

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(DODOMA DISTRICT REGISTRY)
AT DODOMA**

DC CRIMINAL APPEAL NO. 128 OF 2020

(Originating from Singida District Court in Criminal Case No. 165/2018)

**1. FRED MAIKO
2. ELIBARIKI GOEFREY
3. ABDALLA JUMA**

.....**APPELLANTS**

VERSUS

THE REPUBLIC **RESPONDENT**

JUDGEMENT

Date of last Order: 22/09/2021
Date of Judgement: 12/11/2021

KAGOMBA, J

FRED MAIKO, ELIBARIKI GEOFREY and ABDALLA JUMA (The “appellants”) were found guilty and convicted by the District Court of Singida at Singida (the “trial Court”) for the offence of armed robbery contrary to section 287A of the Penal Code, [Cap 16 Vol 1 R. E 2002], as amended by section 10(A) of the written Laws (Miscellaneous Amendments) Act No. 3 of 2011. NOEL ALOYCE and ABEID SELEMA @ NKUKI were also charged together with the appellants for the same offence but were acquitted.

The appellants having been aggrieved by the conviction and sentence have appealed to this Court, based on the following grounds;

1. That, none of them was identified at the scene of crime in the material night.

2. That, nothing was recovered from their possession in connection with the alleged crime.
3. That, the trial Court failed to note the contradictory evidence adduced by the prosecution side. While it was alleged that Tsh. 11, 800,000/= was in M-pesa account (page 2 para 1 of the copy of Judgment), PW5 Joyce Ernest (victim's wife) alleged that she took a bag, which among other things, had cash money Tshs. 11,900,000/= (page 2 para 3 of the copy of Judgment), thereby raising a question as to the true amount and whether the money was in M-pesa account or in form of cash. Thus, the trial Court erred in law and fact for accepting such contradictory fact and testimonies.
4. That, the trial Court erred in law and fact for accepting the testimony of PW4 one Simon Mbenejo as he failed to produce sim cards. No. 0766-036494 which had Tsh. 20,000/= and sim card NO. 0762 789489 to support the alleged crime.
5. That, the trial Court erred in law and fact for accepting the testimony of PW4 Simon Mbenejo about the alleged robbed sim cards as none of them was registered in his name and those people who owned those cards were not called before the trial Court to prove the allegation and to say how their sim cards got into the hands of PW4.
6. That, the trial Court failed to notice another contradiction in the prosecution evidence, on page 2 para 1 of the copy of the judgment, that all properties and cash money robbed were valued at Tshs. 15,595,000/= while in page 3 para 3 of the copy of Judgement it is alleged to be Tshs. 17,445,000/= as the actual value of properties and money robbed in the material night. That neither Manyora nor Sahani Kilonzo who PW4 sent Tsh. 21,650/= was before the Court, thus the

appellants were convicted and sentenced for an offence they had never committed.

7. That, the trial Court erred in law and fact for accepting hearsay evidence from PW6 1097 D/CPL EXAVER who alleged that the 1st accused person one NOEL ALYOCE told them that it was FRED MICHAEL and ELIBARIKI GODFREY who were communicating with PW4, with no any corroboration or supporting testimony, while NOEL ALOYCE was the one who was communicating with PW4. Under such circumstances it is easier to mention the name of anybody to exonerate himself from liability.
8. That, the trial Court erred in law and fact for accepting personal statements of the 2nd and 3rd accused persons recorded by PW6 as they were not given a chance to call their relatives or lawyer before recording their statements. Under such circumstances their right were violated.
9. That, PW8 Zacharia Simon who later they came to know he was a magistrate after being taken to him by H. 5355 D/C Raphael, did not introduce himself who he was. He rather asked what happened and the appellants told him that they were arrested and beaten for alleged armed robbery, the incident that they had never participated, the allegation by H. 5385 D/C Raphael that they (Fred Michael and Elibariki Godfrey) were ready to confess was a preparation to a cook case against them as they found out that there was no evidence to implicate them with the alleged crime.
10. That, the statement of Abdallah Juma (4th Accused) and Noel Aloyce (1st Accused) recorded by Fredinard Michael Njau, Magistrate, to whom

they were taken by CPL Aloyce for allegation that they wanted to confess, was not tendered before the Court by the prosecution side in order to hide the truth of the alleged crime as well as the truth that none of the appellants did confess before any magistrate to whom they were alleged to be taken.

11. That, PW10 one Benard Kombe, Sales Manager Vodacom Singida Branch presented a print of No. 0764215973 and 0764213570 together with TIN No. 01134 and said that the owner of the said Vodacom sim card and Tin number was Asia Shabani and not Simon Mbenejo, thus it is evident that the prosecution side tried to connect the victim of crime, the alleged incident and accused persons (appellants) for reasons best known to them.
12. That, while the incident took place on 14/4/2018 the PF.3 which was filled by Maria Karola, Assistant Medical Officer St. Carolus, was signed on 6/06/2018. Why such long time? It is evident that the victims PF.3 was filled by the Assistant Medical Officer to suit the purpose and not because the alleged incident occurred.
13. That, taking into consideration the circumstances of the case and evidence/testimonies tendered before the trial Court, prosecution side had failed to prove its case beyond reasonable doubt against the appellants.

Based on the stated grounds, the appellants prayed the Court to quash both conviction and sentence and eventually set them to liberty. The appellants prayed to be present during the hearing of their appeal.

On the date set for hearing, the appellants appeared in persons under custody and they were not represented by an advocate. The respondent was represented by Mr. Meshack Lyabonga, learned State Attorney.

In presenting their appeal, the appellants spoke through the voice of Abdallah Juma, the third appellant (previously the 4th accused). He prayed the Court to consider all the grounds of appeal as presented in the Petition of appeal. He again prayed the Court to quash the conviction and sentence meted out to them by the trial Court.

Mr. Lyabonga, for the respondent opposed the appeal. He submitted that all the three accused persons (now "appellants") were charged at the Singida District Court and were convicted for the offence of armed robbery and were sentenced to thirty (30) years imprisonment. He submitted that the appellants have raised 16 grounds of appeal which points out to one general ground that the prosecution failed to prove the case against them beyond reasonable doubts. He prayed to address that one general ground, which he did as follows;

Firstly, he conceded that appellants were not identified at the scene of crime when they were committing the offence. He said however that, their non identification does not exonerate them because there was other evidence which was used to convict them.

Mr. Lyabonga submitted that, on page 33 of the typed proceedings of the trial Court, the cautioned statement of the 1st appellant, Fred Maiko was admitted in evidence. He said, in the cautioned statement the 1st appellant Fred Maiko confessed to have participated in committing armed robbery. Further, on page 37 of the typed proceedings of the trial Court there was an

extrajudicial statement of the 1st accused, Fred Maiko wherein the 1st appellant continued confessing his guilt. Mr. Lyabonga further submitted that by showing that the statements were true, he did not object to their admission, and did not even cross-examine the witness who tendered the evidence.

Mr. Lyabonga called to his support the case of **EMMANUEL SAGUDA @ SULUKUKA AND ANOTHER V. R**, Criminal Appeal No. 422 'B' of 2013 the Court of Appeal, Tabora, where on page 7 of the typed judgement of the case the Court of Appeal referred to the case of **BROWN V. DUNN [1893] 6 R. 67. HL** which stated that a decision not to cross examine a witness amounts to an acceptance of the unchallenged evidence. Mr. Lyabonga therefore submitted that the act of the 1st appellant not to object admission of the cautioned and extrajudicial statements and not to cross examine the witness who tendered the statements is tantamount to his acceptance of the evidence tendered.

Mr. Lyabonga further submitted that, the same scenario as for the 1st appellant happened to the 2nd appellant ELIBARIKI GEOFREY. That on page 37 of the proceedings his extrajudicial statement was tendered but the 2nd appellant did not object to its admission. The statement was thus admitted as Exhibit P4. He said, the 2nd appellant also did not use his right to cross examine the witness which is tantamount to admission of the evidence tendered.

It was Mr. Lyabonga's further submission that the best evidence is the confession of the accused freely made. He said, as PW8 said, the accused were not compelled to confess. He thus prayed the Court to give much weight to the testimony of PW8 in this regard.

Mr. Lyabonga submitted that on page 31 of the typed proceedings, there is a cautioned statement of the 3rd appellant ABDALLA JUMA which was tendered in Court as evidence. On this page of the proceedings, the 3rd appellants states that he agreed with the statement tendered by saying the statement was the one he gave, to mean that it was true. Mr. Lyabonga expressed his opinion that the said statement was true and was freely admitted.

Mr. Lyabonga further submitted that it is only the cautioned statement of the 1st appellant that went to the stage of inquiry but the trial Court accepted it. All other exhibits were not objected and were accordingly admitted by the Court, which, according to him, the evidence was competently adduced and admitted. He thus prayed the Court to uphold the decision of the trial Court in both the conviction and the sentence so that the appellants will continue to serve their sentence accordingly.

The appellants took the stage to submit their rejoinders. ABDALLAH JUMA, the 3rd appellant submitted that he objected to the admission of his cautioned statement but the trial Court admitted the same nevertheless. He submitted that the statement was not made by him as he was forced to sign it. He argued that the statement has two signatures as a proof that the same was not his and was not made freely. He said there is a signature of the Police Officer who recorded the same but he signed after being threatened. He argued that there is no signature of an independent witness.

The 3rd appellant further submitted that he told a Justice of the Peace that he did not know anything about the case but the prosecution decided to hide the extrajudicial statement by not tendering it purposely during trial. He thus prayed the Court to find him innocent.

FRED MAIKO, the 1st appellant also rejoined. He denied knowledge of and participation in the alleged armed robbery. He said that he denied the allegation at police station but was forced to confess. He told the Court that his leg was still in pain since the date he was beaten at police. He argued that after denying the allegation the police officer started writing the statement without his involvement. That, after finishing, the officer threatened him and made him to sign but because of his tender age then, he accepted the officer's demand but still he did not sign and the officer signed himself.

FRED MAIKO rejoined further that he was further threatened and later taken to another person who did not identify himself to the 1st appellant, for interrogation, where again he did not confess. He said that during trial he was not given chance to cross-examine the prosecution witness who tendered the statement, for those reasons he objects the statement because he was denied his basic right from the beginning. He therefore prayed the Court to set him free.

On the other hand, the 1st appellant rejoined that the State Attorney representing the Republic in this appeal, has not told the Court which ground of the appeal submitted by the appellants he was opposing. He argued that by not challenging the other grounds, the state Attorney was accepting those grounds. He thus prayed the Court to quash the conviction and set aside the sentence accordingly.

ELIBARIKI GEOFFREY, the 2nd appellant took the flow to rejoin. He submitted that the trial Court did not do him justice. Like his co-appellants, he denied making any confessional statement. He prayed the Court to set him free.

The above submissions by both the appellants and the prosecution sides sum up what was submitted during the hearing of the appeal. Having gone through the said submissions, I find it appropriate to frame only one major issue, which is whether the prosecution proved the case against the appellants beyond reasonable doubts.

The appeal is indeed based on one general ground as correctly submitted by Mr. Lyabonga. What is stated in the ground of appeal are, in my view, a description of several aspects in the prosecution case where the appellants found faults to the effect that, as they argue, the case against them was not so proved. For record purpose, while the Petition of Appeal lists 16 grounds of appeal, three of those i.e the 1st, 15th and 16th grounds are information and prayers. As such the Court deals with 13 grounds of appeal as stated in this judgment.

In determining the issue before the Court, I have carefully gone through the grounds of appeal, the Judgment and Proceedings of trial Court as well as submissions of both parties. The judgment of the trial Court has produced the flow of evidence which was considered during trial in light of the particulars of the offence in the charge. According to the particulars, the offence of armed robbery was committed on 14/4/2018 at 21:00hrs at St. Carolus Hospital area, Mtinko ward and division within the district and region of Singida. Stolen in the incident were cash money Tsh. 2,900,00/= three mobile phones make NOKIA each valued at Tsh. 30,000/=, three (3) other mobile phones make Itel valued at 105,000/=, two (2) NOKIA Alcatel both valued at Tsh. 50,000/=, two (2) smart phones make Techno L8 valued at 400,000/= and Altel H8 550 valued at Tsh. 210,00/=.

Also in the itemized list of stolen properties were faster charger (STC) valued at Tsh. 40,000/= and Tsh. 11,800,000/= which was in M-pesa account. All properties and cash money valued at Tsh. 15,595,000/= being properties of SIMON S/O MBENEJO. The particulars of the offence further state that immediately before and after such stealing machete and iron bar were used by the perpetrators of the offence to threatened the victim in order to obtain and retain the said properties. The accused persons pleaded not guilty in their unison.

The trial Court provide from page 2 of the typed judgment, the chronology of events and the evidence adduced which eventually led to the arrest, prosecution and conviction of the appellants. PW5 Joyce Ernest, the wife of the victim gave testimony on how she went to the business office of his husband, the victim (PW4). She stated that upon leaving home to her husband's business at 21:00 hrs she found him closing the business office. She took a bag which was having air time, cash money Tsh. 11,900,000/=: ten phones which she mentioned the make and the value. It is from her testimony, the fourth ground of appeal as per filed Petition of Appeal (ground of appeal No. 3 per this judgment) originates. There is indeed difference in figure between Tsh. 11,800,000/= which was said to be in M-Pesa account according to particulars of the offence in the charge, and Tsh. 11,900,000/= which PW5 Joyce Ernest stated in her testimony that it was cash money. It is the views of this Court that in a charge for armed robbery, the difference in amount of money robbed or whether it was in Mpesa account or cash or even cheque may not be material, other things being equal. The differences could be useful to impeach the credibility of the prosecution witness but who was able to mention other properties in the bag convincingly well. Sometimes, the concept of cash can be doggy to many people with some

considering M-pesa balance as cash because of the ease of converting M-pesa balance into cash.

I would therefore conclusively say that the prosecution's case cannot be diluted on this petty ground if other constituent of the offence were fully proved.

PW5 Joyce Ernest further testified that while heading home from her husband's business office with her husband they passed at St. Corolus Hospital to pick a security guard to escort them. As they could not get one, they tossed to go home unescorted. Their home was within St. Corolus Hospital staff quarters where her husband was working as a clinical officer. As they were almost getting home, she said, there appeared almost ten thugs armed with machete, iron bars and knives. They attacked her husband. Thereafter they turned to her and grabbed her bag. The thugs run away after she had raised an alarm and people from the hospital came to their rescue.

PW5 Joyce is on record, in the judgment mentioning those who came to the scene of crime as PW1 Omary Rashid who is the security guard, PW2 Pamela Nikolus who is a nurse, and one Adam Khamis. According to the trial Court judgment, the two were called as witness and they did testify that they went to the scene of crime following the alarm raised by PW5 Joyce Ernest. They also testified that upon their arrival they did not find thugs around but found PW4 Simon Mbenejo lying down after he was injured on his ear by the thugs.

The above testimonies of PW1 Omary Rashid, PW2 Pamela Nikolus and one Adam Khamis partially prove that the thugs were not identified by them,

but also prove that the incident of the attack on PW4 occurred. This evidence is relevant because in the 13th ground of appeal, as per Petition of Appeal, the appellants question whether the alleged incident really occurred.

The appellants question the occurrence of the incident merely because the PF3 was dated 6/6/2018 while the incident is said to have occurred on 14/4/2018. The Court has examined the PF.3 which was admitted as exhibit P.8 and observed that there are differences in the dates when medical examination of PW4 Simon Mbenejo was requested, which was 14/4/2018 and the date when the medical practitioner one Sr. Maria Clara gave her remarks, which was on 4/6/2018. We shall in due course revert to discuss this difference in dates and its impact on prosecution case. For now, we are of settled mind that the incident truly occurred.

On page 3 of the typed judgment of the trial Court there is a testimony of PW4 Simon Mbenejo, a clinical officer at St. Corolus hospital and a businessman. According to the trial Court, his testimony was the same as his wife (PW5 Joyce) save that in his testimony he said that in the phones which were in the bag, there were sim cards, one of which had No. 0766036494 which was having Tsh. 20,000/= and another sim card was No. 0762789489. Apparently, the judgment does not show if PW4 Simon Mbenejo produced the said sim card in Court as exhibit. It is from this part of testimony the appellants raise their ground of appeal No. 5, as per Petition of Appeal, where they say the trial Court erred in law and fact for accepting the testimony of PW4 Simon Mbenejo as he failed to produce the sim cards. This Court finds no fault on neither the trial Court nor the prosecution in this respect. It is our view that production of the simcard was irrelevant and insignificant in proving the charge of armed robbery. It is both irrelevant and

insignificant because; **one** the sim cards were in the phones which were stolen. **Two**, the offence of armed robbery would be proved even if it was an empty bag that was stolen by using weapon, provided that there is evidence to sufficiently link the appellant with commission of the offence. For these reasons, the 5th ground to appeal, as per Petition of Appeal has no merit.

The testimony of PW4 continues on page 4 of the typed judgment of the trial Court where he testified that after recovery from the attack, he reported the incident to the respective authorities including cybercrime department. He says, after a while he was told that one of his sim cards with number 0766636494 registered in the name of Simon Mbenejo was on air and being used at Mtinko area. The testimony of PW4 explains clearly how a trap was set which eventually caught 1st accused one Noel Aloyce.

The testimony of PW6 1097 D/CPL Exaver explains how the arrest of other accused persons was done from a link provided by 1st Accused person Noel Aloyce, who was however found to be innocent, but gave useful information that uncovered how and who participated in the armed robbery incident subject of this appeal.

The testimony of PW6 1097 D/CPL Exaver, PW 7 G2428 PC Shito, PW 8 Zacharia Simon Yona and PW 9 Ferdinand Michael Njau, the last two being magistrates and Justices of the Peace, conclusively prove that the statements of the accused persons who are now the appellants, was duly recorded without any flaws as alleged by the appellants in their rejoinder. PW8 Zacharia Simon Yona testifies, for example, that on 4/5/2018 PW11 H.5385 D/CPL Raphael appeared to him with two accused persons, namely, Elibariki Godfrey, first, and later Fred Michael (Maiko). PW 11 H. 5385 D/CPL

Raphael told him that the duo wanted to confess. He interrogated Elibariki Geoffrey first until he was satisfied that he was free to give his statement, that is when he recorded the same. The extrajudicial statement of Elibariki Geoffrey was admitted in evidence, without objection, as Exhibit P4. PW8 further stated that he recorded the extrajudicial statement of Fred Michael that was submitted as Exhibit P5. The same type of testimony was made on page 6 of the typed judgment of the trial Court, by PW9 Ferdinand Michael Njau, a magistrate and justice of the peace, who recorded the extrajudicial statement of Abdallah Juma (The third appellant) and Noel Aloyce (who was the first accused) PW9 also recorded the statements after being satisfied that they were free to give the same. Those statements were however not produced in Court, for reason known to prosecution.

At this point it is important to state that with regard to the admission of the cautioned statements of 1st appellant, Fred Maiko and 2nd appellant Elibariki Geoffrey there were inquiries conducted by the trial Court as appearing on page 21 to page 29 of the typed proceedings. The trial Court did satisfy itself that the objections by the accused persons (now appellants) had no merit, a decision this Court finds supportable.

With regard to the cautioned statement of Abdallah Juma, the 3rd appellant, the testimony of PW7 G2428 PC Shito concisely show, on page 30 to 31 of the proceedings, that the same was taken freely by observing the required legal guidelines. PW7 is recorded telling the Court that the appellant, Abdallah Juma, told him that he wanted his statement to be recorded while with PW7 alone. PW7 further told the Court and we believe the appellant also heard, that the appellant admitted the offence he was charged with. On page 31 of the typed proceedings, the appellant is recorded

as telling the Court that he gave that statement, which was admitted as PW3 (sic).

The record of proceedings further shows on the same page 31 that the exhibit was read in Court as required by law, but there was no any serious cross examination of PW7 by the appellants.

The testimonies of the justice of the peace started to be recorded from page 35 of the proceedings. PW 8 Zacharia Simon Yona, Magistrate, also clearly and convincingly showed how the extrajudicial statement of the 1st and 2nd appellant was recorded by observing the required legal guidelines. He testified that the 2nd appellant, Elibariki Geoffrey, was the one who started giving his extrajudicial statement in which he confessed that he was involved in the matter (offence) by one person called Mangora. The 2nd appellant signed the same after it was read over to him by PW8. The statement was tendered as an exhibit while the appellant said he had no objection. Likewise, the extrajudicial statement of the 1st appellant, Fred Maiko was taken and he also confessed. Even though he told the Court that he was forced by police, he said he was not forced by the justice of the peace. He also told the trial Court that he had no objection to the extrajudicial statement by saying "I have no objection to the admission of the statement, it is what I told him".

Despite the fact that the 3rd appellant Abdalla Juma gave an extrajudicial statement before PW9 Ferdinand Michael Njau, a Magistrate that statement was not tendered in evidence, apparently from the testimony of PW9 on page 39 of the typed proceedings, the appellant did not confess before the justice of the peace. According to PW9, the 3rd appellant said that he is charged with robbery, he was at Singida police station and he was

brought before PW9 to give his confessional statement. That was all he said. Obviously, such a short extrajudicial statement could not be useful to prosecution. No wonder it was not tendered in evidence. It would have added nothing to the prosecution's case against the 3rd appellant.

On the other hand, PW9 testified on page 39 of the proceedings that the appellant, when he appeared before him, he had no anybody injury. PW9 checked him and found no injury on his body. This piece of evidence is relevant to show that the cautioned statement given by the 3rd appellant at police station, in which he confessed, was not procured by force. The Court holds this opinion because the cautioned statement of the 3rd appellant was recorded by PW7 G2428 PC Shito on 3/5/2018 at 09:15 hrs and the appellant was taken to the Justice of Peace PW9 on 4/5/2018 at 13:00hrs. Within such a short time, if the cautioned statement was taken after torture threats or any flaws, the justice of the peace, PW9 could have noticed observed or been told. For this reason, we find the confession by the 3rd appellant which is embedded in his cautioned statement (Exhb. PW3) was correctly relied upon by the trial Court to Convict him in light of strong circumstantial evidence adduced in Court.

The above position which we have taken is supported by clear explanation on the law on confession made in the case of **NDALAHWA SHILANGA AND ANOTHER V. REPUBLIC**, Criminal Appeal No. 247 of 2008 CAT at Mwanza, where the Court of Appeal stated that once a Court is satisfied that a confession was made voluntarily and properly, the Court can convict the accused person based on such confession provided the Court finds the same to contain nothing but the truth. The trial Court would also determine if corroboration was needed or not, and may convict without

corroboration after warning itself of the danger of doing so. In our view, the trial Court's analysis of the evidence of DW4, the 3rd appellant, made it satisfied that the cautioned statement of the 3rd appellant was incriminating him and that what it contained was nothing but the truth. According to the said cautioned statement (Exhibit P3) it is the 3rd appellant who studied the time the victim usually closes his M-pesa business and relayed the information to one Mang'ola who organized the robbery. It is the 3rd appellant who also carried the 2nd and 3rd accused persons on his motorcycle to the scene of crime with knowledge that they are going to commit armed robbery. In terms of section 23 of the Penal Code, [Cap 16 R.E 2019] since the 3rd appellant showed common purpose with other appellants, he is counted to have committed the offence of armed robbery that ensued.

As correctly submitted by Mr. Lyabonga, the learned State Attorney, confession freely obtained is the best evidence prosecution can produce. In **JUMANNE AHMAD CHIVINJA AND ANOTHER V. REPUBLIC** Criminal Appeal No. 371 of 2019 the Court of Appeal stated;

"It has long been settled that a person who confess to a crime is the best witness, a position taken by the Court in many of its decisions such as DPP VS NURU GULAMRASUL [1988] T. L. R 82 cited in DIAMON MALEKELA "MAUNGAYA VS REPUBLIC".

In the above cited case of **JUMANNE AHMAD CHIVINJA AND ANOTHER**, the Court of Appeal further considered what makes a statement to qualify as a confession. Quoting from the decision in **DIAMON MALEKELA @MAUNGANYA VS REPUBLIC**, Criminal Appeal No. 205 of 2005 (unreported) and **RHINO MIGERE VS REPUBLIC**, Criminal Appeal

No. 122 of 2002 (also unreported), the Court stated to the effect that a cautioned statement shall qualify to be a confession if it contains all the ingredients of the offence charged as provided for under section 39(c) of the Evidence Act, 1967.

What the 3rd appellant confessed in his cautioned statement (Exhibit P3) is that he had agreed with one Mang'ola to track the time the victim SIMON S/O MBENEJO closes his M-pesa shop for the purpose of stealing money from him with an agreement that once the mission is successful, he would get half of the money stolen.

The 3rd appellant further confessed to have not only tipped Mang'ola about the time the victim closes the shop but also carried him and his cohort to a place near to the scene of crime on his motor cycle. He further states in his statement that his passengers had carried machette and a piece of iron bar for carrying out the robbery, and that the robbery was carried out as planned.

Despite the fact that such confession does not admit all the ingredients of the offence of armed robbery by the 3rd appellant, which are stealing and to immediately before or after such stealing use weapon to threaten the victim to obtain and retain the properties stolen, his liability for the offence is based on the fact that he formed a common intention with Mang'ola to have the victim robbed and share the proceeds of crime equally. He went ahead to facilitate the prosecution of their joint purpose by driving Mang'ola and his gang to the scene of crime. Section 23 of the Penal Code, [Cap 16 R. E 2019] aptly provides;

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose

an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence”.

It is in the light of the above quoted provision of the law, the 3rd appellant cannot escape liability for the crime of armed robbery which he actively participated to prosecute with a common unlawful purpose of sharing proceeds of the crime as he confessed to have been promised.

Having examined the evidence adduced in trial Court in line with the legal duty of this Court as the first appellate Court, we are now in a position to state that the grounds of appeal, which pinpoint some contradictions in figures, dates and non-production in Court of certain evidence such as the stolen sim cards, are comfortably discounted by the appellant’s own freely obtained confessions.

As it was held by the Court of Appeal in **NDALAHWA SHILANGA AND ANOTHER V. REPUBLIC** (supra), the trial Court was right to convict the appellants based on their own confessions, after the Court had satisfied itself on their admissibility and the fact that the same contained nothing but the truth.

The appellants have pointed discrepancies in the prosecution evidence such as difference in the amount of money stolen. We hold that while such discrepancy does cast some doubts on prosecution evidence, the same are not reasonable doubts. It is immaterial whether the actual value of property stolen was Tsh. 15,595,000/= or Tsh 17,445,000/= provided there is proof that those properties were actually stolen.

Discrepancies on details may occur as a result of several factors including the frailty of human memory as was deemed excusable by the Court of Appeal in **JOHN GILIKOLA V. REPUBLIC**, Criminal Appeal No. 31 of 1999, CAT at Mwanza. On the eighth page of the typed judgment of the Court of Appeal, such discrepancies were not considered material so as to affect the credibility of the evidences given in Court. We also consider the discrepancies raised as immaterial, and so are the other grounds of appeal raised.

In the final analysis, I find no merit in the appeal. The same is therefore dismissed. As a consequence, the conviction and sentence entered by the trial Court are upheld accordingly.

It is so ordered.




ABDI S. KAGOMBA

JUDGE

12/11/2021