IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWAMBEGELE, J.A., KITUSI, J.A. And MGONYA, J.A.)

CRIMINAL APPEAL NO. 231 OF 2022

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

LENGAI OLE SABAYA
SILVESTER WENCESLAUS NYEGU ..... **RESPONDENTS**
DANIEL GABRIEL MBURA

(Appeal from the Judgment of the High Court of Tanzania, at Arusha)

(Kisanya, J.)

dated the 6th day of May, 2022
in
Criminal Appeal No. 129 of 2021

.....

JUDGMENT OF THE COURT

1st & 17th November, 2023

MWAMBEGELE, J.A.:

The three respondents, Lengai Ole Sabaya, Sylvester Wenceslaus Nyegu and Daniel Gabriel Mbura, were arraigned in the Court of the Resident Magistrate of Arusha for three counts of armed robbery contrary to section 287A of the Penal Code. After a full trial, the trial court (Amworo, SRM), convicted them as charged in the second count. In the first and third counts, the learned trial Senior Resident Magistrate, was of the view that the offence of armed robbery had not been proved. In its stead, the learned trial Senior

Resident Magistrate thought the evidence with regard to the two counts established the offence of gang robbery and convicted them of that offence. The respondents were sentenced to a prison term of thirty years in each of the three counts. The sentences were ordered to run concurrently. Aggrieved, they successfully appealed to the High Court of Tanzania; it being satisfied that the trial was a nullity for failure by the trial court to afford the second and third respondents the right to cross examine Mohamed Numas Jasin (PW2). No retrial was ordered for the reason that the interest of justice did not dictate so and that the prosecution evidence at the trial fell short of proof of the case beyond reasonable doubt. Irked, by the judgment on appeal acquitting the respondents, the Director of Public Prosecutions preferred this appeal, premising the same on seven grounds. However, at the hearing, the second ground was dropped and the third, fourth, fifth and seventh grounds were consolidated. Thus the appellant argued the following three grounds: **one**, the first appellate court erred in law by holding that the preliminary hearing was contrary to section 192 (2) of the Criminal Procedure Act; **two**, the first appellate court erred in law by vitiating the proceedings for failure to accord the second and third respondents the right to cross examine the second prosecution witness and;

three, the first appellate court erred in law by holding that the prosecution did not prove the case beyond reasonable doubt.

When the appeal was placed before us for hearing, Ms. Chivanenda Luwongo, learned Principal State Attorney led a team of four senior trained minds representing the appellant. Appearing together with her were Mses. Elianenyi Njiro, Sabina Silayo and Verdiana Mlenza, learned Senior State Attorneys. The respondents were also ably represented. While Mr. Moses Mahuna and Ms. Fauzia Mustapha, learned advocates joined forces to represent the first respondent, Messrs. Sylvester Kahunduka and Fridoline Bwemelo, also learned advocates, represented the second and third respondents, respectively. However, in a bizarre twist of things, when called upon to respond to the grounds of appeal and submissions by the appellant, counsel for the respondents joined forces and Mr. Mahuna led the team to represent all the respondents. Messrs. Kahunduka and Bwemelo as well as Ms. Mustapha assisted him in that endeavour. We blessed that course of action, for it saved time and convenience as well as the interests of justice.

The first ground of appeal was argued by Ms. Njiro. Supporting it, she submitted that the purposes for which section 192 was enacted was to expedite the disposition of criminal cases. She argued that there are five

steps under the section which must be taken for its strict compliance. She enumerated them as; if an accused person is not represented by an advocate, the court shall explain to him the nature and purpose of the preliminary hearing and the court may ask the accused questions without him being sworn in. Then, the facts shall be adduced by the prosecution. She added that at the end, the court shall prepare a memorandum of the matters agreed which shall be read over and explained to the accused person in a language that he understands and signed by him and his advocate, if represented. In the case at hand, she argued, the High Court nullified the preliminary hearing proceedings of 16th July, 2021 because the letter of section 192 of the CPA was not complied with. That was an error because that provision of the law was complied with, she argued. By the trial court recording at p. 8 of the record of appeal that section 192 of the CPA had been complied with, she submitted, it should be taken to signify that every requirement of the section had been complied with by the trial court. After all, she went on, omission to record that every requirement of the section had been complied with, is curable under section 388 of the CPA especially in circumstances where an accused person is represented and therefore not prejudiced. She relied on the case of **Masamba Musiba @ Musiba Masai Masamba v. Republic** (Criminal Appeal No. 138 of 2019)

[2021] TZCA 270 (28 June, 2021) TANZLII at p. 12 for this proposition. She thus implored us to allow this ground of appeal.

The sixth ground of appeal which challenges the High Court on appeal for holding that the proceedings of the trial court were a nullity for not according the second and third respondents the right to cross examine the second prosecution witness, was argued next. Ms. Silayo, who argued in support of this ground, submitted that the right to cross examine a witness brought by an adversary party is a mandatory legal requirement and is given by section 147 of the Evidence Act. She conceded that as evident at p. 34 of the record of appeal, when PW2 had finished testifying in chief, advocate Oola, the learned counsel who was assisted by Mr. Mahuna in representing the first respondent, was given the right to cross examine him. The advocates representing the second and third respondents; Messrs. Kahunduka and Ngemela for the second respondent and Mr. Bwemelo for the third respondent, were not accorded that right. The learned Senior State Attorney submitted that the High Court nullified all the proceedings for this ailment. That was an error, she argued, for the Judge on appeal had to nullity the proceedings in respect of the second and third respondents only who were not afforded that right, not in respect of the first respondent

who was not deprived of that right. She thus urged us to allow this ground of appeal by holding that the evidence of the second prosecution witness was vitiated as against the second and third respondents only.

The last ground of appeal which faults the High Court for holding that the evidence by the prosecution fell short of proof of the case beyond reasonable doubt, was argued for the appellant by Ms. Mlenza. She premised her arguments on three aspects; **first**, on the substitution of the offence of armed robbery to one of gang robbery; **second**, on the variance of the charge and the evidence adduced, and; **third**, on the inconsistencies and contradictions in the evidence of the prosecution witnesses.

With regard to the substitution of the offence of armed robbery to one of gang robbery, the learned Senior State Attorney was aware of the existence of the letter of section 300 of the CPA which provides that an accused person may be convicted of an offence which is minor to the offence he was charged with even thought he was not charged with that offence, provided that the evidence adduced proves that minor offence. She argued that the offence of gang robbery is not minor to the offence of armed robbery. If anything, she submitted, both are serious offences attracting a sentence of not less than thirty years in jail on conviction. She cited to us

Richard Estomihi Kimei and Another v. Republic (Criminal Appeal No. 375 of 2016) [2018] TZCA 210 (11 October, 2018) TANZLII at pp. 6 and 8 where we held that the offence of gang rape cannot be a substitute of an alternative verdict to that of rape. She thus implored us to follow suit and hold that the offence of gang robbery cannot be a substitute for the offence of armed robbery. She beseeched us to so hold and allow this ground of appeal.

With regard to the variance between the charge and evidence, the learned Senior State Attorney admitted that, indeed, the coins and EFD machine did not feature in the charge but featured prominently well in evidence, that they were among the items allegedly stolen by the respondents. The same was the case with a handkerchief and a wallet. The learned counsel submitted that the High Court Judge held that this variance was fatal. She argued that there was that minor variance but did not go to the root of the matter and did not occasion any injustice to the respondents and, therefore, the High Court should have found so. After all, she added, Bakari Rahibu Msangi (PW6) did not say a wallet was stolen from him. The High Court thus erred in stating that a wallet was one of the items stolen from PW6. She relied on our decision in **Joshua Joseph @ Paulo v.**

Republic (Criminal No. 307 of 2018) [2022] TZCA 610 (6 October, 2022) TANZLII wherein we held in an akin situation that failure to mention a wallet in the charge sheet did not have any effect on the offence of armed robbery the appellant stood charged with and convicted of, as long as all the ingredients of the offence under section 287A of the Penal Code were disclosed and evidence led to prove them. In the case at hand, she argued, all the ingredients of the offence under section 287A of the Penal Code were there in that PW2 proved that there was theft and that the respondents were armed with offensive weapons and also that there was violence.

As to the inconsistencies and contradictions in the evidence of the prosecution witnesses, Ms. Mlenza argued that they were not there. She submitted that what ASP Gwakisa Venance Minga (PW7) testified as evident at p. 136 of the record of appeal is that the CCTV cameras were not useful because they had been turned to face the wall and the other two recorded incidents from another angle and therefore all the CCTV cameras were not useful. That evidence was supported by H 348 D/C James (PW11).

Lending Ms. Mlenza a helping hand, Ms. Luwongo added that the High Court referred to contradictions in respect of the time during which the items were allegedly stolen, the amount of money allegedly stolen; that is,

whether the Tshs. 1,000,000/= referred to by Mohamed Saad Hajirin (PW1) was inclusive in the Tshs. 2,769,000/= mentioned in the charge sheet. Another alleged contradiction referred to by the High Court is with regard to the identification parade which was supervised by Insp. Evance Francis Mwamengo (PW9) to the effect that PW6 identified Deogratias Peter and Daniel Bura while the testimony of PW9 and Exh. P2 show that the suspect who was identified was Daniel Laurent Bura; Deogratias Peter is not mentioned. The learned Principal State Attorney clarified that the learned High Court Judge misapprehended the evidence in that he did not realize there were two identification parades conducted during which Deogratias Peter was identified in one and Daniel Laurent Bura was identified in another.

