the first appellant to go to the victims' house, the second appellant was the one who threatened the victims by pointing a pistol to them at the time of the robbery. In his evidence at page 69 of the record of appeal, PW2 explains the reasons why he could not forget the second appellant. He is recorded to have stated that:

> *"The person who was holding a pistol while on the dining room facing the wall is in this room as well. Here is the person.*
>
> ***Court**: PW2 identified the 2nd accused to be the person who was holding a pistol .... On that day, it was my first time [that a gun was pointed at me]. I can never forget the face of that person."*

The trial court also acted on the evidence to the effect that, the first appellant was found with some of the properties which were stolen from the victims' house including exhibit P5 and thus invoked the doctrine of recent possession to convict the appellants. From the evidence, the first appellant who was with the second appellant in the latter's motor vehicle, was found with among other things, PW2's

NMB card and driving licence. Both Messrs Mbekomize and Lamwai have faulted the learned first appellant Judge for holding that the documents were improperly acted upon because they were not read out after their admission in evidence. With due respect to the learned advocates, we are unable to agree with them. The rule that after admission of a document, its contents must be read over to the accused person in a rule of principle. As observed by the learned first appellate Judge in his judgment, the purpose is to enable the accused person to understand the contents of the document.

Given the nature of the documents in question which had PW2's photographs, the appellants were not prejudiced by the omission to read out their contents because they contained personal information of PW2 which were described when they were sought to be tendered. The contents were known by the first appellant because the cards were found in his possession. In the circumstances, we agree with Ms. Luwongo that the omission to read out the contents of the cards did not render those documents invalid. In any case, even without that evidence upon which the doctrine of recent possession was rightly invoked to convict the appellants, from the concurrent finding of both courts below that the appellants were

properly identified by PW2, the finding which was not challenged by the appellants in this appeal, their conviction would still be sustained. Similarly, on the argument by Mr. Lamwai that the appellants should not have been convicted of robbery on the contention that the prosecution did not prove that the victims owned the properties which were stolen from them, with respect, that argument is not sound because the ownership by the victims of money and minerals was not at issue during the trial. The finding that the prosecution did not prove that the minerals found at the PCCB office and the money found in prosecution of the appellants belonged to the victims does not connote that the victims did not own money or minerals, more so because buying of minerals was their main business. The 1st ground is therefore, lacking in merit.

On the chain of custody of exhibit P5, as stated above, the exhibit which comprised of the items including the cards, were found in possession of the first appellant when he was arrested while in the second appellant's motor vehicle. Having found the items, PW1 prepared a seizure certificate (exhibit P2) which was not signed by the first appellant because he refused to do so. The documents were later tendered by the same witness and the same were

admitted without any objection by the appellants. According to Ms. Ombock, from the nature of the exhibits, even if the prosecution would have failed to establish their chain of custody, the omission would have no effect against the prosecution evidence. This is because, from their nature, the same were not in the danger of being tempered or altered. We respectfully agree with the learned State Attorney. In the case of **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported) the Court observed as follows on that principle:

> *"... it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence regardless of its nature. We are certain that this cannot be the case, say where the potential evidence is not in the danger of being destroyed or polluted, and/or in any way tempered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken, of course, this will depend on the prevailing circumstances in every particular case."*

On the basis of the foregoing reasons, we do not as well, find merit in the 3rd ground of appeal.

On whether or not the prosecution proved its case beyond reasonable doubt which is the gravamen of the first appellant's sole ground of appeal and the 2nd ground of the second appellant's grounds of appeal, we hasten to state that, from the above stated findings, the answer is in the affirmative. The appellants were identified by PW2 to be the persons who threatened him and his cousin brother with a pistol and robbed them their properties including PW2's cards. It does not matter that the pistol is the one which was issued to the second appellant to use it at his work place or not. PW2's evidence was found by the two courts below to be credible. It is trite principle that this court cannot interfere with concurrent findings of facts by the two courts below unless there has been a misapprehension of evidence, a miscarriage of justice or a violation of the law or practice. See for example, the cases of **Dickson s/o Joseph Luyana and Another v. Republic,** Criminal Appeal No. 1 of 2005 and **Yohana Dioniz and Another v. Republic**, Criminal Appeal No. 114 of 2009 (both unreported). Having considered the evidence, we could not find any justifiable

reasons to differ with concurrent findings of the two courts below that the offence was sufficiently proved against the appellants.

In the event, we find that, this appeal is lacking in merit and thus hereby dismiss it.

DATED at **DAR ES SALAAM** this 6th day of June, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 7th day of June, 2023 in the presence of the appellants appeared in person. Ms. Salome Kagoa hold brief for Mr. Remedius Mbekomize, learned counsel for the 1st appellant via Video Link from High Court Bukoba. Ms. Mary Lamwai hold brief for Mr. Roman Selasini Lamwai, learned counsel for 2nd appellant and Mr. Shaban Abdallah Kabelwa assisted by Ms. Elida Mtisi, via Video Link from High Court Morogoro both learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL