IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: SEHEL, J.A., KIHWELO, J.A. And KHAMIS, J.A.)

CRIMINAL APPEAL No. 152 OF 2021

JACKSON JOHN MARASE @ MEN.....1ST APPELLANT

SAITOTI PARITOMARI MARAIA.....2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mzuna, J.)

dated the 23rd day of August, 2021

in

Consolidated Criminal Appeals Nos. 119 of 2019 and 45 of 2020

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JUDGMENT OF THE COURT

15th & 20th March, 2024

KIHWELO, J.A.:

The appellants, Jackson John Marase @ Men and Saitoti Paritomari Maraia were arraigned, tried and convicted by the District Court of Ngorongoro at Loliondo for two counts of armed robbery contrary to section 287A of the Penal Code, Cap 16 (the Penal Code). They denied the charge, whereupon the prosecution featured ten witnesses and seven physical as well as documentary exhibits.

In a nutshell, the case for the prosecution was to the effect that, on the fateful day, around 13:15 hours or so, at Ololosokwani village along Soitisambu to Ololosokwani road within Ngorongoro District, Arusha Region, the appellants had stolen TZS. 2,200,000.00, one camera make sonny valued at US$ 600.00 the properties of one Gaangho Wangu.

It was further alleged that, on the same fateful day, time and place, the appellants unlawfully did steal US$ 260.00, one Binocular make Bush nell valued at TZS. 250,000.00 the properties of one Simon Sirikwa.

It was also alleged that, immediately before and after such stealing, the appellants did use a gun to threaten the said Gaangho Wangu and Simon Sirikwa.

Briefly, the prosecution case which was found credible by the lower courts was that, on the fateful day, Simon Alex Sirikwa, a driver and tour guide (PW3), was driving a tourist vehicle carrying a number of tourists among them was Gaangho Wangu, a Chinese. They were peacefully enjoying the tour having just visited Lake Natron and heading to

Serengeti National Park, until when they encountered the unexpected armed bandits at Ololosokwani village. One of the bandits who was armed with a gun ordered PW3 to stop the vehicle to which PW3 obediently complied with. Shortly thereafter, other two bandits emerged from nowhere armed with traditional weapons and demanded to be given money while beating PW1 and the tourists. In response, PW3 surrendered his Binocular and US$ 260.00 while the Chinese tourist surrendered TZS. 2,200,000.00 as well as a camera. It was PW1's further telling that, the bandits also stole PW's and other tourists' mobile phones and ordered them to leave the besieged scene without pulling a trigger.

Later on, the matter was reported to the police where PW3's and the tourists' statements were taken and thereafter, they were allowed to leave. It was on 25th October, 2018 when PW1 was summoned at the police station where he identified the Binocular and a camera (white in colour). He was further, taken to the identification parade where he identified the appellants.

A prisoner officer with No. B 6141 Corporal Yohana (PW1), testified how he apprehended the first appellant and notified Marco Lollu (PW2),

the village chairman of Soitisambu. It occurred that, PW2 had earlier on informed PW1 about the robbery incidence that occurred on 22nd October, 2018. Shortly after arresting the first appellant, PW2 joined PW1 and together they interrogated the first appellant who made an oral confession that, he was involved in the robbery incident of the tourists on 22nd October, 2018. The first appellant mentioned the second appellant to PW1 and PW2, and the duo went to apprehend the second appellant who also confessed to have been involved in the robbery incident and together, they went to the scene of crime and managed to recover two cameras. The appellants were then taken to Loliondo Police Station for further investigation.

John Kija (PW4) an Inspector of police at Loliondo Police Station testified how he received a call from the chairman of Soitisambu village one Marco Parkiosi (PW2) and was informed about the arrest of the first appellant. He explained how they went to Soitisambu village and found PW2 with the first appellant along with a Militia. It was PW4's testimony that, the first appellant mentioned the second appellant and they went to apprehend the second appellant at his house. According to PW4, the duo confessed to have committed the robbery incident and he took them

to Gasper Malisa (PW10), a primary court magistrate and justice of peace who recorded the extra judicial statements of the appellants which were admitted in evidence as exhibits P6 and P7. In his further testimony, PW4 described how on 25th October, 2018, the second appellant took them to the forest where they recovered the stolen items, to wit, binocular and white camera (exhibit P1), following which PW4 filled in the seizure certificate (exhibit P2), which was witnessed by PW2 and the Militia, one Ezekiel Thomas Seleni (PW5).

On the other hand, PW5 testified how on 22nd October, 2018 while at Loliondo, he received the information of the arrest of the first appellant at Soitisambu village from PW2 and that immediately, in the company of PW4, a police officer one Bakari and another person from Serengeti they left to Soitisambu where they found the first appellant under arrest. PW4 testified further that, upon the first appellant mentioning the second appellant they went to arrest the second appellant and that, since several people were arrested at the house of the second appellant, an identification parade was conducted upon which the first appellant identified the second appellant who was arrested and the duo were taken to the police. He also testified how the

second appellant on 25th October, 2018 took them to the forest to recover the stolen items.

On the other hand, No. F. 5838 D/Cpl Ramadhan (PW6) testified to have recorded the cautioned statement of the first appellant (exhibit P3) and that, the second appellant confessed his involvement in the robbery incident. Similarly, Assistant Inspector Masumbuko (PW9) recorded the cautioned statement of the second appellant (exhibit P4) who equally confessed his involvement in the robbery incident in question. PW9 also prepared the identification parade register (exhibit P5) after the identification parade was done at the police station during which PW3 identified the appellants as the bandits who perpetrated the robbery. Pascal Daniel (PW7) and Mwala Sanga (PW8) who participated in the identification parade gave an account of what transpired during the exercise and how the appellants were identified by PW3. With this detail, so much for the version told by the prosecution witnesses on the occurrence.

In reply, the appellants reiterated their complete disassociation from the prosecution accusation. The first appellant (DW2) did not quite refute the detail about being arrested by the police, however, he denied

any involvement in the alleged robbery incident. In his account, he was just arrested by the Ololosokwani villagers where he went to collect a parcel which he was expecting to receive from his relative. In his testimony, he was about to hire a motorcycle, when the angry villagers were about to attack him on allegation of being involved in robbery incident, but luckily the village chairman came for his rescue and stopped them. He was arrested and taken to the police on 23rd October, 2018. While in police custody, he was threatened to be implicated with murder case and forced to sign any document brought to him and also PW9 asked for bribe of TZS. 1,000,000.00 from him.

To fortify his account, the first appellant featured into testimony his relative Eliud John, (DW4) who testified that, he called the first appellant so that he could collect his parcel of beans he wanted to go and sell in Arusha on the day the first appellant was arrested.

On the other hand, the second appellant (DW1) like the first appellant, did not quite refute the detail about being arrested by the police at his house, however, he denied any involvement in the alleged robbery incident. The second appellant asserted that, on account of the dispute between him and PW2 which relates to cows, PW2 developed a

grudge against him as a result he had earlier on threatened to fix him. In his further testimony, the second appellant complained that, while at Loliondo Police Station, he was brutally tortured by the police and was forced to sign confession statements. In his further testimony, on 2nd November, 2018 he was led by the police and PW2 along with a child to the forest and the latter showed them where he saw a bag and the police alleged that the bag was hidden by the appellants. He totally refuted the contents of both the cautioned statement and the extra judicial statement. He also testified that, the police requested for a bribe of TZS. 21,000,000.00 in order to let him off the hook and upon failure to pay that bribe, the matter was brought before the trial court.

To fortify his account, the second appellant featured into testimony his son, namely, Alalasha Saitoti (DW3). As it were, DW3 gave an account of what happened in the morning of 23rd October, 2018 when the police appeared at the second appellant's house and arrested him alleging that, the second appellant was involved in the robbery incident. DW3 further testified how the second appellant and his wife were beaten by the police during the arrest.

At the conclusion of the case for the prosecution and the defence, the learned trial Resident Magistrate, after considering the evidence placed before him, found the prosecution proved the case to the hilt and therefore convicted the appellants and sentenced them accordingly as hinted earlier on.

On the first appeal, the High Court found that, the first count was not proved owing to the fact that the key witness Gaangho Wangu did not testify. Therefore, the conviction and sentence of the appellants for the first count was set aside. The High Court found no valid cause to fault the findings of the trial court on the second count and the appeal was, accordingly, dismissed. However, the High Court expunged exhibits P3, P4 and P5 on account that, they were irregularly admitted in evidence.

Still undaunted, the appellants have come to this Court in a second appeal. Initially, on 8th August, 2022 the appellants lodged a lengthy memorandum of appeal with eleven (11) grounds. Later, on 11th March, 2024 the appellants lodged a supplementary memorandum of appeal with seven (7) grounds. All in all, upon thorough scrutiny all the grounds of appeal boil down to the following crystalized grounds:

1. *That the Honourable Judge misdirected himself by upholding the conviction and sentence based upon a defective charge.*

2. *That the Honourable Judge erred in law by upholding the conviction and sentence based upon the evidence of exhibits which were irregularly admitted in evidence.*

3. *That the Honourable Judge erred in law when he relied on the doctrine of recent possession in upholding the conviction and sentence.*

4. *That the Honourable Judge erred in law and in fact by upholding the conviction and sentence based upon the prosecution's evidence which was unreliable, contradictory, inconsistent and not credible.*

5. *That the Honourable Judge erred in law by upholding the conviction and sentence based on the evidence of identification which was improper and insufficient.*

6. *That the Honourable Judge erred in law and in fact for the failure to note that the trial court did not consider the defence case.*

7. *That the first appellate Judge erred in law by upholding the conviction and sentence despite the fact that the case was not proved to the hilt.*

At the hearing before us, the appellants appeared in person, and had no legal representation, whereas the respondent Republic had the services of Ms. Lilian Kowero, Senior State Attorney who was being assisted by Mses. Amina Kiango, Neema Mbwana and Eunice Makala, both learned State Attorneys.

The first appellant made his submission by addressing ground one of the substantive grounds in which the main complaint was that, the charge was defective and therefore, the judge of the High Court erred to sustain conviction and sentence. Elaborating, he argued that, while the charge indicated that, the appellants stole US$ 260.00 and one Binocular make Bush nell valued TZS 250,000.00 the property of PW3, it was unfortunate that PW3 at page 18 of the record of appeal testified about items which are not covered in the particulars of offence in count two and also PW3 could not offer clear description of the Binocular. He further argued that, PW3 did not produce any receipt to prove ownership and worse still the same was not identified during trial. He emphatically contented that, since the respondent Republic did not amend the charge in terms of section 234 (1) of the Criminal Procedure Act, Cap. 20 (the CPA) then there was variance between the charge and the evidence

which occasioned injustice to the appellants. He referred us to the cases of **Noel Gurth@ Bainth and Another v. Republic,** Criminal Appeal No. 339 of 2013, **Issa Mwanjiku @White v. Republic,** Criminal Appeal No. 175 of 2018, **Mashaka Bashiru Republic,** Criminal Appeal No. 242 of 2017 and **Killian Peter v. Republic,** Criminal Appeal No. 508 of 2016 (all unreported). He rounded off by arguing that this ground has merit.

In support of the second ground of the substantive grounds, the first appellant was fairly brief and argued that, all the documentary exhibits were irregularly admitted in evidence while referring to exhibits P2, P6 and P7. Illustrating, he submitted that, while exhibit P2 was not read out upon admission and therefore denying the appellants the right to know its contents, exhibits P6 and P7 were tendered by the prosecutor and not the witness. To fortify his argument, the first appellant cited the cases of **Joseph Melkiori Shirima @ Temba v. Republic,** Criminal Appeal No. 261 of 2014 and **Mohamed Juma @Mpakama v. Republic,** Criminal Appeal No. 385 of 2017 (both unreported).

We wish to interpose here and observe that, we have examined the cases cited to us by the first appellant, but we are unable to appreciate their relevance to the issue under consideration.

Arguing in support of the third ground of the substantive grounds, the first appellant faulted PW3's evidence in particular on the description in relation to the identification of the appellants at the scene of crime as no descriptions were offered in terms of the physique and complexion of the appellants or colour of clothes they wore on the day of the incident. He further argued that, PW3 did not offer any explanation on the source of light and cited to us the case of **Waziri Amani v. Republic** [1980] T.L.R. 250.

In further arguing in support to this ground, the first appellant submitted that, while PW2 testified that he informed the police about the robbery and those who committed the offence but did not give the police prior description of the appellants. He further contented that, while PW1 testified that, he arrested the first appellant, however, upon cross examination he argued that, the first appellant was mentioned by the second appellant. In his further submission, the first appellant argued that, while PW4 said he received the call from the village chairman,

Marco Parkiosi, but the chairman who testified as PW2 was Marco Lollu and to him this was a contradiction.

The first appellant argued ground seven, eight and nine conjointly. His submission was to the effect that, the appellants were charged under section 287A of the Penal Code with the offence of armed robbery which presupposes two conditions to be fulfilled and that, is theft and use of force. According to section 110 of the Tanzania Evidence Act, Cap 6, the prosecution was duty bound to prove the two elements including the use of force. In his view, use of force was not proved since no weapon was produced in court. He further contended that, PW3 did not identify the Binocular before the court and did not produce any receipt to prove ownership or its value while the charge indicated that it was worth TZS. 250,000.00. He paid homage to the case of **Ally Said @ Tox v. Republic**, Criminal Appeal No. 308 of 2018 (unreported). He emphasized that, there was no proper identification, the appellants did not confess committing the robbery before PW1 and PW2 nor did he take them to the second appellant's home. He finally argued that, the prosecution's evidence was marred with a number of inconsistences and

contradictions that go to the root of the matter. He implored us to dismiss these grounds.

Submitting in support of the tenth ground of the substantive grounds, the first appellant was very brief and contended that, the defence case was not considered at all by the trial court and the High Court too and instead, the trial court shifted the burden of proof on the first appellant when it held that, the first appellant was unable to demonstrate before the trial court what he was doing at the Ololosokwani village knowingly that he had neither relative nor friends there. He took the view that, the appellants were convicted on the basis of the defence weakness and not the prosecution's strength. He cited to us the cases of **Christan Kale and Another v. Republic** [1992] T.L.R. 302 and **Ali Ahmed Saleh Amgara v. Republic** [1959] EA 654 to fortify his proposition.

As regards the eleventh ground of the substantive grounds of appeal, the first appellant faulted the High Court for sustaining the conviction and sentence on the basis of the doctrine of recent possession which is not applicable in the circumstances of the present case. Elaborating, the first appellant submitted that, the facts and evidence on

record does not support the doctrine. Illustrating further, he argued that, PW3 did not positively identify the items stolen before its admission in court and therefore falling short of the conditions to be met for the doctrine of recent possession to apply. Reliance was placed in the case of **Mashaka Bashiri v. Republic**, Criminal Appeal No. 242 of 2017 (unreported) to facilitate the proposition that, for the doctrine of recent possession to apply, the owner of the stolen property must describe it before its admission in evidence.

In respect of the additional grounds of appeal, the first appellant began with the first ground whose complaint is on misapprehension of the identification parade in which PW9, the parade master did not comply with directions provided for under the Police General Orders (PGO) 232. He argued that, the appellant was not informed of his rights and the witness did not describe the suspect before the parade. He cited to us the cases of **Richard Otieno @Gullo v. Republic**, Criminal Appeal No. 367 of 2018, **Yosiala Nicholaus Marwa and Others v. Republic**, Criminal Appeal No. 193 of 2016, **Mwita Kigumbe Mwita and Another v. Republic**, Criminal Appeal No. 63 of 2015 (all unreported), **Yohanis Msigwa v Republic** (1990) T.L.R. 143 and

Anangisye Masendo Ng'wang'wa v. Republic (1993) T.L.R. 202. He rounded off by arguing that, the identification of PW3 was not watertight to warrant conviction of the appellants.

In respect of the second, third, fourth and fifth grounds of the additional grounds of appeal, the first appellant essentially repeated the earlier submission made in support of the substantive grounds of appeal in relation to failure by PW3 to identify the Binocular, variance of charge and evidence, inconsistences and contradictions of the prosecution case, particularly that of PW3 in relation to identification at the scene of crime as he did not mention the specific time that the robbery incident occurred and finally the complaint about shifting the burden of proof.

In relation to the sixth ground of the additional grounds of appeal, the first appellant faulted the High Court for not finding that, there was no independent witness who participated in what is alleged to be recovery of the stolen items in the forest. He also insistently faulted the confusion as regards names of PW2 between Marco Lollu and Marco Parkiosi and submitted that, this was an inconsistent and a contradiction.

Finally, on the seventh ground of the additional grounds, the first appellant was very brief and contended that, the prosecution did not produce any receipt as required by section 38 of the Penal Code and therefore the offence was not proved to the hilt. In all, he urged us to allow the appeal and release the appellants.

On our prompting regarding the time of the incident, the second appellant admittedly argued that, truly PW3 did not mention in his testimony the time the incident occurred but the charge is conspicuously clear in that the incident occurred at 13:15 hrs and the extra judicial statements, exhibits P6 and P7 supports that. As regards documentary exhibits which were irregularly admitted, he admittedly argued that, all of them were expunged from the record except exhibits P2, P6 and P7. On the procedure of tendering exhibits P6 and P7, he argued that, and rightly so in our minds, the prosecutor merely led PW10 to tender the exhibits and the appellants did not object to their admission.

On his part, the second appellant associated himself with the first appellant's submission without more.

Conversely, Ms. Kowero, took the stand, arguing in response to the appeal on behalf of other State counsel. She premised her reply submission in respect of the first ground in the substantive grounds which was argued conjointly with the third ground in the additional grounds of appeal by contending that, the charge has no problem and that it, was prepared in compliance with the mandatory provisions of sections 132 and 135 of the CPA. She took the view that, there is no variance between the charge and the evidence, since PW3 in his testimony at page 18 of the record of appeal mentioned all items which were stolen from himself and the tourists. PW3 also testified that, the robbery incident occurred at Ololosokwani village and this is obtaining in the charge as well. The learned Senior State Attorney admittedly argued that, exhibit P2 was irregularly admitted in evidence and therefore, she implored us to expunge it. However, in her view, the remaining evidence of PW4 is sufficient to sustain the appellants' conviction.

Ms. Kowero, argued in response to the third and fourth grounds in the substantive grounds as well as the first ground in the additional grounds of appeal which faulted the identification of the appellants by PW3 both at the scene of the crime and during the identification parade.

In her focused submission, she admittedly argued that, the identification parade was not conducted in line with the PGO 232. Elaborating, she contended that, record of proceedings at page 36 are conspicuously silent on whether PW9 accorded any rights to the appellants before the said parade was conducted and whether the witness described the suspects before the onset of the parade.

The learned Senior State Attorney, argued further that, the identification at the scene of crime was watertight since the robbery incident occurred during a broad daylight and PW3 identified the 1st appellant by the dress he wore and the gun he carried. She further submitted that, the testimony of PW3 on identification was supported by the extra judicial statements of the appellants, exhibits P6 and P7. In her view, the conviction of the appellants did not base on the evidence of identification but rather their own confession before PW1, PW2 and PW5 as well as the evidence of PW3. Emphasizing, the learned Senior State Attorney argued that, the testimonies of PW1, PW2 and PW3 were supported with the extra judicial statements.

Arguing in response to the fifth ground of appeal whose complaint is on the unreliability, contradiction, inconsistency and

incredibility of the testimonies of PW1, PW2, PW3 and PW4, the learned Senior State Attorney was fairly brief and argued that, there was no any inconsistency and contradiction and if at all the contradiction on the number of bandits between PW3 on one hand, who said they were five and PW1, PW2 and PW4 on the other hand who said they were three was minor and did not go to the root of the matter. Similarly, she argued that, the confusion between the name of Marco Lollu and Marco Parkiosi was minor since both names refers to one and the same person, that is PW2, and in any case she contended that, this did not go to the root of the matter. In her view, these minor contradictions are healthy as they demonstrate that witnesses were not rehearsed.