Another contradiction referred to by the High Court Judge, Ms. Luwongo went on submitting, was in respect of the name of the third respondent; while the charge sheet refers to him as Daniel Gabriel Mbura, PW6 and Exh. P2 refer to him as Daniel Bura and Daniel Laurent Bura, respectively. The learned Principal State Attorney submitted that there were essentially no contradictions and the minute discrepancy regarding the name of the third respondent can be glossed over as minor and did not go

to the root of the matter. She relied on our decision in **Issaya Renatus v. Republic** (Criminal Appeal No. 542 of 2015) [2016] TZCA 218 (26 April, 2016) TANZLII for the point that semantics will not make a case for the prosecution fail. In that case, reference in evidence to "Fance Ntakimazi" and "Faith Takimazi" were regarded as mere display of semantics and an inadvertent mishap which did not go to the root of the matter.

Ms. Luwongo, in respect of another reason which made the High Court Judge allow the respondents' appeal; failure to call a material witness which made his Lordship draw an inference adverse to the prosecution case, submitted that the High Court erred in drawing that adverse inference to the case for the prosecution in that there were other witnesses who testified on what Mzee Salim Ally; the witness who was not called, could have testified. The learned Principal State Attorney was emphatic that it is the quality of evidence, not the quantity of it, that matters. There were thus no gaps to fill, as the High Court erroneously found, and the learned Principal State Attorney called upon us to so find and invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act to reassess the evidence and find that the prosecution proved the case against all the respondents to the hilt and reverse the findings of the High Court.

Responding for all the respondents, Mr. Mahuna vehemently attacked the submissions of the learned State Attorneys submitting that the judgment of the High Court Judge cannot be faulted in any way. Addressing us on ground one of the appeal on failure to observe the letter of section 192 of the CPA, the learned counsel admitted that the shortcoming may not be fatal in certain circumstances, but in circumstances where the facts adduced incriminate an accused person, it becomes incurably fatal. To buttress this standpoint, he referred us to our decision in **Boniface Thomas Mwimbwa and Another v. Republic** (Criminal Appeal No. 325 of 2019) [2023] TZCA 192 (19 April 2023) TANZLII in which we so held. In the case at hand, he contended, the facts in the preliminary hearing incriminated the respondents and therefore the noncompliance with the letter of section 192 was incurably fatal. He thus implored us to dismiss the first ground of appeal.

On the right to cross examine, the subject of ground six of the appeal, Mr. Mahuna submitted that the right was fundamental and that it cannot be against only the second and third respondents who appear on the record of appeal to have not been afforded that right. He contended that the ailment affected the first respondent as well who could have benefitted from the cross examination by the second and third respondent as the trio were

jointly charged. She thus urged us to dismiss the prayer by the learned Senior State Attorney that we should consider it fatal as against the second and third respondents only.

Responding to the general ground which challenged the High Court for holding that the case was not proved beyond reasonable doubt, Mr. Mahuna submitted that the High Court correctly found that the prosecution evidence fell short of proof to the required standard; that is, beyond reasonable doubt. He addressed us on the aspect of variance between the charge and evidence submitting that they were so apparent in the proceedings of the trial court and that the High Court Judge chose just some of them. There was variance on the items allegedly stolen; the coins, EFD machine, wallet, handkerchief and documents featured in evidence but the charge sheet was silent on them. That was incurably fatal and the trial court ought to have ordered amendment of the charge short of which the charge was not proved and the High Court correctly so found, he argued. There was also variance on the actual amount stolen as well as the location of the *locus in quo*, he added.

Mr. Mahuna also addressed us on what he referred to as apparent contradictions in the testimony of prosecution witnesses. The contradictions

with regard to the CCTV cameras, the actual amount of money stolen, the names of the third respondent which have been referred to by the appellant, as held by the High Court Judge, were not minor but went to the root of the matter, he contended.

