IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

CRIMINAL APPEAL NO. 31 OF 2022

(Originating from the District Court of Kiteto at Kibaya, Criminal Case No. 146 of 2020)

MAISHA JONAS @ NGITAO .....1st APPELLANT

JITIHADI SELEMAN NGOLO @ KERI .....2nd APPELLANT

SHUKURU YOHANA @ MASUDIA SAID ..... 3rd APPELLANT

WILSON LETEMA @ SIDE ..... 4TH APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order 4th October, 2022
Date of Judgment 27th October, 2022

MALATA, J.

Maisha Jonas @ Ngitao, Jitihadi Seleman Ngolo @ Keri, Shukuru Yohana @ Masudia Said and **Wilson Letema** the Appellants herein, are challenging conviction and sentence of thirty years imprisonment imposed on them by Kiteto District Court (the trial Court). In the trial, the Appellants were charged with two counts of Armed Robbery contrary to section 287A of the Penal Code, Cap. 16 [R.E 2019].

It was alleged by the prosecution that on 16/03/2019 at 16:00hrs at Mturu area, Lengatei village within Kiteto District Manyara Region, the Appellants did steal two motorcycles make SANLG, the properties of Sunguya Kerika

and Msuya Simon Mswahili, and immediately before and after stealing they did threaten the owners of the said motorcycles by using local made shotgun in order to retain the said properties. All the four Appellants pleaded not guilty to the charges

Before dwelling on the merits of the appeal, it is resourceful to recount background facts of the case leading to this appeal as can be gleaned from the evidence adduced, albeit briefly. They thus go: On 06/03/2019, at 16:00hrs Sunguya Kerika (PW1) was from Sunya Market heading to his home. While at Mturu area he met the Appellants who robbed him his motorcycle, make SANLG with registration No. 493. The 1st Appellant had a gun and the 4th Appellant had manchette.

On that day, at around 15:00hrs, Msuya Simon @ Mswahili (PW4) was heading to Kibaigwa where he lives. He was riding his SANLG motorcycle, red in colour with registration No. MC 916 AAW. When he reached at Mturu area, he found three motorcycles parked on the road. When he was closer, he was stopped by the 3rd Appellant who had a machete. After stopping, the 1st and 4th Appellants emerged from the wilderness, holding guns. They forced PW4 disembark from the motorcycle, which he did. He was taken off the road to the wilderness where he found other people who were captured. They were ordered to sleep on their bellies and warned that whoever raised his head would be shot dead. The assailants took his bag, phone, TZS 50,000/= and his motorcycle, and disappeared. The victims reported the matter to Sunya police post. His motorcycle registration card was admitted as exhibit PE6. PW4 bought the motorcycle from Mohamed Musa Hamisi. The sale agreement was admitted as exhibit PE7.

On 08/05/2019, F 17879 Inspector Hassan (PW2) was called by the OCCID. He was assigned to go and carb robbery incident that was planned to take place. He was informed that there was an organized robbery incident against sunflower businesswoman that would be executed at Lelku village Kiponyi area. He organized his fellow policemen, headed to Kiponyi junction. After a short while, the bandits arrived in three motorcycles. They were ordered to stop but defied the order. Instead, they started to shoot bullets towards the policemen. PW2 and his colleagues responded by shooting back, they managed to injure three bandits and three managed to escape. The injured bandits were taken to Kiteto Police Station but two of them died on the way before reaching to the hospital. The surviving bandit was the third Appellant, who was taken to the hospital.

At the crime scene they found two locally made shotguns and ten bullets. The third Appellant was riding motorcycle with registration number MC 493 BQV which was stollen from PW1 at Mturu area and reported at Sunya police post. They handed the exhibits to the police station. The SANLG motorcycle with registration number MC 935 ABR, chassis number LBR5PJSSXH9010181 was admitted as exhibit PE1.

G1525 DC Gregory (PW8) was the investigator of the case, On 06/03/2019 he went to Sunya market for patrol purposes following frequent robbery incidents that were reported. On that day, two people were robbed their motorcycles. As an investigator, he got information that one of the stollen motorcycle was at Tiago village.

On 09/05/2019, at 01:00hrs, PW8, PF 20548 A/Insp Venant (PW3) and other police officers were assigned duty by OCCID to go to Tiago village where he heard of people owning guns. They left for Tiago village where they met the secret informer, who took them to the 4th Appellant's house. They also took the hamlet chairman Paulo Kefa (PW6) with them. They knocked the 4th Appellant's door but he refused to open. They had to break the door. When they entered in, they found the 4th Appellant sleeping with his wife and their little child. They arrested him. They found 21 bullets on the table that was in the room. When they inspected the room, they retrieved two shotguns locally made from a pistol. The two local shotguns were admitted as exhibit PE2. They filled the certificate of seizure which was signed by the 4th Appellant as well as PW6. It was admitted as exhibit PE3.

They organized themselves, went to the 1st Appellant's house. They arrested him. After interrogating him, he admitted that they had stollen motorcycle which he had left to Lusulo Sonyo (PW7). He took them to PW7, who opened for them and admitted to have the 1st Appellant's motorcycle. The motorcycle was red in colour, make SANLG, with registration number T 938 BRD, but upon investigation, it was revealed that its true registration number was MC 916 AAW. PW3 filled the certificate of seizure which was admitted as exhibit PE5. The motorcycle with registration number T 938 BRD with chassis number LBRSPJB58C9022455 was admitted as exhibit PE4.

On the same night they went to arrest the 2nd Appellant. After inspecting his house nothing was found therein. They took the 1st, 2nd and 3rd Appellants to the police station together with the exhibits. On the same day in the morning, G 5310 DC Mussa (PW5) was assigned to record the

confession statement of the 1st Appellant. He recorded the statement from 08:00 hrs to 09:30hrs. In the statement, the 1st Appellant admitted that on 06/03/2019 together with Side, Davi and Yohana were involved in the armed robbery incident at Mturu area where they robbed two motorcycles, five phones and TZS 150,000/=. He also admitted to have changed the registration number of exhibit PE4. The confession statement of the 1st Appellant was admitted as exhibit PE8.

On 17/05/2019, PW1 was called at Kiteto Police Station, where the Appellants had been arrested and he identified them. He also found his motorcycle which was found in the Appellants' possession at the time they were arrested.

the Appellants generally denied involvement in the commission of the offence. Maisha Jonas Ngitao (DW1) was arrested at his home while sleeping after his door was broken. He was severely tortured as result signed the confession statement. Finally he testified that, he was put under medication until 20/05/2019 when he was arraigned in the trial Court.

Jitihad Seleman Mgolo (DW2) stated that on 08/05/2019 he went to Ngirigishi village to buy crops. On the next day while at Mama Bill's house he was arrested, taken to Kiteto police station where he met the co-Appellants. On 16/05/2019 they were taken to Babati and the next day they were returned to Kiteto. On 20/05/2019 they were arraigned in court.

Shukuru Yohana Mswahili (DW3) was arrested on 13/05/2019 at 05:00hrs. He was severely beaten to the extent that his two legs, left hand and a finger were broken. He was put in the police vehicle where he found two dead bodies. He was taken to Kiteto hospital where he was

admitted for seven days. On 22/05/2019 he was taken to court. He attended hospital while in the prison. His referral letters and PF3 were admitted as exhibits DW3 1, and DW3 2 respectively.

Saidi Wilson Letema (DW3) was arrested on 08/05/2019 while sleeping at his home with his wife and child. The police officers took his money, motorcycle and clothes. They also took the guns out of their car and put them in DW4's house. They called the chairman whom they told that they found guns in DW4's house. He was taken in the police vehicle where he found other people he didn't know. They were taken to Kibaya police station. DW4 was tortured until 22/05/2019 when he was taken to court. He was given referral to Dodoma General Hospital for treatment. His PF3, referral letter, hospital file and x-ray print out were admitted as exhibits DW4/1, DW4/2, DW4/3 and DW44 respectively.