In response to the seventh, eighth and ninth grounds of the substantive grounds of appeal on the proof of the offence of armed robbery, Ms. Kowero was fairly brief and contended that, armed robbery is committed when there is theft and that immediately before, during or after that theft, there is use of dangerous weapon to threaten violence and that violence must be directed at the owner of the property stolen. She was emphatic that, PW3 in his testimony at page 18 of the record of

appeal ably proved all those elements which are well articulated in the case of **Richard Otieno** (supra) which was cited by the first appellant.

On our prompting, Ms. Kowero submitted that, admittedly PW3 did not identify the Binocular before the court when he testified, however, he identified it at the police. She further argued that, PW4 gave an account of the recovery of the stolen items following the confession by the appellants who led them to the forest where they recovered the hidden items. In her view, the appellants' confession in the extra judicial statements which led to the discovery of the stolen items was the basis of the conviction and the findings of the High Court which upheld the conviction. She further, argued that, the appellants' oral confession before PW1, PW2 and PW4 was sufficient to convict them.

As regards to the tenth ground of the substantive grounds and fifth ground of the additional grounds, on the failure to consider the defence case and shifting the burden of proof to the appellants, Ms. Kowero argued that, the High Court sufficiently considered the second appellant's defence at page 267 of the record of appeal and found that such defence did not shake the prosecution case. She equally referred to page 277 of the record of appeal where the High Court considered the

first appellant's defence and found that, such defence did not shake the prosecution case. In her view, the burden of proof was never shifted and their conviction based upon their own confession and being found in possession of properties recently stolen.

Ms. Kowero argued in response to the eleventh ground of appeal whose main complaint was on misapplication of the doctrine of recent possession that, the High Court properly applied the doctrine of recent possession. Illustrating, she contended that, the appellants were found by PW2, PW4 and PW5 in possession of stolen items, the items belonged to PW3 who identified it and that, the items were stolen from PW3 by the appellants. She took the view that, the testimonies of PW2, PW3, PW4 and PW5 were consistent with the confession of the appellants in the extra judicial statements exhibits P6 and P7. She paid homage to the cases of **Justine Hamis Juma Chamashine v. Republic**, Criminal Appeal No. 669 of 2021 (unreported) and **Ally Bakari & Another v. Republic** [1992] T.L.R.10 to facilitate her proposition.

In response to the seventh ground of the supplementary grounds of appeal, in which the appellants faulted the High Court for upholding the conviction and sentence without regard to the absence of receipt

issued during seizure of exhibit P1, in terms of section 38 (3) of the CPA, Ms. Kowero was very brief and quite understandably, and submitted that, since the seizure certificate (exhibit P2) was irregularly admitted as readily conceded to, then this ground should not detain us. However, she was of the view that, since the appellant signed the seizure certificate a receipt was immaterial. She went ahead to submit that, even in the absence of seizure certificate and receipt, the available account of PW2 and the appellants' own confession suffices to uphold the conviction and sentence.

On our prompting, Ms. Kowero contended that, PW3 mentioned everything which was stolen on the fateful day and initially the charge was for both count one and two and that count one related to the items belonging to the Chinese tourist.

When offered the opportunity to rejoin to the respondent's Republic submissions, the appellants were very brief. While the first appellant insisted that a receipt was essential to prove that the appellants were apprehended with the stolen items, the second appellant submitted that, it is not clear who the independent witness was between Marco Lollu and Marco Markiosi.