With regard to the adverse inference drawn against the prosecution case by the High Court Judge for failure to field a material witness, the learned counsel submitted that the decision made was quite appropriate. He contended that Salim Hassan and Ally Shabani were among the victims of the alleged crime and that they were also beaten by the respondents. These were material witnesses who should have been brought to testify for the prosecution, failure of which the court was correct in drawing inference adverse to the prosecution case. To reinforce this proposition, the learned counsel referred us to our decision in **Yosiala Nicholaus Marwa and Two Others v. Republic** (Criminal Appeal No. 193 of 2016) [2019] TZCA 147 (9 April, 2019) TANZLII, at pp. 12 and 13.

The learned counsel also raised a legal point that the trial of the first respondent was a nullity for, being a presidential appointee, his trial ought to have been consented to by the Director of Public Prosecutions as required by the Consent to Prosecute (Delegated Powers) Regulations, 2019 - GN

No. 830 of 8th November, 2019 (the Regulations). He argued that regulation 5 thereof, requires that the Director of Public Prosecutions must sanction the prosecution of every presidential appointee, among others. That was not done and therefore the trial was a nullity. He invited us to nullify the trial for this shortcoming.

Giving Mr. Mahuna a hand, Mr. Kahunduka beefed-up the former's submissions with some more authorities. On the right to cross examine, he cited **Albanus Alloyce and Another v. Republic** (Criminal Appeal No. 283 of 2015) [2016] TZCA 616 (21 July, 2016) as well as **Elias Mwaitambila and Three Others v. Republic** (Criminal Appeal No. 414 of 2013) [2015] TZCA 508 (18 August, 2015) TANZLII in which the Court nullified the proceedings as a whole despite the fact that only two appellants were deprived of the right to cross examine. He thus invited us to follow suit and nullify the proceedings of the trial court. He invited us to see also **Said Mohamed Said v. Muhusin Amiri and Another** (Civil Appeal No. 110 of 2020) [2022] TZCA 208 (25 April, 2022) TANZLII on the same point.

The learned counsel also added that PW6 was not a credible witness in that what he testified in court was different from what he stated at the police. On the authority of our decision in **Sophia Joseph Kimaro v.**

Republic (Criminal Appeal No. 152 of 2019) [2023] TZCA 17589 (1 September, 2023) TANZLII, he invited us to discount his evidence.

Likewise, Mr. Bwemelo added authorities on top of what was presented to us by Mr. Mahuna. On variance between the charge and evidence, he referred us to **Killian Peter v. Republic**, Criminal Appeal No. 508 of 2016 (unreported) and **Erasto John Mahewa v. Republic** (Criminal Appeal No. 287 of 2020) [2023] TZCA 17678 (29 September, 2023) as opposed to the **Joshua Joseph** case cited by the appellant which he said was decided way back before **Erasto John Mahewa** (supra).

With regard to the identification parade, the learned counsel submitted that there is nowhere in the record of appeal that shows there were conducted two identification parades. On that basis, he argued that the identification parade should not be relied upon as was the case in **Riziki Ally Mfinanga @ Kicheche v. Republic** (Criminal Appeal No. 315 of 2020) [2023] TZCA 17546 (24 August, 2023) TANZLII. The learned counsel also insisted that the evidence of PW2 should be expunged in favour of all the respondents arguing that they were charged jointly and together, as such, it cannot be expunged against only the second and third respondents and left to stand against the first respondent. Having so said, he urged us

to allow the appeal arguing that a retrial will afford an opportunity to the appellants to make amends of the unveiled ailments as was observed in **John Julius Martin and Another v. Republic** (Criminal Appeal No. 42 of 2020) [2022] TZCA 789 (8 December, 2022) TANZLII. He thus beseeched us to order no retrial of the respondents.

In a short rejoinder, Ms. Luwongo dismissed as unfounded the complaint that the first respondent should have been tried upon consent of the Director of Public Prosecutions. Referring us to regulation 2 of the Regulations, she argued that the Regulations apply to those offences which are categorized as specified offences and thus require consent of the Director of Public Prosecutions to prosecute. On what are specified offences, she referred us to regulation 9 which states that they are the ones listed in the Second Schedule and the offence of armed robbery with which the respondents were charged is not one of them. She thus implored us to dismiss the complaint for being unfounded.

With regard to the discrepancies in evidence on the location of the *locus in quo*, the learned counsel urged us to ignore it for being an afterthought of the respondents because they did not file a cross appeal.

Even if they filed a cross appeal, she argued, the evidence is abundantly clear that the incident took place around Sokoni area, along Bondeni Street.

Ms. Mlenza rejoined on some of the authorities cited by the respondents' counsel submitting that they were distinguishable with the present appeal. She referred us to the case of **Erasto John Mahewa** (supra) that it was distinguishable because in that case, unlike in the present, not a single item mentioned in the charge sheet was mentioned in evidence. She went on to submit that **Yosiala Nicholaus Marwa** was also distinguishable in that there, unlike here, there was only one eyewitness and was not brought to testify. In the case at hand, she argued, there were several witnesses and some were brought to testify for the prosecution and their evidence sufficiently covered what the witnesses who were not called should have testified.