After hearing the evidence and scrutinized the tendered exhibits, the trial Magistrate found the charges against the Appellants were proved beyond all reasonable doubts. They were convicted of both offences and sentenced to serve thirty years imprisonment. Aggrieved by both conviction and sentence. They preferred this appeal to protest conviction and sentence. Initially, the appeal was preferred on seven grounds. With leave of the Court, the Appellants filed additional nine grounds of appeal, but at the hearing of this appeal, they condensed them into five grounds as hereunder:

1) *The trial Court erred in law and fact in convicting and sentencing the Appellants basing on incurably defective charge sheet;*

2) *That, the trial Court erred in law for failure to accord right to DW1, DW2 and DW3 to cross examine DW4;*
3) *That, the trial Court erred in law and fact by relying on identification evidence which was not watertight to warrant conviction of the Appellants;*
4) *That the trial Court erred in law and in fact for relying on a flawed and irregular conducted identification parade which was conducted contrary to PGO 232; and*
5) *That the trial court erred in law in invoking the doctrine of recent possession in convicting the Appellants.*

Basing on the foregoing grounds of appeal, the Appellants prayed that the appeal be allowed by quashing conviction and setting aside the sentence meted against them.

At the hearing of the appeal, the Appellants appeared in Court in person unrepresented and defended for themselves. The Respondent, Republic, was represented by Mr. Charles Kagirwa, learned State Attorney. The appeal was heard *viva voce*. By consent of other Appellants, the second Appellant submitted on behalf of the rest.

Submitting in support of the *first ground* of appeal, the Appellants contended that there was variance in the charge sheet in respect of the crime scene. In the charge sheet the crime scene was Mturu area Lengatei village, Kiteto District in both counts, but the evidence adduced by PW1 and PW4 the scene of crime was Mturu road not Mturu area Lengatei village as per the charge sheet. They referred this Court to the case of ***Godfrey Simon and Another vs Republic***, *Criminal Appeal No. 296 of 2018 (unreported)* which held that where there is variance between the

charge and evidence in respect of the crime scene the charge sheet ought to be amended failure of which renders the charge sheet defective.

They further submitted that both in the 1st and 2nd counts, the charge sheet shows that the value of the stolen motorcycles is TZS 2,300,000/= while the evidence on record does not indicate their value.
Also, the chassis number of the stolen motorcycle in respect of the first count differs with the motorcycle tendered by PW2 as exhibit PE1
Additionally, in the second count the charge sheet shows that it was only motorcycle that was stolen from PW4, but in his evidence, PW4 mentioned other items such as mobile phone, bag and Tshs 50,000/=.

However, the referred items were not reflected in the charge sheet. The Appellants contended that, due to the variance apparent, the charge ought to have been amended as per section 234 of the Criminal Procedure Act and as guided by the Court of Appeal decision in the *case* ***Godfrey Simon*** *(supra).* He further made reliance on the Court of Appeal decision in ***Mashaka Bashiri vs Republic,*** *Criminal Appeal No. 242 of 2019* (unreported). Since the same was not amended, the trial Court proceeded to determine the based on the defective charge sheet.

Submitting in respect of the **second ground of appeal**, the Appellants averred that the trial court denied DW1, DW2 and DW3 the right to cross examine DW4 and cross examine each other. In their view, this contravened Article 13(6) of the URT Constitution 1977.

Elaborating the **third ground of appeal**, the Appellants asserted that the Appellants' identification was not watertight because there was no description of the Appellants in terms of apparels that they wore on the material day and other peculiar identity. They maintained that since the

crime took place in the day light, the victims ought to have proved that it was the Appellants who really committed the offence by providing clear identification of them. They referred this Court to the following Court of Appeal decisions: ***Kilian Peter vs Republic,*** *Criminal Appeal No. 508 of 2016 (unreported)* and ***Waziri Amani vs Republic*** *[1980] TLR 250.*

Regarding the **fourth ground of appeal**, it was the Appellants' argument that the identification parade stated to have been conducted by the prosecution was in violation of the law because there is no documentary proof whether such parade was conducted, specifically PF 180 was tendered. Additionally, the procedure before and after were not complied with by the police officers who conducted such parade.

Expounding the **fifth ground of appeal**, the Appellants averred that the doctrine of recent possession was wrongly invoked by the trial Magistrate. They submitted that, first, the victims did not identify the stolen properties by special marks, second, they failed to prove ownership as PW1 did not tender registration card to prove ownership. They submitted further that the Appellants were not found in possession of the stolen properties. Regarding exhibit PE4, its registration card was tendered in court but was not read to the parties. Thus, the trial Magistrate erred in convicting the Appellants basing on the doctrine of recent possession placing reliance on the case of ***Kilian Peter vs Republic*** *(supra).*

They insisted that the prosecution did not prove the case beyond reasonable doubts because there was no search warrant or receipt issued after seizing the exhibits from the Appellants. Further, chain of custody form was not tendered showing movement and how the seized items were stored. They made reference to section 38(1) of the CPA and the Court of

Appeal decision in ***Augustine Msigara & Another vs Republic,*** *Criminal Appeal No. 365 of 2018 (unreported).* Finally, the Appellants urged the Court to allow the appeal by quashing the conviction and setting aside the sentence.

On his part, Mr. Kagirwa did not support the appeal. Submitting in response to the ***first ground of appeal,*** he contended that the crime scene was the same both in the charge sheet and the evidence adduced. According to the evidence of PW1 and PW4, the crime scene was Mturu area which also appears in the charge sheet. He fortified that the cited case of ***Godfrey Simon vs Republic*** *(supra),* is distinguishable to the case at hand. Regarding the value of the stolen motorcycles, Mr. Kagirwa submitted that the value was not at issue, what mattered is the stolen motorcycles.

He conceded on the variation of the chassis number in the charge sheet in respect of the stolen motorcycle in the first count. On the stolen properties mentioned by PW4 in his evidence which do not appear on the charge sheet, Mr. Kagirwa submitted that the irregularity is minor one because the motorcycle which was the property in issue, was mentioned in the charge sheet. Alternatively, he urged the Court if the defect is found to be fatal, invoke section 388(1) of the CPA. To support his contention that the variation was minor, the learned State Attorney relied on the case of ***Emmanuel Lyabonga vs Republic,*** *Criminal Appeal No. 257 of 2019 (unreported).*

On failure to accord DW1, DW2 and DW3 the right to cross examine DW4, Mr. Kagirwa submitted that such right was afforded and the Appellants exercised it referring to page 77 of the trial court proceedings.

Submitting in respect of the **third ground of appeal**, Mr. Kagirwa argued that the offence was committed during broad daylight. Both PW1 and PW4 stated that the incident took place at 16:00hrs & 15:00hrs respectively, which shows that the Appellants were clearly identified. PW1 also stated that he identified the Appellants clearly.

Responding to the **fourth ground of appeal**, the learned State Attorney admitted that there was no documentary evidence proving identification parade as portrayed at page 18 of the trial court judgment. However, even in the absence of the identification parade register, yet the evidence of the prosecution witnesses proved identification of the Appellants.

Submitting on the **last ground**, Mr. Kagirwa fortified that the evidence adduced, connected all the Appellants in the commission of the offence. Similarly, the motorcycle card and the sale agreement tendered proved ownership of the stolen motorcycle which was found in possession of the 1st Appellant. Regarding seizure process, Mr. Kagirwa submitted that it was complied with as the certificates of seizure were tendered as exhibits PE3 and PE5. He insisted that the oral testimony of the witnesses suffice to mount conviction referring to the case of ***Simon Shauri Awaki @ Dawii vs Republic,*** *Criminal Appeal No. 62 of 2020* (unreported) to augment his contention. He concluded that the offences were proved beyond reasonable doubts and prayed for dismissal of the appeal.

When given opportunity to re-join, the Appellants had nothing useful to add, they simply insisted that their appeal should be considered and allowed.

This Court has given deserving weight to the grounds of appeal and the submissions by both the Appellants and the learned State Attorney. I have also scanned the trial court record; thus, I will determine the appeal basing on the grounds of appeal as raised and argued by the parties.

In the first ground of Appeal, the Appellants challenged the charge sheet stating that it was defective. The **first** complaint, they pondered that the charge and the evidence adduced in respect of the crime scene varied. I have revisited the trial court record, in both counts, the charge shows that the place where the armed robbery took place is Mturu area, Lengatei village within Kiteto District Manyara region. In his evidence regarding the crime scene, PW1 is recorded to have said:

> *"I am Sunguiya Kalika, I live at Lemugu am (sic) a pastoralist. On 6/3/2019 I was at Sunya in a market (sic) to sell my cows. I left the market at 3:30pm, at 4:00 I was at **Mturu area, I met the accused** and they took my motorcycle..."*(Emphasis added)

Similarly, in his evidence regarding crime scene PW4 who was also the victim of the robbery stated:

> *"On 6/3/2019 I was at farm Kilimbogo, at around 3:00pm I started going back home at Kibaigwa. I decided to pass through **Mturu road** ahead I found three motorcycles parked on the road."*(Emphasis added)

From the above evidence of the victims of crime, the allegation by the Appellants that there was variance in their evidence and the charge regarding the crime scene, appears unfounded. As reproduced above, both in the charge sheet and the evidence adduced, the crime scene was said to be Mturu area. Correctly as pointed out by Mr. Kagirwa, the case

of ***Godfrey Simon and Another vs Republic*** *(supra)* is distinguishable to the circumstances of the case at hand. This Court found that, the first ground of appeal lacks merits.

The **second** complaint posed by the Appellants is that there was no disclosure of the value of the stolen motorcycles in the evidence adduced. They contended that the charge sheet shows in both counts that the value of the stolen motorcycles was TZS 2,300,00/= @ each. I entirely agree with the Appellants that there was no evidence that led to disclose of value of the stolen motorcycles in both counts. Had that evidence been adduced, the Court would have been in a position to determine whether the value stated by witnesses varied with the value stated in the charge sheet. In the absence of such evidence, failure to disclose the value of the stolen motorcycles in both counts in my view, did not prejudice the Appellants nor did it occasion any injustice. As such, I endorse Mr. Kagirwa's submission that since the stolen motorcycles were stated and described in the charge sheet, their value in evidence was immaterial. Further, the contentious issue is stealing and not value of the stolen properties.

The **third** complaint is in respect to variance between the charge and the evidence of PW2 on chassis number of exhibit PE1. According to the *first* count, the Appellants were charged of stealing a motorcycle make SANLG with chassis number LBRSPJB5XH9010282. However, in evidence by PW2, the said motorcycle exhibit PE1 with registration number MC 935 ABR had chassis number LBRSPJ55XH9010282. That the chassis number is different with the one stated in the charge sheet. Further, the charge sheet did not provide for registration number.

Further, in the second count, as it appears on the charge sheet, the motorcycle had chassis number LBRSPJB58C9022455 make SANLG., however, with no registration number. This was stolen from PW4. During testimony, PW4 stated that, among the properties stolen at the scene of crime were motorcycle, bag, mobile phone and Tshs 50,000, however the same were not made part of the stolen properties as per the charge sheet.

Having noted the variance, the prosecution ought to have prayed for amendment of the charge as per section 234 of the CPA, of which they did not. It is trite law that variance between the charge and the evidence adduced renders the charge sheet defective. Inspiration in this respect is gathered in the case of ***Michael Gabriel vs Republic,*** *Criminal Appeal No. 240 of 2017 (unreported),* where the Court held:

> *"Going by the above stated position of the law, we find that the variance rendered the prosecution case deficient of proof beyond reasonable doubt. Besides that deficiency, the manner in which the skins, the subject matter of the charge was handled, raises reasonable doubt in the evidence as to whether the same were found in possession of the appellant."*

In criminal law, a charge sheet is a heart or constitution of any criminal offence without it nothing can be proved against accused. This legal position is anchored in ***Criminal Appeal No. 189 Of 2020 Remina Omary Abdul Vs Republic, (CAT unreported)*** where these were said;

> *"This requirement hinges on the fact that in a criminal trial a charge is the foundation of any trial against an accused person.* ***(See Mussa Mwaikunda v R [2006] T. L. R. 387).*** *Accordingly, the particulars, in order to give the accused a fair trial, the particulars should be informative enough so as enable*

him to align a proper defence. They must allege the essential facts (ingredients) of the offence required by law"

In the light of the above position of the law, failure by the prosecution to amend the charge to reflect the chassis number and registration card number in respect of the stolen motorcycle in the first count renders the charge sheet on the first count defective. This goes hand in hand with the fact that PW1 did not tender any evidence to prove ownership of the said exhibit PE1. Hence, the charges against the Appellants in respect of the first count were not proved due to the highlighted errors in the charge sheet.

The **fourth** complaint by the Appellants is in respect to other items alleged to have been stolen from PW4, but erroneously not reflected in the charge sheet. Mr. Kagirwa admitted to the flaw but he was of the view that since the motorcycle was mentioned, that sufficed. I have revisited the charge sheet which shows that the only items stolen in both counts were two motorcycles. However, in his evidence as reflected at page 39 of the typed proceedings PW4 is recorded to have said the following:

*"I went off the motorcycle, and slept on my belly. I had a bag on the motorcycle, **they took the bag, my phone and 50,000 Tshs.**"*(Emphasis added)

As it is apparent on the charge sheet, items such as the bag, the phone and TZS 50,000/= were not reflected in the charge sheet. However, as depicted, the victim (PW2) in his evidence mentioned them as among the stolen items. Furthermore, in his evidence, PW5 who recorded the confession statement of DW1 stated that DW1 admitted to have participated in the crime and among items they stole on 06/03/2019, were

two motorcycles, five mobile phones and TZS 150,000/=. Failure to feature such items in the charge, rendered the evidence insufficient to ground conviction and sentence against the Appellants.

In ***Issa Mwanjiku @ White vs Republic,*** *Criminal Appeal No. 175 of 2018 (unreported),* the Court of appeal had this to say on omission of failure to include in the charge sheet the properties mentioned during trial:

> *"We note that, other items mentioned by PW1 to be among those stolen like ignition switches of tractor and Pajero were not indicated in the charge sheet. In the prevailing circumstances of the case, we find that the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard." Similar stance was taken in the case of* ***Masota Jumanne vs R, Criminal Appeal No. 137 of 2016 (unreported).*** *In that case items such as 4 kg of sugar, 2 bars of soap, 7kg of rice featured in evidence, while the particulars of offence of armed robbery named a bicycle and Tshs. 15,000/= only. When the matter reached the Court of Appeal, it was held that: -*
>
> *"In a nutshell the prosecution evidence was riddled with contradiction on what actually was stolen from PW1. Such circumstances do not only imply that there was a variance between the particulars in the charge and the evidence as submitted by the learned State Attorney. This also goes to the weight of evidence which is not in support of the charge."*

Additionally, *in* ***Mashaka Bashiri vs Republic,*** *Criminal Appeal No. 242 Of 2017 (unreported),* the Court of Appeal while deliberating on a similar issue observed that:

> *"It is therefore evident that, even at this initial stage, the prosecution did not seek leave to amend the charge to include all the alleged stolen properties therein. The failure to amend the charge sheet is fatal and prejudicial to the appellant hence leads to serious consequences to the prosecution case as it was stated by this Court in various cases some of which have been cited to us by the appellant. Specifically, in the latter case, when the Court dealt with an akin situation where the charge sheet was at variance with the evidence in relation to the type of properties which were alleged to have been stolen from the complainant PW, it stated that: -*
>
> ***"We note that, other items mentioned by PW1 to be among those stolen like, ignition switches of tractor and Pajero were not indicated in the charge sheet. In the prevailing circumstances of this case, we find that the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard."*** [Emphasis added]

Going by the above stated position of the law, it is the finding of this Court that the variance on the stolen items rendered the charge sheet defective in respect of the second count. I hold this view because the evidence of PW4 was in respect of the second count.

In totality since the charge sheet has been found defective in both counts, it rendered the prosecution case deficient of proof beyond reasonable doubt. Fortified by the above observation and analysis, the first ground of appeal has merits, it is accordingly allowed.

In the ***second ground of appeal***, the Appellants' complaint is that they were not accorded right to cross examine each other. Specifically, they complained that DW1, DW2 and DW3 were not accorded right to cross examine DW4. My perusal of the record shows that the complaint is unfounded. For easy reference, I will reproduce what transpired after DW4 was cross examined by the Public Prosecutor. The following is noted in the proceedings at page 77:

"DW4 RE XD BY ACCUSEDS

1st accused: I don't know you.

SGD M. S. SASI-DRM

5/7/2021.

2nd accused: I don't know you.

SGD M. S. SASI-DRM

5/7/2021.

3rd accused: I don't know you.

SGD M. S. SASI-DRM

5/7/2021.

S. 210(3) CPA cap 20 R. E 2019 complied with."

From the above, it is patently clear that the 1st, 2nd and 3rd Appellants were accorded right to cross examine the 4th Appellant when he was testifying. They mutually exercised that right by asking him questions whether he knew them. Therefore, the second ground of appeal is found devoid of merits, it stands dismissed.

As to ***the 3rd and 4th grounds of appeal*** being in respect to identification this Court has dealt with it together. In the first place, my entire perusal of the trial court record, I did not come across a piece of evidence suggesting that identification parade was conducted. At page 15 of the proceedings, PW1 is recorded to have said:

> *"I went and found the accused and recognize them, they were placed outside on a line and I recognize (sic) them all the accused."*

That piece of evidence does not conclusively imply that identification parade was conducted. More than that ought to have been stated such as the mode used in identifying the Appellants, the number of people that lined up, their features and so on. The conduct of identification parades is governed by Police General Order (P.G.O) No 232 issued by the Inspector General of the Police by virtue of the powers vested in him under section 7 (2) of the Police Force and Auxiliary Services Act, Cap 322 R.E.2002.

In the case of ***Maisa Lucas Mwita @ Kipara vs Republic,*** *Criminal Appeal No. 119 of 2011 (unreported),* the Court of Appeal propounded procedures to be complied with in conducting identification parade. This guidance are found in the defunct Court for Eastern Africa in the case of ***Rex Vs Mwango Manaa [1936] EACA 29.*** The rules include the filling in of the identification parade register, the suspect is also to be informed his right to have his advocate or relative in attendance, persons selected for the identification parade must be of similar age, height, and general appearance, the officer in charge of the case may be present in the parade but must not take part in the parade, there should be no delay in

conducting the parade from the day the accused is arrested and so on, as highlighted in PGO 232.

Having gone through the evidence, as pointed out earlier, there is no evidence suggesting that identification parade was conducted and if so, the procedures were not complied with. Further there is no attendance register that was tendered in evidence proving that identification parade was actually conducted. However, in her judgment, the learned trial Magistrate relied on identification parade in finding the Appellants guilty. At page 18 of the judgment, she had this to say:

> *"In this case at hand, I had no doubt as to the identification of the accused since according to the prosecution witnesses PW1 and PW4 the offence was committed at daylight so it was easy for the victims to recognize the accused* ***but also an identification parade was held at the police station at Kibaya and the victims recognized the accused as for PW2 evidence."*** (Emphasis added)

It was grave error for the trial magistrate to rely on the evidence of identification parade which was not in place. In other words, such evidence, even if adduced, was deficient of procedure. It ought not to be relied upon to form basis of the Appellants' conviction.

On whether the Appellants were properly identified, no description was given to eliminate possibilities of mistaken identity of the Appellants. In his evidence, PW1 denied to have known the Appellants before. In his evidence PW4 when cross examined, he admitted that he knew DW1 and DW4 before as he lived in Taigo village. However, there is no evidence that he named the suspects at the police immediately after the incident.

It is settled principle of law that failure to name the suspect at the earliest opportunity casts doubts in the prosecution evidence. In ***Juma Marwa and 2 Others vs Republic,*** *Criminal Appeal No. 91 of 2006 (unreported)* the Court stated:

> *"There was no description of the 2nd Appellant (3rd Accused). None of the witnesses put up an explanation as to how they knew the 2nd Appellant, his physique* ***and the clothes he was wearing.*** *No description of the 3rd Appellant (5th Accused) was given; neither the physique* ***nor the clothes he was wearing.*** *This was also true in respect of the 1st Appellant (1st Accused)."*
> (Emphasis added)

That said and done, the Appellants' identification was unprocedural. The trial Magistrate fatally erred in relying on the evidence of identification parade, which was not in compliance with the dictates of the law. The 3rd and 4th grounds of appeal are meritorious. It is therefore allowed.

Mindful, I thought of the advice made by Mr. Kagirwa that, the defects he admitted to exist are curable under section 388 of the CPA. I do not want to event the will, but respectfully adopt principles of our respectable decision of our superior Court in Criminal Appeal No. 168 of 2015 between ***Mateso Nguruwe*** *and* ***Fukia Liganga Vs the Republic*** *(CAT unreported),* where it settled that;

> *"We take the same position and hold that since we have found the charge, which was the foundation of the trial, to be incurably defective, then there is no charge in existence on which the appellants can be retried. As we have hinted upon, the defectiveness of the charge will suffice to dispose the appeal*

and, for that matter, we need not belabour on the merits of the other grounds of appeal".

In nutshell, the 1st, 3rd and 4th grounds of appeal sufficiently dispose of the appeal. I find no compelling reasons to dwell on the rest of the grounds. I am indebted to emphasise that, in criminal law, a charge sheet is a heart or constitution of any criminal offence in which the prosecution side bears legal duty to prove beyond reasonable doubt. Such charge must disclose all features to enable the accused understand the nature of offence and enter defence passionately.

This Court hold therefore that, ***first,*** there was no proper charge maintainable against the Appellants following the failure by the prosecution side to apply for leave to amend the charge sheet as guided by the Court of Appeal through the afore cited decision, in the circumstances, such as in this case, and ***second***, the Appellants' identification evidence used in convicting the Appellants was full of imperfection, thus inadmissible.

As such, the trial Court's conviction and sentence were founded on fatally defective charge sheet and inadmissible evidence. That being the case, the conviction and sentence by the trial Court was illegally anchored. Consequently, I allow the appeal, quash conviction and set aside the sentence imposed to the Appellants. The appellants are to be released forthwith unless otherwise lawfully detained in custody.

It is so ordered.

DATED at **ARUSHA** this 26th October, 2022.

G. P. Malata

JUDGE

26th October,2022

Right of appeal explained to the parties

G. P. Malata

JUDGE

26th October,2022