We have examined the record of appeal and considered the contending oral and written submissions of the parties as well as the authorities relied upon. We wish to predicate our deliberation with a little exposition of principles governing powers of this Court on second appeal. As often times restated by the Court when revisiting section 6 (7) (a) of the Appellate Jurisdiction Act, Cap 141, on second appeal this Court is mostly concerned with matters of law only and not facts. However, the Court may interfere with the concurrent findings of the two courts below only where they misapprehended the evidence or omitted to consider available evidence or have drawn wrong conclusions from the facts, or there have been mis-directions or non-directions on the evidence in view of making its own findings. There is, in this regard, a long and unbroken chain of decisions of the Court. See, for instance; **Salum Mhando v. Republic,** [1993] T.L.R. 170 and **DPP v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149.

Starting with the first ground of the substantive appeal, on defective charge owing to the variance between the particulars of offence in the charge and the prosecution evidence. We hasten to state that this issue should not detain us much and the reason is not far-

fetched. Whereas the appellants submitted that, PW3 testified about items which are not covered in the particulars of offence in count two, the learned Senior State Attorney argued and rightly so in our mind that, PW3 was testifying as a driver of the vehicle which the bandits stopped apart from being the owner of some stolen items and that is why in his testimony he described everything which was stolen during the robbery incident including items that were not covered in the second count of the offence. PW3 also ably testified that, the robbery incident occurred at Ololosokwani village and this fact is also obtained in the charge sheet. We therefore, find considerable merit in the submission by the learned Senior State Attorney that, there is no variance between the charge and evidence on record and therefore this ground is unmerited.

Next, we will consider the admissibility of the certificate of seizure (exhibit P2) which was produced in evidence by PW4 but quite unfortunate its contents were not read. We begin by noting the convergence of the submissions by the parties in that, exhibit P2 was irregularly admitted in evidence by PW4 as it was not read after clearance for admission and this denied the appellants' right to know its contents which is prejudicial and fatal. We are fortified in this view by

the principle which has been stated in our previous decisions stressing on the duty to read the contents of documentary exhibits after being cleared for admission. We are satisfied that the omission to have the contents of exhibit P2 read out by the witness who tendered it after it was cleared for admission was fatal. There is a plethora of case law in this area but just to mention one is the celebrated case of **Robinson Mwanjisi and Others v. Republic** [2003] T.L.R. 218. For that reason, we expunge exhibit P2 straightaway from the record. As to its probative value we shall, at a later stage of our judgment, revert to this aspect if need be.

The other grievances were raised by the appellants in relation to the two courts below erroneously relying upon the doctrine of recent possession in convicting the appellants. The vexing issue which stands for our determination is whether or not the doctrine of recent possession was correctly applied in the instant matter before us. The circumstances upon which the doctrine of recent possession can be invoked were stated in the case of **Juma Bundaia v. Republic,** Criminal Appeal No. 151B of 2011 (unreported) in which we followed our earlier decision in

Mwita Wambura v. Republic, (supra) in which we expounded these circumstances to be:

> *"1) The stolen property must be found with the suspect.*
> *2) The stolen property must be positively identified to be that of the complainant.*
> *3) The property must be recently stolen.*
> *4) The property stolen must constitute the subject of the charge."*

Our reading and understanding of the excerpt above in line with the facts on record, we are settled in our mind that, the two courts below wrongly applied the doctrine of recent possession to the matter before us for the following reasons. **One**, the appellants were not found in possession of the items alleged to be stolen and the evidence which was led by the prosecution did not irresistibly point to the appellants. Whereas, PW2, PW4 and PW5 testified that the appellants led them to the forest where they hid stolen items, this is not consistent with the confession that the appellants made in exhibits P6 and P7 in which they did not admit hiding in the forest items stolen nor leading PW2, PW4 and PW5 to where the items were hidden. In the contrary, in exhibits P6 and P7, the first appellant did not say what they did with the stolen items

while the second appellant stated that, each of the bandits took some of the items which were stolen and the money was distributed amongst them. **Two**, the stolen item was not positively identified by PW3 when he testified in court. It is now settled that, a detailed description by giving special marks of the stolen items has to be made before such exhibits are tendered in court in order to avoid doubts on the correctness of the alleged stolen items. We took this position in the case of **Mustapha Darajani v. Republic**, Criminal Appeal No. 242 of 2015 (unreported).

Since the four circumstances stated in **Mwita Wambura** (supra) have to apply cumulatively, the totality of the above leads to one logical conclusion that, the two courts below erroneously applied the doctrine of recent possession in the instant matter before us.

Adverting to the next grievance raised by the appellants that, the prosecution's evidence was unreliable, contradictory, inconsistent and not credible, we hasten to state at this point that, there are several principles that govern testimony of witnesses which contain inconsistences and contradictions. **One**, the court has a duty to address the inconsistences and try to resolve them where possible, else the court

has to decide whether the inconsistences and contradictions are minor or whether they go to the root of the matter. See, for example **Mohamed Said Matula** [1995] T.L.R. 3. **Two**, it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled. See, for example **Said Ally Ismail v. Republic**, Criminal Appeal No. 249 of 2008 (unreported). **Three**, in all trials, normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of the occurrence. Minor contradictions and inconsistences on trivial matters which do not affect the case of the prosecution should not be made grounds on which the evidence can be rejected in its entirety.

In the instant case, the question is whether the prosecution's evidence was unreliable, contradictory, inconsistent and not credible. In an attempt to answer this issue, we shall traverse to the evidence on record in order to unearth the truth. **One**, a cursory perusal of the extra judicial statements of the appellants reveals that, they are not consistent with one another and moreover, they do not support the prosecution's

account, particularly, that of PW2, PW4 and PW5. Whereas, the first appellant in the extra judicial statement stated that, they were four bandits who committed the robbery incidence, the second appellant stated that, they were five while PW2 and PW4 said they were three in total. **Two**, while the appellants in the extra judicial statements stated that, they wore masks to hide their identity, PW3 who alleged to have identified them at the scene of crime did not testify to this fact. **Three**, while PW2 and PW4 testified that, the first appellant took them to the house of the second appellant where they arrested him, PW5 testified that, since there were so many people at the second appellant's house when they went to arrest him they had to conduct an identification parade. This fact was not mentioned by other prosecution witnesses nor was it mentioned by the appellants. **Four**, whereas, PW3 neither identified nor described the Binocular before the court, the appellants did not mention it in their respective extra judicial statements as one of the items which they stole. **Five**, whereas the second appellant in his extra judicial statement stated that, they forced everyone out of the car and ordered them to lie down and went on to search them, PW3 and the first appellant gave a different version of the story on what happened at the

scene of crime. **Six**, whereas, PW2, PW3 and PW4 testified that, they recovered the stolen items in the forest, PW1 testified that, they went to the scene of crime along with the first appellant where they found the camera.

With great respect, we think that these discrepancies are not minor. We are quite clear in our mind, even without resort to any painstaking inquiry that, they cast doubts on the evidence of the prosecution. Had the two courts below addressed these contradictions they would not have arrived at the conclusion they made to convict the appellants. Considering that the judge of the High Court upheld the conviction and sentence of the appellants on the strength of the doctrine of recent possession and the appellants' own confession, and bearing in mind the infractions we have demonstrated above, the appellants were undeniably right to argue that the prosecution did not prove the case beyond reasonable doubt.

That said, we think, it will only be pretentious to deal with the rest of the grounds of grievance. It will be hypothetical and a mere academic exercise not worth our time.

In the event and for the foregoing reasons, inevitably, we find that the appeal has merit and accordingly we allow it. The conviction and sentence are hereby, respectively, quashed and set aside and we order the immediate release of the appellants from prison unless otherwise lawfully held.

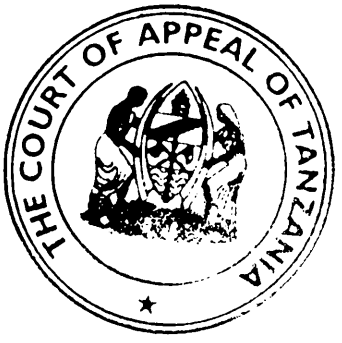
DATED at **ARUSHA** this 20th day of March, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 20th day of March, 2024 in the presence of the 1st and 2nd appellants appeared in person and Mr. Alawi Miraji, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPE