IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 196 OF 2021

(Originating from Criminal Case no. 107 of 2020 in the Resident Magistrate's Court of Kibaha at Kibaha by Hon. J.Mushi, RM, dated 17th March 2021)

YUSUPH MUSA @MBONDE @MASHOTO.....1st APPELLANT

OMARY JUMA KITAMBULIO @BALLO.....2nd APPELLANT

RASHID SAID @LWAMBONAKO.....3rd APPELLANT

MAJID JUMA MUNG'AGI @DUNCHU.....4th APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

04th October, 2022

ITEMBA, J.

The four appellants in this appeal were charged with and convicted of the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E [2002] as amended. It was alleged by the prosecutions that, on 9th of May 2020 at Kiguza village in Mkuranga District within Costal region, they stole different types of alcoholic drinks valued at TZS 18,425,900/=, the properties of one Malulu Mpanduji, a retired police officer. That, while at the scene, the appellants attacked the security

guard with a bush knife, iron bar and clubs in order to obtain and retain the said properties. After a full trial the appellants were convicted and sentenced to 30 years imprisonment each. Having been pained by the trial court's verdict, they have preferred this appeal with the following grounds:

1. *That, the learned trial magistrate grossly erred in both law and fact when convicted the 1st, 2nd, 3rd and 4th appellants relied on incredible an unreliable visual identification evidence of PW1 at the scene of crime despite him (PW1) failure to state in his evidence the position, color of the bulb and distance it was illuminating from to the point of confrontation.*
2. *That, the learned trial magistrate grossly erred in both law and fact when convicted the 1st,2nd,3rd and 4th appellants relied on PW1's evidence who merely asserted that he knew the appellant's prior to the date of the incident yet failed to consider that the issue of familiarity will only hold where condition of a proper identification at the scene of crime prevails.*
3. *That, the learned trial magistrate grossly erred in both law and fact when convicted the 1st,2nd, 3rd and 4th appellants relied on a case where there was no evidence from prosecution witnesses including PW1 to suggest that he ever named or gave description i.e special features, complexion or how his culprits were clad at the time of the alleged incident.*
4. *That, the learned trial magistrate grossly erred in both law and fact when convicted the 1st, 2nd, 3rd and 4th appellants relied on PW1's evidence yet there was no identification parade conducted after their arrest as no evidence was adduced to suggest that there was a manhunt mounted immediately after the alleged incident, no evidence to show that PW1 was the one who led to their arrest*

despite his claim that he knew them and their place of abode, and no claim to show they ever ran away after the said crime.

5. *That, the learned trial magistrate grossly erred in both law and fact when convicted the 4th appellant in a case where prosecution witnesses were giving contradictory evidence as to how, reason and mode of his arrest.*
6. *That, the learned trial magistrate grossly erred in both law and fact when convicted the 1st appellant in a case where the prosecution witnesses in their evidence showed that his arrest did not emanate from the case at hand.*
7. *That, the learned trial magistrate grossly erred in both law and fact when convicted the 3rd appellant in a case where was no direct evidence from the prosecution side that could have implicated him or connected him with the case at hand.*
8. *That, the learned trial magistrate grossly erred both in law and fact when convicted the 1st appellant relied on Exh PE1 (caution statement) which was unprocedural recorded by a ward executive officer (PW2) who had no mandate of recording a caution statement of a suspect who was under police custody and use a police rubber stamp and worse of all he took it (caution statement) out of prescribed time.*
9. *That, the learned trial magistrate grossly erred both in law and fact when based the 1st appellant conviction on a retracted and repudiated caution statement Exh PE4 allegedly recorded by PW8 whereas no inquiry was conducted by the trial court to test its voluntariness.*
10. *That, the learned trial magistrate grossly erred both in law and fact when convicted both 2nd and 4th appellants relied on repudiated and retracted caution statements Exh PE3 collectively which were unprocedural recorded by PW7 who had knowledge of alleged incident as he stated in his evidence that he had previously recorded statements of other prosecution witnesses hence there is*

no way he could have been impartial, and worse still no inquiry was conducted to test their voluntariness.

11. *That, the learned trial magistrate grossly erred both in law and fact when convicted 1st, 2nd, 3rd and 4th appellants relied on PW1's evidence even after having found that there was no any other evidence adduced by the prosecution that could collaborate his evidence.*
12. *That, the learned trial magistrate grossly erred both in law and fact when used weak, tenuous, contradictory, inconsistent and uncorroborated evidence of the prosecution witnesses that lacked collaboration as a basis of convicting the 1st ,2nd, 3rd and 4th appellants.*
13. *That, the learned trial magistrate grossly erred both in law and fact when convicted 1st ,2nd ,3rd and 4th appellants without giving due weight to their strong defences.*
14. *That, the learned trial magistrate grossly erred both in law and fact when failed to critically analyze and evaluate the evidence from both prosecution and defence side while composing his judgment.*
15. *That, the learned trial magistrate grossly erred both in law and fact when he held that prosecution had proved its case to the required standard despite there lacking even an iota of evidence to suggest that after their arrest the police attempted to conduct a search in their respective homes to try to recover any of the said stolen items.*

At the hearing of the appeal, the appellants fended for themselves, while the respondent was represented by Mr. Clemence Kato, learned state attorney. Hearing of appeal was done by way of written submissions. Submitting in support of the appeal, the appellants started by faulting the evidence of visual identification by PW1 that evidence of

this nature is of weakest kind and it should not be acted upon until when the Court is fully satisfied that the evidence is water tight and that there are no possibilities of mistaken identity. They added that, the intensity of light which allegedly enabled PW1 to identify the appellants was not stated and also the distance between them was not specified. They complained that PW1 never gave description of the attire worn by the appellants. They are of the view that PW1 was supposed to give clear evidence which leaves no doubt that the identification is correct and reliable. Again, they criticized that there was no PF3 tendered to support that the victim was hospitalized as he alleged. They concluded that the evidence by PW1 in visual identification was unreliable.

The appellants supported these averments with decision in the cases of ***Waziri Amani v The Republic*** [1980] TLR 250, ***Hassan Said and Seleman Ally v The Republic***, Criminal Appeal No. 44 of 2002, ***Nhembo Ndalu v The Republic***, Criminal Appeal No. 33 of 2005 and **Dorokakagusa v The Republic**, Criminal Appeal No. 174 of 2004 (Unreported).

The appellants state that the trial Court did not properly consider their defence. They hold the view that apart from summarizing their evidence at page 7 and 8 of the judgment the trial magistrate did not

consider or analyze the defence evidence which according to them it vitiated the appellants conviction. To support these arguments, they cited the decision in the case of ***Hussein Idd and Another vs The Republic*** [1986] TLR 166.

The appellant kept on complaining that the trial court erred when it considered the evidence of PW5 who was not among the witnesses listed in terms of Section 246 (2) of the Criminal Procedure Act, CAP 20 RE.2019 (CPA). They argued that even the contents of exhibit PE.3 was not read over to them during preliminary hearing, and that the prosecution was supposed to apply for leave in terms of Section 289 (1) of the CPA to add PW2 as an additional witness or to add exhibit PE.3. Based on such omission they urged the court to expunge the testimony of PW5 together with exhibit PE.3.

As regards the evidence of PW8, they complained that it was illegally recorded as the witness did not take oath before giving his testimony. They contended that the said omission violates provisions of section 198 (1) of the CPA. Based on that they are of the view that his testimony is of no evidential value hence need to be expunged from the record together with exhibit PE4 which was retracted and repudiated statement allegedly made by the 1st appellant.

The appellants argued further that the retracted exhibit PE1, PE4, and PE3 (collectively) were procured unlawfully and exhibit PE3 (collectively) were not voluntarily made. They stated that a ward executive officer (WEO) could not assume the role of a justice of peace under Section 56 of the Magistrate Courts Act CAP. 11 RE. 2002. According to them, a WEO was incompetent to record cautioned statement of the 1st appellant and PW2 Elia Kostica Rukamba did not comply with the chief justice's instructions as exhibit PE1 does not show when the appellant was arrested and the place he slept before he was brought to him.

The appellants fault the confession statements of the 1st, 2nd and 4th appellants, saying that they were recorded out of prescribed time. They hold the view that recording must be done within four hours from the arrest of the accused persons and failure to it, enlargement of time must be sought under provisions of Section 50 (1), (a) and (51) (1) (a) of the CPA. They are of the view that after the appellants had objected the admission of the caution statements, the trial court was supposed to conduct an inquiry, to determine the point objected to, something which did not happen. The appellants urged this court to expunge the cautioned statements exhibit PE1, PE3 and PE4 from the record.

Again, the appellants faulted the trial decision that there were material contradictions which according to them went to the root of the prosecution case. They argued that, PW1, PW3, PW4, PW5, PW6, PW7 and PW8 each of them gave different versions over the same incident as to their arrest and their evidence was not corroborated. They added that the arrest of each appellant did not emanate from the case at hand.

They also faulted the court for not explaining the substance of the charge properly to the appellants after it found that they have a prima facie case to answer and that they were not informed of their rights to give evidence in accordance with Section 231 (1) (a) and (b) of the CPA. They stated that such omission by the trial court left the appellants wondering at the witness box.

Lastly, the appellants submitted that the charge was not proved beyond reasonable doubts. They reiterated the weaknesses explained in the former grounds of appeal. They urged the court to hold that the appeal has merit and the prosecution has failed to prove their case beyond any reasonable doubt.

In rebuttal submissions, the learned counsel for the respondent, Mr. Clemence Kato state attorney, stated as follows; starting with the testimony of PW1 on visual identification, he replied that it was very

strong because the witness clearly stated intensity of light that helped him to identify the appellants. He further stated that PW1 recognized the appellants as they lived in his neighborhood. He supported his averments by citing the decision in the case of ***Christopher Ally v Republic,*** Criminal Appeal No. 510 of 2017 (Unreported).

The 2nd and 3rd grounds were argued jointly. The learned counsel for the respondent stated that, the appellants have misconceived what was the basis of conviction. He argued that the trial magistrate considered both factors in avoiding possibilities of mistaken identity at page 10 of the trial proceedings where PW1 stated how he knew the appellants before the incident and intensity of the light.

In respect of the 4th ground of appeal he replied that the appellants have misconceived the position of law. He argues that the relevancy of identification parade is only where the accused are totally strangers to the expected witness. He cited the decision in the case of ***James Kazungu Ntambara vs Republic,*** Criminal Appeal No. 177,178 of 2011 (Unreported). He kept on insisting that the appellants were familiar to PW1.

On the claims that it was not established by the prosecution how the appellants were arrested, he replied that, these claims are not true

as on page 9 of the trial proceedings PW1 has informed the Court that he reported the matter to the police station through a taxi driver, one Juma Pazi.

Regarding the 5th and 6th grounds, he submitted that there is no contradictions which goes to the root of the case, that all prosecution witnesses gave revelation that point fingers to the appellants. He added that PW1 named the first appellant who was arrested by PW2 (VEO) and he made confession before him and also the 1st and 2nd appellants made the same confession to PW7 and PW8. He conceded that there were discrepancies but they did not halt the prosecution's case. To bolster his arguments, he cited the decision in the case of ***Armand Guehi v Republic***, Criminal Appeal No. 242 of 2010.

In the 7th ground of appeal, he submits that it is misconception that there was no direct evidence from the prosecution, because PW1 is an eye witness who was at the scene of crime and saw the incident hence an eye witness and his evidence meet the requirements provided under Section 62 (1) of the Tanzania Evidence Act CAP. 6 RE. 2017.

With regard to the 8th ground of appeal, which criticizes the cautioned statement recorded by Ward Executive Officer who had no mandate. He stated that the claims are unfounded because they are

based on records of proceedings that were recorded with a slip of a pen as seen on page 13 and 14 of the trial proceedings. He cited the decision in the case of ***William Getari Kagege vs Equity Bank and Another***, Civil Application No. 24 of 2019. He urged the court to find that the trial court made an error to record 'cautioned statement' instead of 'extra judicial statement' and the same can be cured under slip of the pen rule.

Regarding to the 9th ground, he states that there is no record showing that the cautioned statements exhibit PE4 was retracted or repudiated. He added that page 37 of the trial record shows that the objection against admission of cautioned statement was on the fact that during interrogation the accused was not availed with right to call witness. According to him such objection does not amount to retraction or repudiation as stipulated under the law, hence there was no need to conduct a trial within trial.

In respect of the 10th ground, the complaint was that the cautioned statement was recorded by the same police who investigated the case, he argues that provisions under Section 58 (4) (a) of the CPA allows investigators to record cautioned statements and he supported his submissions in respect of this point by citing the decision in the case of ***Kadiria Kimaro v Republic***, Criminal Appeal No. 50 of 2018.

In respect of grounds 11 and 12, he submitted that, this claim is misconceived, he argued that the evidence of PW1 was corroborated by confessional statement of the 2nd and 4th accused persons.

Regarding the 13th and 14th grounds of appeal, the learned state attorney conceded that the trial magistrate has failed to evaluate or consider the defence evidence. He was of the view that since this is the first appellate court it can re-evaluate evidence and make its findings as it was stated in the case of ***Leornard Mwanashoka v Republic***, Criminal Appeal No. 226 of 2014.

In the last ground of petition of appeal in which the appellants claim that prosecution side failed to prove case beyond reasonable doubt he argues that it is misconceived because the prosecution paraded 8 credible witnesses and each of them is entitled to credence as it was held in ***Goodluck Kyando vs Republic***, Criminal Appeal No. 26 of 2006.

On the claims that PW8 evidence was taken without oath or affirmation he conceded but stated further to it that at page 44 of the typed proceedings of the trial Court it appears that there was a typing error the wording reads 'take and other and statement' he is of the view that these words does not carry any logical meaning according to him it

was a typing error which can be cured and he relied on the case of ***William Getari Kegege vs Equity Bank*** (Supra).

Lastly, on the issue of contravention of Section 50 and 51 by the trial court in admitting the cautioned statements, he was of the view that the appellants misconceived facts from the record of proceedings at page 56. He kept on stating that it is clear from the above-mentioned page that DW2, the second appellant whose caution statement was admitted in evidence was arrested on 06/06/2021 and interrogated on the same day, that the same applies to the 4th appellant whose caution statement was recorded within time frame. In the end he prayed that the court should uphold the conviction and sentence.

Having gone through the evidence and grounds of appeal which are raised, the issue is whether the appeal has merit. Logic dictates that, I should first address the 14th ground. In this ground, the appellants are complaining that the trial magistrate did not analyse the evidence when composing the judgment and that he did not consider the appellants' defence. The respondent has conceded to these grounds and moved the court to step into the shoes of the trial court and do the needful.

Section 312(1) of the CPA provides that:

312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and ***shall contain the point or points for determination, the decision thereon and the reasons for the decision****, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court. (emphasis supplied).*

I have gone through the trial court records and the judgment therein reflects the analysis of evidence at page 11, and I quote:

'For the line of evidence given by the prosecution witnesses, I draw Inference on the alleged properties stolen hence evidence adduced by PW1 not in corroboration of any other witness, but exhibit PE1, PE4 and PE5 the caution statement of the accused persons of which the accused person admitted to have committed the offence. I have said above this court has to warn itself on the danger of uncorroborated evidence when direct proof is in question. Upon this juncture I can be in good position to holds that this court has considered circumstances of this case and it is proved beyond reasonable doubts that the offence was committed by the accused persons, since in the whole testimonial evidences of DW1, DW2, DW3, DW4 failed to even raise doubts in the mind of the magistrate'

This was the end of the reasons for the decisions issued by the trial magistrate. Indeed, the judgement contains just a summary of prosecution evidence and elements of the offence of armed robbery. Apart from that the trial magistrate straight concluded that he finds the appellants guilty of the offence of armed robbery because 'they could not raise any reasonable doubt'. It is therefore without doubt that the trial magistrate neither analysed the evidence nor gave reasons for his decisions as provided for under section 312(1) of the CPA. Under the circumstances, this court being the 1st appellate court, it has the duty to step into the trial court's shoes and assume the powers of the trial court as it was guided by a number of Court of Appeal decisions including **Demay Daati and 2 others v Republic**, Criminal Appeal no. 80 of 1994 (CAT) Arusha.

Starting with the 1st, 2nd, 3rd and 4th grounds of appeal, in all four grounds, the appellants are complaining about the identification at the scene, therefore, these grounds will be addressed jointly. The appellants are challenging the evidence of visual identification by PW1 that it did not meet the required legal standard. In their submission, they referred to the several cases including the landmark one of **Waziri Amani** (supra), stating that PW1's testimony was not in accordance with the principle therein. In the 4th ground, they mentioned that the identification parade

was not conducted. The respondent is countering this ground stating PW1 knew the appellants before as there were neighbors and that at the scene of crime there was electricity light good enough to enable identification.

As mentioned by the appellant, visual identification is best gauged under the principle established in **Waziri Amani** (supra). In this landmark case, it was provided that when the issue of visual identification arises, among the important aspects to be considered is if there was light at the scene and the intensity of that light, the time the witness had the accused under observation, the distance which the witness had the accused under observation and whether the witnesses knew the accused before. This principle was furthered in the decision of ***Chacha Jeremiah Murimi v. Republic***, Criminal Appeal No. 551 of 2015 (unreported) in which the Court of Appeal had this to say:

> *'Admittedly, evidence of visual identification is of the weakest kind and no court should base a conviction on such evidence unless it is absolutely watertight; and that every possibility of a mistaken identity has been eliminated. To guard against that possibility the Court has prescribed several to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are:*
>
> *how long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? What interval*

has lapsed between the original and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them in his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it?'

Moving to the facts at hand, I will be guided by the criteria in the case laws which I have referred. Starting with the light intensity, there is no dispute that the incidence occurred past midnight, at 3am which means it was dark. However, PW1 had clearly explained that at the scene there was 'big' electricity light. By this explanation, it means that the light being sourced from electricity, was good enough to enable identification. It also is mentioned that, the scene of crime was inside a bar sometimes referred as a shop, the evidence is silent on the size of the bar but being inside the building, I don't think that PW1 was far from the appellants. On whether the witness knew the appellants before, PW1 also explained that he knew all the 4 appellants. That, the 1st appellant is his cousin named Yusuph Musa. He identified him even by his name. Either, I agree with the learned state attorney that there was no need to conduct the identification parade against the 1st appellant as PW1 knew the 1st appellant before. So, I am satisfied that as PW1 knew the 1st appellant before by name and that they are actually relatives and that the scene

had light which enabled visual identification, then PW1 properly identified the 1st appellant at the scene of crime.

As regards the remaining 3 appellants, apart from PW1 identifying the 1st appellant by name, he claims that he also knew all the appellants before, however, the evidence is silent on how often had PW1 seen the appellants before? It is not also stated if PW1 had any special reason for remembering the 2nd, 3rd and 4th appellants? The incidence had occurred on 9/5/2020 but the appellants were arrested later, at different dates. According to the testimony of the 2nd and 4th appellants and that of PW7, the 2nd accused was arrested on 6/6/2020 and 4th accused on 11/6/2020. The 3rd appellant testified that he was arrested on 5/9/2020. Therefore, the 2nd, 3rd and 4th appellants were all arrested a month after the incidence and it is not even explained as to how did PW1 describe the appellants to the investigators to enable their arrest?

I have gone through PW1 evidence at page 9 and 10 of the proceedings and contrary to what the respondent has submitted, in his testimony, PW1 told the court that "*I knew the accused persons even before the offence since they used to come at the bar for Bonanza.'* I am of the firm view that this statement was not enough evidence to establish that the persons whom PW1 identified at the scene are the exact one

who were arrested. There could be more information of their names, physical features, where they live, what they do as their daily work or business; features which will differentiate them from the rest of the people who usually visit the said bar for bonanza or any other purpose. That being said, I agree with the appellants that PW1 could not establish that he properly visually identified the 2nd, 3rd and 4th appellants at the scene. Therefore, the 1st ground holds water in respect of the 2nd, 3rd and 4th appellants and it suffices to allow their appeal.

That being said we are left with the 1st appellant; therefore, the rest of the grounds will be checked against the 1st appellant. The 5th, 7th and 10th grounds were specific for the 2nd, 3rd and 4th appellants whose appeal is allowed; therefore, there is no value in addressing them.

The remaining grounds 6th,8th ,9th ,11th, 12th and 15th of appeal challenges the arrest, recording of cautioned statement, analysis of defence and admission of exhibits and non-consideration of appellant's defence.

Starting with the 6th ground, it is a fact that the 1st appellant was arrested after being suspected of stealing clothes which were hanged. I believe even though the 1st appellant was not arrested immediately after the incidence of armed robbery which he is charged with, that does not

necessarily mean that he did not commit the offence. The rest of the prosecution evidence is the one which will determine his case.

The 8th and 9th grounds are referring to the extra judicial statement which was recorded by the VEO and the cautioned statement of the 1st appellant which was taken out of time and that it was repudiated and retracted. Section **50(1) of the CPA** requires that the cautioned statement should be written within four hours counting from the time when the suspect was taken under restraint in respect of the offence. The 1st appellant does not state when he was arrested. I have gone through the said cautioned statement and proceedings, and I find that at page 46 of the proceedings, PW8 who recorded the cautioned statement stated that the 1st appellant recorded his statement on 4/6/2020 from 20:26 to 21:41 hours and during cross examination PW8 stated that the 1st appellant was arrested on the same day of 4/6/2020 at around 18:30 hours. Based on this testimony there is an interval of not more than 2 hours between the arrest and the recording of the cautioned statement. Further, as rightly stated by the state attorney the cautioned statement was neither repudiated nor retracted, the 1st appellant only complaint was that the statement was recorded by the arresting officer, a ground which was overruled. I have also gone through Exhibit PE1 it is tittled '*Maelezo ya ungamo ya Yusuph Musa Mbonde'* which translates as 'Extra judicial

statement of Yusuph Musa Mbonde', therefore I agree with the learned state attorney that the court referring PE1 as cautioned statement was a slip of the pen which does not affect prosecution evidence. Therefore, the 8th and 9th grounds have no merit.

In the 13th ground, the 1st appellant is complaining among others, that the trial magistrate did not consider his defence. It is vivid in record that the trial magistrate did not consider the appellant's defence. This omission leads to misapprehension of evidence and miscarriage of justice. As mentioned above, this being the 1st appellate court, it will assume powers of the trial court in considering the defence of the 1st appellant. Going through the 1st appellant defence at page 53 and 54 of the proceedings, he denied to have committed the offence, he explained among others that his father has plot near PW1 and that the two have a conflict. He added that he (PW1) had once stated that 'he will show him'. Now in the judgement there is nowhere suggesting that the trial magistrate considered the 1st appellant defence. I am of the view that there might have been grudges between PW1 and the 1st appellant's father, however I could not see how the said grudges would have caused PW1 to frame the 1st appellant in this case. PW1 was a security guard at the bar of PW3. There is no dispute that the properties were stolen from the bar and PW1 was attacked and injured. PW1 could not have staged

this robbery just to discipline the 1st appellant. I find this as a weak defence which does not goes to the root of prosecution case, against the 1st appellant.

The remaining grounds 11th, 12th and 15th challenges the evidence against the 1st appellant, that it was contradictory, uncorroborated and there was no search done to trace the alleged stolen items. These grounds will be addressed jointly because they are co-related. On whether PW8 took an oath, the typed proceedings read: 'take and other and statement' however having gone through the original records, it reads: "PW8 *take 'and' oath and state"* clearly, it is my finding that there is a slip of a pen during trial which led to a typing error but in my opinion both errors found in the original and typed proceedings, cannot be interpreted that PW8 did not testify under oath.

In respect of evidence against the 1st appellant, having weighed the prosecution evidence I have gathered that; **one;** PW1 has successfully visually identified him at the scene of crime as one of the attackers, **two;** the 1st appellant has confessed to have committed the offence when he was recording both his cautioned statement and his extra judicial statement which were admitted as exhibits PE4 and PE1 respectively, **three,** the fact that the 1st appellant was not found with the stolen

properties does not mean that he was not involved in armed robbery. To me, the prosecutions' evidence points fingers to the 1st appellant as being responsible with the offence of armed robbery which he was charged with. It means therefore, the prosecution produced water tight evidence to prove that the 1st appellant, being armed, he attacked PW1 and managed to steal the items in the bar belonging to PW3.

To conclude;

1. The appeal is allowed in respect of the 2nd, 3rd and 4th appellants. I therefore, quash the convictions and set aside the sentences and orders against the said 3 appellants. I order that Omary Juma Kitambulio @Ballo, Rashid Said @Lwambonako and Majid Juma Mung'agi @Dunchu be set free unless they are held for some other lawful cause.
2. The appeal against the 1st appellant Yusuph Musa @Mbonde @Mashoto, fails and it is hereby dismissed.

   It is so ordered.

Dated at **DAR ES SALAAM** this 4th day of October, 2022.

L. J. ITEMBA
JUDGE
04/10/2022

Judgement delivered by Hon. J. Luambano, Deputy Registrar, this 4th day of October, 2022 in the presence of all 4 appellants in person, Mr. Emmanuel Maleko, learned Senior State Attorney for the Respondent and Mr. Oscar RMA.

Further rights fully stated.

L. J. ITEMBA
JUDGE
04/10/2022