In the determination of the appeal, we propose to start with dealing with a legal point raised by Mr. Mahuna seeking to attack the jurisdiction of the courts below for trying the first respondent without the consent of the Director of Public Prosecutions. We shall not be detained much by this complaint, for the law on the point is as was stated by Ms. Luwongo. We reproduce the relevant part of the regulation hereunder for easy reference:

"5-(1) A request for consent to prosecute involving the following categories of cases shall be issued personally by the Director of Public Prosecutions irrespective of any monetary value:

(e) An offence involving a presidential appointee, Member of Parliament, Justice of Appeal, Judge of the High Court, Registrar of Court of Appeal and High Court, Magistrate and State Attorney;"

These Regulations were enacted with a view to controlling consents of the Director of Public Prosecutions and putting in place which kind of offences would be consented to by the Director of Public Prosecutions personally and which ones should be consented to on delegated powers. The Regulations also is a guideline to those delegated with those powers. Thus, under regulation 5 (1) (e) of the Regulations, referred to by the respondents' counsel and which we have reproduced above, once that offence involves as an accused person a presidential appointee, Member of parliament, Justice of Appeal, Judge of the High Court, Registrar of the Court of Appeal and High Court, Magistrate and State Attorney, that consent will have to be given by the Director of Public Prosecutions himself. Put differently, if a person in the category mentioned under regulation 5 (1) (e) above commits a specified offence, consent shall be given by the Director

of Public Prosecutions personally. There is a long list of what constitutes a specified offence. It is provided in the second schedule of the Regulations entitled "Offences Requiring Consent of the Director of Public Prosecutions to Prosecute". The list has 113 offences under different legislation. Armed robbery does not fall under the category. It is not in the list and therefore it is not a specified offence. If, for instance, the first respondent commited such an offence, that is, which needs consent of the Director of Public Prosecutions to prosecute, in terms of regulation 5 (1) (e) of the Regulations, it would be the Director of Public Prosecutions personally who would legally be responsible for issuance of that consent.

In view of the above discussion, we are not prepared to agree with Mr. Mahuna in his line of argument that whenever the category of persons mentioned in regulation 5 (1) (e) of the Regulations commit any offence under the sun, the Director of Public Prosecutions must consent to their prosecution. If that was the law, we are afraid, the legislation would surely be not only out of legal sense but also ridiculous and absurd.

We now turn to consider the first ground of appeal. It is a complaint on how the preliminary hearing was conducted. That the High Court erred in holding that it did not comply with the letter of section 192 (3) of the

CPA. The High Court, at p. 1216 of the record of appeal, nullified the preliminary hearing proceedings on account that the memorandum of agreed facts was no read over to the respondents. The learned High Court Judge relied on our decision in **Republic v. Abdallah Salum @ Haji** (Criminal Revision No. 4 of 2019) [2019] TZCA 297 (10 September, 2019) TANZLII in which we observed that failure to comply with section 192 (3) of the CPA was an incurably fatal irregularity. Indeed, the standpoint taken by the learned High Court Judge has been taken by this Court in some of its decisions some of them being **Abdallah Salum @ Haji** (supra) and **Republic v. Peter Joctan @ Isinika @ Chinga and Another** (Criminal Appeal No. 293 of 2016) [2016] TZCA 889 (13 September, 2016) TANZALII. However, it is one thing to say proceedings of a preliminary hearing are a nullity and it is quite another to say the trial thereof was a nullity. From settled case law in this jurisdiction, a trial of a case will not *ipso facto* be vitiated for failure to conduct a preliminary hearing or for conducting it improperly.

In **Benard Masumbuko Shio v. Republic,** Criminal Appeal No. 213 of 2007 (unreported), we answered this question in the negative; a trial will not be vitiated by a defective preliminary hearing. We relied on our previous

decisions in **Mkombozi Rashid Nassor v. Republic,** Criminal Appeal No. 59/2003 (unreported), **Joseph Munene and Another v. Republic,** Criminal Appeal No. 109/2002 (unreported) and **Christopher Ryoba v. Republic,** Criminal Appeal No. 26 of 2002 (also unreported) to so hold.

In **Christopher Ryoba** (supra), for instance, the trial court did not comply with the requirements of section 192 (3) of the CPA. We held:

> *"... conducting a preliminary hearing is a necessary prerequisite in a criminal trial. It is not discretionary. The procedures stipulated under s. 192 are mandatory. And needless to say, s. 192 was enacted in order to minimize delays and costs in the trial of criminal cases.* ***However, in the most unlikely event that a preliminary hearing is not conducted in a criminal case that trial that proceeds without it will not automatically be vitiated ..... the proceedings could be vitiated depending on the nature of a particular case .....*** *" [as cited in* ***Benard Masumbuko Shio*** *(supra)].*

Thus failure to conduct a preliminary hearing will not *ipso facto* vitiate a trial unless such omission results in unfair trial leading to failure of justice – see also: **Hamadi Kassimu Chota v. Republic** Criminal Appeal No. 68

of 2001, **Dotto Ngasha v. Republic** Criminal Appeal No. 6 of 2006, **Leonard Jonathan v. Republic** Criminal Appeal No. 225 of 2007 and **Waisiko Ruchere @ Mwita v. Republic** Criminal Appeal No. 348 of 2013 (all unreported).

In the case at hand, it is abundantly clear that the trial court did not show clearly that it complied with the letter of section 192 (3) of the CPA in that the memorandum of agreed facts was not shown to have been read to the parties. That was an irregularity but for our part, we think, the same was curable in terms of section 388 of the CPA, the more so the trial court recorded that "section 192 of the CPA [has been] complied with". That is evident at p. 8 of the record. In our view, that should be enough to indicate that the letter of the section had been complied with. In a somewhat akin scenario in **Masamba Musiba @ Musiba Masai Masamba** (supra) the decision cited to us by Ms. Njiro, there was a complaint over noncompliance with section 293 and the parties were represented. We quoted the following excerpt from **Bahati Makeja v. Republic** [2010] T.L.R. 49:

> *"It Is our decided opinion that where an accused person is represented by an advocate then if a judge overlooks to address him/her in accordance with s. 293 of the CPA the paramount factor is whether or*

not injustice has been occasioned. In the current matter there was no injustice occasioned in any way at ail. It is palpably dear to us that the iearned Judge must have addressed the accused person in terms of s. 293 of the CPA and that Is why the learned advocate stood up and said that the accused person is going to defend himself on oath. But even if the learned judge had omitted to do so, the accused person had an advocate who is presumed to know the rights of an accused person and that he advised the accused person accordingly and hence his reply."

Having quoted the above excerpt, we proceeded to hold that given that the appellant was effectively represented by the learned advocate in the entire trial court proceedings, he was fully aware of his rights and therefore the omission to comply with the letter of section 293 of the CPA did not prejudice him. Applying the principle in **Bahati Makeja** (supra) and **Masamba Musiba @ Musiba Masai Masamba** (supra) to the present case, we are settled in our mind that even if the trial court did not say it complied with section 192 of the CPA, the respondents would not have been prejudiced, for they were fully represented by learned advocates. In the premises, we think the first appellate court should not have nullified the

preliminary hearing proceedings as it did. We therefore allow the first ground of appeal and hold that by nullifying the preliminary hearing proceedings conducted on 16th July, 2021, the first appellate court fell into error.

However, it should be borne in mind that the second appellate court did not allow the appeal on the ground of any fact in the memorandum of agreed facts. The *ratio decidendi* of the decision of the first appellate court is found at p. 1222 of the record of appeal. We will let the judgment at that page speak for itself:

> *"That being the position of law, the proceedings of the trial court are vitiated because the 2nd and 3rd appellants were not accorded the right to cross-examine PW2. Consequently, the conviction and sentences meted against the appellants are a nullity for being based on the vitiated proceedings."*

Thus the nullification of the preliminary hearing proceedings did not have any bearing on the release of the respondents on appeal.

Having decided at p. 1222 of the record of appeal that the failure to accord the second and third respondents the right to cross examine PW2 and nullified the trial, the first appellate court considered, at some

considerable length, the issue whether, given the nullification of the trial, a retrial would be ordered. The rest part of the judgment (from pp. 1222 to 1239) was a justification of why a retrial would not be ordered.

The foregoing takes us to consideration of the sixth ground of appeal which is a complaint on failure by the trial court to accord the second and third respondents the right to cross examine. The ground challenges the first appellate court for holding that the omission was a fatal irregularity and nullified the trial. The parties seem to be at one that failure by the trial court to accord the second and third respondents the right to cross examine PW2 was a fatal irregularity. What is at issue is the extent of that fatality. While the appellant takes the view that the ailment is fatal as against only the second and third respondents who were deprived of that right, the respondents take a diametrically different stance; that the trial was vitiated against all the respondents.

Available case law supports the stance taken by the respondents' counsel. Some of them have been referred to in the judgment of the High Court. In **Elias Mwaitambila** (supra), we were confronted with a somewhat identical situation. Counsel for the second and fourth accused persons at the trial was not accorded the opportunity to cross examine

witnesses. We held that the same was an incurably fatal irregularity and nullified the entire proceedings of the trial. We did not nullify the proceedings as against only those who were not accorded that right of cross examination. The same was the case in **Charles Kidaha & Others** (Criminal Appeal No. 395 of 2018) [2021] TZCA 526 (27 September, 2021) TANZLII. The first appellate court reproduced the following excerpt from that decision which we find worth reproduction here:

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

The Court proceeded to nullify the trial in favour of all the appellants. Once again, not in favour of only those who were denied that right. On the authority of **Elias Mwaitambila** (supra) and **Charles Kidaha** (supra), with respect, we do not agree with the appellant that the ailment was fatal only

in respect of the second and third respondents who were denied that right. With equal respect, we agree with counsel for the respondents that the infraction was fatal in respect of all the respondents. The respondents were jointly charged and the trial proceeded jointly. The first appellate court rightly so held.

But that is not the end of the matter; we ask ourselves a consequential question; what would have been the way forward? The first appellate court nullified the whole trial for that irregularity. With unfeigned respect to the learned High Court Judge, we do not think that course of action was the right way forward. In the authorities relied upon by the High Court, that right was denied in respect of all the witnesses. The position seems to be somewhat different in our case. Here, unlike there, the right was deprived on only one witness; the second prosecution witness. The proceedings went on perfectly well in respect of other witnesses. Should we nullify the whole proceedings for this ailment? Admittedly, this question has exercised our mind. We do not think the interest of justice would be served if we discard the whole trial for that ailment. On the contrary, we think justice will smile if we discard only the evidence of PW2. That is the path we took in an akin scenario in **Sebastian Michael & Another v. Director of Public**

Prosecutions (Criminal Appeal No. 145 of 2018) [2021] TZCA 37 (25 February, 2021) TANZLI and we have no reasons to depart from it. In that case, the trial court did not afford the second appellant the right to cross-examine PW8. We held that for so doing, the trial court strayed into error and observed that the omission amounted to an unfair trial to the second appellant's prejudice and proceeded to expunge the testimony of PW8. This is the course of action we are prepared to take in this matter. Guided by our decision in **Sebastian Michael** (supra), we are of the considered view that the learned High Court Judge, instead of nullifying the whole trial for the infraction that counsel for the second and third respondents were not given the chance to cross examine PW2, he should have expunged the testimony of the said witness. In the premises, we find and hold that the learned High Court Judge erred in holding that the whole proceedings of the trial court were a nullity for failure of the advocate for the second and third respondents to cross examine PW2. The six ground of appeal, therefore, succeeds to that extent. We so find and hold.

Following the foregoing finding, we think the High Court should have proceeded to evaluate the remaining evidence; whether it proved the guilt of the respondents to the hilt. Instead, it went on to evaluate the same in

answer to the issue whether a retrial should be ordered. Now that the first appellate court did not do what it ought to have done, we step into its shoes and do what it did not do and come to our own conclusion. Available case allows us so to do – see: **Joseph Leonard Manyota v. Republic** (Criminal Appeal No. 485 of 2015) [2017] TZCA 260 (11 August, 2017) TANZLII, **Julius Josephat v. Republic** (Criminal Appeal No. 3 of 2017) [2020] TZCA 1729 (18 August. 2020) TANZLII, **Karimu Jamary @ Kesi v. Republic** (Criminal Appeal No. 412 of 2018) [2021] TZCA 95 (9 April, 2921) TANZLII, to mention but a few.

This takes us to consideration of the general ground on whether the evidence proved the case against the respondents beyond reasonable doubt; the subject of the consolidated ground of appeal. This we will consider having expunged the evidence of PW2, one of the eye witnesses. The remaining eye witnesses are Ramadhani Ayubu Rashid @ Anas Ayubu Rashid (PW3), Hajirin Saad Hajirin (PW4) and PW6.

This ground, we must confess, has also exercised our mind greatly. We say so because the respondents were charged with armed robbery and that they made away with cash (as per charge sheet) and cash and some

items (as per evidence). The evidence that was led in support of that, we are afraid, does not support that charge. We shall demonstrate.

The charge in the three counts is one of armed robbery. The particulars of the offence have it, *inter alia*, that the three respondents robbed at gun point. That the trio used the guns and violence to obtain and retain the robbed cash. Tshs. 2,769,000/=, Tshs. 390,000/= and Tshs. 35,000/= feature in the first, second and third counts respectively. We have found it doubtful, and prepared to resolve the doubt in favour of the respondents, if the intention of the respondents was to rob the complainants. It is in evidence of the eye witnesses that the respondents had gone there claiming that the victims did their business without issuing receipts and that they were engaged in selling foreign currency illegally. It is also in evidence that the EFD machine was also taken in that exercise including some documents. The complainants were later taken to the police on account that they were economic saboteurs. We, for our part, did not stop to wonder why would the armed robbers accomplish their assignment of armed robbery and at the same time take the victims to the police?

We will let part of the testimony of eye witnesses speak for itself to justify our doubts. PW3 is recorded at p. 39 as saying:

"The shop owner was being asked as to why he did not issue complete sale receipts. The shop owner replied that he used to issue receipts. Those men did beat him up as he replied. The one who used to question the shop owner was forcing the shop owner to answer his questions as he needed. When the shop owner was asked "are you not issuing receipts". The man needed the shop owner to answer in affirmative. The shop owner then admitted that they do not issue receipts. Accordingly, the one who used to question the shop owner used his mobile phone to record the shop owner while admitting they do not issue receipts."

Likewise, PW6 testified at p. 71 of the record:

"Then he said "umekuja kuwatetea hawa Answal Sunni wenzako, kwanza ni wahujumu uchumi, watakatisha fedha haramu wanafanya biashara bila kutoa risiti" Then he proceeded saying have you come to stop the work he was sent by president Magufuii to collect Government revenue. Then I proceed telling General Sabaya that he was not the DC of Arusha, not TRA and PCCB and the Police. Upon that utterance General Sabaya was raged. He twisted his body and lifted up his short sleeved dark blue Kaunda Suit and did saw his pistol. At the tlme

I entered into the shop Sabaya was drinking red stuff which was in the bottle."

Our literal translation of the Kiswahili part of the excerpt would be:

"... you have come to defend your fellow Answar Sunni (a religious sect among Muslims). After all they are economic saboteurs, money launderers and doing business without issuing receipts."

PW6 also testified that the first respondent pointed a gun at him telling him in the process that he should stop poking his nose in his affairs.

Similarly, PW4 testified that the first respondent accused them of dealing with exchanging US Dollars illegally (at p. 48). That at one point one of respondents asked him to give Tshs. 70,000,000/= so that he could tell the first respondent to release him out of that mess. There is another piece of evidence from this witness that the first respondent bought them bananas to break their fast. He had testified earlier that they were fasting.

All the above leaves us with doubts if the *actus reus* was coupled with the requisite *mens rea*. It is not humanly possible for robbers to do what they did and take the victims of the very robbery to the Police. We entertain doubts that the respondents masqueraded as agents of the tax collector of the Government and that they were sent there to collect Government revenue. We also entertain doubts that they might have gone thither to

inspect money laundering allegations. Thus, while there is no evidence to prove the first count, the evidence of PW2 having been expunged, there is no evidence to prove the second and third counts as well as there are doubts if the taking of Tshs. 390,000/= and 15,000/=, if at all, subject of the second and third counts, was done in the course of armed robbery. The use of the guns complained of was not done in furtherance of robbery. In the circumstances, no offence of armed robbery was proved. For the avoidance of doubt, the trial court also erred in substituting the offence of gang robbery, for it is not a cognate and minor offence to the offence of armed robbery. As rightly put by the appellant, both armed robbery under section 287A of the Penal Code and gang robbery under section 285 (2) of the Penal Code, attract a minimum jail term of thirty years with or without corporal punishment on conviction. In the premises, gang robbery cannot be a cognate and minor offence to armed robbery. As we held in **Richard Estomihi Kimei** (supra), substitution moves from a greater offence to a minor one. Thus, in substituting the conviction of the offence of gang robbery for that of armed robbery, the trial court strayed into serious error.

In sum, we do not think the charge was proved, for the evidence led did not prove the offence of armed robbery. Neither did it prove the offence

of gang robbery. Though for different reasons, we hold that the High Court did not err in setting the respondents free.

Given the reasons we have assigned, though for different grounds, we have no speck of doubt that the decision of the first appellate Court to set the respondents free, was but sound at law; it cannot be faulted. This appeal stands dismissed.

DATED at **ARUSHA** this 14th day of November, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered on this 17th day of November, 2023 in the presence of Ms. Upendo Shemkole, learned Senior State Attorney for the appellant and Mr. Moses Mahuna, Ms. Fauzia Mustapher, Mr. Sylvester Kahunduka and Mr. Fridoline Gwemelo, all learned counsel for the respondents, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL