IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CONSOLIDATED CRIMINAL APPEALS NO. 38 AND 44 OF 2022

(Originating from Criminal Case No. 146 of 2020 of the District Court of Musoma at Musoma)

WILLIAM MWITA @ MUGERWA ..... 1ST APPELLANT

AMOSI CHACHA @ MAGUMBO ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

It was on evening of 12/08/2020 where Joyce Mkama was returning home after a whole day long at her place of business. When reached home together with PW3 and her young sister, while at the gate of her home waiting it be opened, they were invaded by three bandits who covered their faces with masks. Those people took two handbags which had money and four mobile phones which were in those handbags (two Nokia, one Itel and one Infinix). After that crime they left with motorcycle. By using IMEI number, Itel phone was recovered and Tatu Maroba, Monica Juma and the second appellant were arrested. Through second appellant the first appellant was arrested with one Nokia phone and a homemade gun.

Following their arrest, both appellants were charged with the offence of armed robbery contrary to section 287A of Penal Code, Cap 16 [R. E. 2022] and the 1st appellant was charged with second count of found in possession of goods suspected to have been stolen. They denied all charged hence full trial. Basing on evidence adduced, the trial Magistrate was satisfied that offence was proved to the required standard and convict the accused then sentenced appellants to thirty years imprisonment on first count and two years imprisonment to 1st appellant for the second Count.

Mr. Amos Wilson and Mng'arwe both advocates represented appellants in this appeal while republic was represented by Isihaka Ibrahim and Natujwa Bakari. As the complaints in the appeals were identical in substance originating from the same decision of the trial court, on 10/05/2023 when they came up for hearing separately, Mr. Isihaka Ibrahim learned state Attorney prayed that the appeals be consolidated so that they can be heard together prayer which was not objected to by counsel for appellants. For convenience of each party and for purposes of economy of time and of all other resources to be deployed in prosecuting and defending the appeals, this court consolidated the two appeals so that the same could be determined together. Together with that order of consolidation, there were

a few supplementary orders that were made including orders that the controlling record shall be criminal appeal no 38 of 2022 and that the appellants shall be arranged as they are appearing in the caption to this appeal.

1st appellant had three grounds but decided to abandoned one while the 2nd appellant had three grounds. One ground was similar to both and therefore when grounds were merged, they form the following summarized grounds of appeal in the consolidated appeal;

1. That the prosecution failed to prove their case beyond reasonable doubt.
2. That the trial court relied on caution statement and extra-judicial statement which were illegally and improperly obtained.
3. That the trial court failed to asses, evaluate and analyze the evidence properly.
4. That the trial court was silent on how the prosecution dealt with the chain of custody of exhibits tendered.

I will tackle this appeal in line with submission of parties. Before doing so, I wish to restate the salutary principles of law that, **one**, a first appeal is in the form of a re-hearing and as such, this being the first appellate court, this court is duty bound to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact (see **Iddi Shaban @ Amasi vs. Republic**, Criminal Appeal No. 2006 (unreported)). On the part of the first appellate court, the credibility of a witness can be determined in other ways namely, when assessing the coherence of the testimony of that witness and when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person (see - **Shaban Daudi vs. Republic,** Criminal Appeal No. 28 of 2001 (unreported)).

The evidence will be evaluated while analyze all grounds of appeal as fronted by both appellants as insisted in the case of **Firmon Mlowe vs. R,** Criminal Appeal No. 504 of 2020 CAT that;

> *We are aware of the settled position that the first appellate court is not bound and expected to answer the points for determination or issues as framed by the trial court in Criminal and Civil cases respectively. Indeed, it is not expected to deal with the grounds seriatim as listed in the petition of appeal. It may also if convenient, address the grounds*

of appeal generally or address the decisive ones only or discuss each ground separately. Nonetheless, the trial court has the duty and is bound to resolve the complaints contained in the raised grounds of appeal.

The central area of this appeal is conviction which was made basing on the caution statement and the Extra Judicial statement as shown in the judgement. This is the second ground of the combined grounds, which according to appellants they were illegally and improperly obtained. Mr. Mng'arwe who represented the 1st appellant submitted that Exhibit P11 was prepared contrary to the law. At page 53 of proceedings, PW6 informed the court he recorded the statement of the 1st appellant from 10:00 hours to 20:00 hours. The law dictates the same to be recorded in 4 hours only. From that he said the caution statement was illegally prepared, he prayed the same to be expunged from court record.

Further to that it was his submission that the statement show it was made under 53, 57 and 58 of the CPA. He clarified that Section 57 is about interview which was done and reduced into writing but he did not see the connection or there are same pages are missing concerning utilization of section 58. To him there are some other information concerning section 58 which are missing and therefore it was admitted wrongly. It was incomplete.

Because the caution statement is the one connects the 1st appellant and the 2nd appellant and when removed its effect will fall to both appellants.

Addressing the issue of time within which the Exh P11 was recorded and enabling provision therein Mr. Isihaka had a brief submission by praying this court to visit handwritten proceedings for authentication.

About caution statement, State Attorney said it was right to be admitted as was cleared for admission any document before tendered must be cleared for admission. It was read in court and the 1st appellant said nothing over the exhibit. And about other provision of law which is section 58 to feature in Exh P11 it was his position that appellant should state to what extent they have been prejudice by the existence of that section and he relied the case of **Nyerere Nyague vs. The Republic,** Criminal Appeal no.67 of 2010 CAT at Arusha and pray this court to maintain the admission of the caution statement.

I visited the handwritten proceedings to verify the time within which the Exh. P11 was prepared. It was from 19:00 hours up to 20:45 hours. From that record then this court find the Exh. P11 was recorded within the prescribed time.

Before analyzing the issue of enabling provisions for recording Exh. P11, I find it necessary to reproduce some of the contents of the said provision thus;

> 'S.*57. (3) A police officer* ***who makes a record of an interview*** *with a person in accordance with subsection (2) shall write, or cause to be written, at the end of the record a form of certificate in accordance with a prescribed form and shall then, unless the person is unable to read—*
>
> *(a) show the record to the person and ask him-*
>
> *(i) to read the record and make any alteration or correction to it he wishes to make and add to it any further statement that he wishes to make;*
>
> *(ii) to sign the certificate set out at the end of the record; and*
>
> *(iii) if the record extends over more than one page, to initial each page that is not signed by him; and.....*
>
> *S. 58 -(1)* ***Where a person under restraint informs a police officer that he wishes to write out a statement,*** *the police officer shall – (a) cause him to be furnished with any writing materials he requires for writing out the statement; and (b) ask him, if he has been cautioned as required by paragraph (c) of section 53, to set out at the commencement of the statement the terms of the caution given to him, so far as he recalls them.*

From the contents of Section 58, a person under restraint is allowed to write his statement, that's why Mr. Mng'arwe was claiming some pages are missing. I see his concerned. If the statement was written under section 53, 57 and 58 then there must be a statement which was written by the accused, in this case the 1st appellant. State Attorney was of the submission that appellants should show how they were prejudiced to this. I find the contents of other parts of the Exh 11 would help in analysis of issues and balance what has been recorded by the police officer and those written by the appellant himself if at all both sections were used. Otherwise Exh. 11 is incomplete as it implicates there is another party which is written by the appellant under section 58 and not attached.

It is on record that 1st appellant repudiated his confession made in Exh P11. The trial Magistrate cited the authorities which requires him/her to satisfy herself that the confession is true. Hon. Magistrate ends up to say, with due respect, that she was satisfied without analyzing how she come to that conclusion that the confession was true. She admitted at page 6 of judgment that the 1st appellant was given Panadol and the same 1st appellant informed the court he was bleeding and he used his clothes to wipe out blood. This is also featured during cross examination when the 1st appellant informed the

court that his clothes were taken by police officer. That mean the clothes had blood stains/ mark that's why police officers took them. All these were not analyzed by the trial Magistrate. State Attorney relied in the case of **Nyerere Nyague vs. the Republic,** Criminal Appeal no.67 of 2010 CAT at Arusha that;

> *'It is not therefore correct to take every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence'.*

This court agree with this position but the same court in the same case provide conditions on applicability to the contrary at page 12 thus;

> *'The decision of the trial court on such matters can only be faulted if it can be shown, that the admission of rejection of such evidence was objected to and that it did not properly exercise its judicial discretion, or at all in rejecting or admitting it'.*

In the case at hand. The admission was objected by the 1st appellant and the trial within a trial conducted and the trial court ending up with admission, I find with due respect the discretion was not properly utilized as explained earlier. Therefore, this court finds the Exh. P11 is incomplete and therefore it was wrongly admitted and is hereby expunged from court record.

Another complain was on admission of the Exh. P7 and Exh P8 Extra judicial statements for both appellants. Counsel for the first appellant succumbed that the extra judicial statement is not supposed to remain in court record as it was prepared contrary to directives of its composition. He said the offence record in the extra judicial statement is not the one the appellants were charged as Exh P8 (extra judicial statement) is about to be found with the pistol while the charge was Armed robbery and found in possession of property suspected to be stollen. He submitted further that when the offence is difference from the one charged, it provides explanation which is not well informed to the appellant. The counsel persuaded this Court to be inspired by a similar stance once dealt by the Court of Appeal in the case of **Mashiku Kidesheni and God Mikoba vs. Republic**, Criminal Appeal No. 586 of 2017 CAT at Mwanza (unreported) at page 8 and 9 that appellants were not informed of the offence for which they were under investigation and that extra judicial statement was expunged and prayed this court to do the same.

State Attorney submitted that the extra judicial was recorded and tendered by PW4 (the Exhibit 8) at page 30. It was admitted without objection. About the presence of other person in the office of justice of peace it was his submission that the testimony should be read in totality not in isolation as

there was a time where PW4 said his assistant was outside. He said so far as Exh. P8 was not objected then it cannot be challenged at later stage and that the court was right to base on extra judicial as was in the case of **Abasi Kondo Gede vs. Republic,** Criminal Appeal No. 472 of 2017 CAT at Dar es Salaam.

The case law cited which is **Nyerere Nyague vs. the Republic** (supra) which has the principle that so far as the exhibit was admitted then it cannot be challenged and expunged at later stage. I had a time to re visit the relied authority. At page 6 and I find;

> *'...during his defence, the appellant himself introduced that he gave a cautioned statement to the police. When the prosecutor sought to produce it, the appellant did not object to its production; and so it was admitted as Exhibit P2. He is now seeking to challenge its admissibility in this Court. It was never raised with the first appellate court. Again, as a matter of general principle, an appellate court cannot allow matters not taken or pleaded and decided in the court (s) below to be raised on appeal (See* ***KENNEDY OWINO ONYANGO AND OTHERS vs. R*** *Criminal Appeal No. 48 of 2006 (unreported) But due to the significance of this point we will try to revisit the basic legal principles on the subject.'*

The court went further and state;

'Objections to the admissibility of confessional statements may be taken on two grounds. First, under S. 27 of the Evidence Act that, that it was not made voluntarily or not made at all. Second, under section 169 of the Criminal Procedure Act: that it was taken in violation of the provisions of the CPA, such as sections 50, 51 etc. Where objection is taken under the Evidence Act, the trial court, has to conduct a trial within trial (in a trial with assessors) or an inquiry (in a subordinate court) to determine its admissibility. *There the trial court only determines whether the accused made the statement at all, or whether he made it voluntarily.'*

The court on this aspect provided six elements regarding admission of the accused confession. It insisted where objection is taken under section 169 of the Criminal Procedure Act, the trial court has absolute discretion not to admit such evidence having regard to the considerations shown under section 169(2). The court further states;

'It follows in our view therefore that the admission of evidence obtained in the alleged contravention of the CPA is in the absolute discretion of the trial court and that before admitting or rejecting such evidence, the parties must contest it, and the trial court must show that it took into account all the necessary matters into consideration and is satisfied that, if it admits it, it would be for the benefit of public interest and the accused's rights and freedom are not unduly prejudiced.'

I appreciate the analysis and I agree with the position of the court on this. Contrary to what was submitted by State Attorney on this, the cited case is distinguishable with the present case on the following reason. The accused in the cited case volunteered the exhibit to be tendered and the issue was not raised at the first appeal. In the case at hand the issue of the Extra judicial statement is raised in this first appeal.

It is on record that PW4 was with his assistant called Leonard Lameck when recording Exh. P7 (which is extra judicial statement of the 2nd appellant) on 09/09/2020 as shown at page 28 of the trial court proceedings. Moreover on 10/09/2020 when PW4 record the Extra judicial Statement of the 1st appellant at page 29 he explained that;

> *'I was at my office, the police officer came with William Mwita (the 2nd appellant) telling me that he brought him there for confession, I took out the police officer, I called Leonard and we closed the door'.*

It does not need more effort to see that while recording Exh. P7 and P8 the PW4 was with another person which is contrary to directives of taking that record. Having another person with him makes his position of free agent not to be seen as presence of another person hinder appellants to give free explanation. There are two issues concerning exh P8. **First;** it has offence

different from what the 1st appellant was charged with, **second;** it was recorded in the presence of another person. Court of Appeal in the case of **Adinardi Iddy Salimu and Another vs. Republic,** Criminal Appeal No. 298 of 2018 (unreported) insisted that the omission to comply with the mandatory statutory requirement cannot be remedied by the failure by the accused persons to object the same at trial because this court is incumbent to ensure that the law is complied with. See also- **Twaha s/o Ali and 5 Others vs. Republic**, Criminal Appeal No. 78 of 2004 and **Mashiku Kidesheni and God Mikoba vs. Republic**, (supra) on different offence in extra judicial statement.

From the above cited precedents, this court finds that exh. P8 was illegally procured and tendered and it cannot be left in the court record. It must be removed from court record, and it is done.

The fourth joined ground is about chain of custody. Mr. Wilson submitted that according to exhibit P9 and P2 which admitted in court (Itel and Nokia make mobile phones respectively) and their certificate of seizure which are Exh. P10 and P3 respectively, the chain of custody was not adhered to as set out by superior courts. He submitted that PW5 informed the court that he arrested Tatu and 2nd appellant and handled the exh. P9 to police station

after he seized it. That means he handled the exh. P9 without disclosing it was handled to who and by the time it was handled/tendered in court was coming from whose hand. The counsel said chain of custody is every important. Among many authorities the counsel cited the case of **Chacha Jeremia Murun and 3 others vs. Republic,** Criminal Appeal No. 551 of 2015 CAT at Mwanza.

On this ground, State Attorney was of the assertion that it was not true that record is silence on the chain of custody. He refers this court to page 20 of the proceedings where PW5 explained how he seized exhibits and the second appellant did not object. He said the 2nd appellant was supposed to do so or even at the hearing of defence was supposed to say so. It was his further submission that, if the court will find the chain to be broken, then, the CAT has provided the way forward in the case of **DPP vs. Stephen Gerald Sipuka,** Criminal Appeal No. 373 of 2019 when sited at DSM that the court should consider if the exhibit is easily to be tempered then chain of custody must be intact because exhibit was tendered and admitted he pray this court to accept the exhibit.

Reading from the trial court record, just as submitted by learned State Attorney, it was PW1 who seized exh. P2 via exh P1 on 09/09/2020 and at

page 20 he tendered in court on 25/05/2021. This witness informed the court that all exhibits were stored in exhibit room and they were taken from the exhibit room to the court by himself (PW1). Exhibit P9 was seized by PW5 via exh. P10 and surrendered all to police station.

In the case of **Paulo Maduka and 3 others vs. Republic,** Criminal Appeal No. 110 of 2007, Court of Appeal insisted the importance of making sure that chain of custody is intact in order to establish that the alleged evidence is in fact, related to the alleged crime rather than, for instance having planted fraudulently to make someone appear guilty. Later on, the same court in **Joseph Leonard Manyota vs. Republic**, Criminal Appeal No. 485 of 2015 the court relaxed the principle established in **Paulo Maduka** Case (supra) when it said where the potential evidence is not in the danger of being destroyed, or polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken.

From the case at hand, all certificates that is, P1 and P10 has IMEI number recorded in it which is two per each exhibit. During tendering the exhibits were cleared through the IMEI number which are similar to those found

during seizure. In the circumstance of this case the principle established in **Paulo Madukas'** case (supra) can be relaxed as it is not easy to temper with the mobile phone which has IMEI number.

The issue now is whether the offence as charged was proved beyond reasonable doubt. In analysing this I will answer ground No. 1 and 3 of the combined grounds. Mr. Amos submitted that, the source of all this is the cellphone make Itel which was tendered and admitted as Exp 9. But according to him there are many doubts. Starting elaborating doubts, he said according to PW5 testimony, he informed the court that he found Monica with the said phone and when asked Monica said the phone belong to her mother (Tatu), then Tatu accepted to own the phone and explained that she was given by Mwita (the 1st appellant). Moreover, PW5 informed the court that he used IMEI number to retrieve the Itel phone. He said IMEI number was given by PW1 who was OC-CID. Mr. Amos lamented that it is nowhere in the record that show PW1 give IMEI number to any person or any police officer and there is nowhere in his testimony, PW1 mentioned IMEI number. For that case, Mr. Amos submitted that there was no evidence to prove where does the PW5 got the IMEI number.

PW1 being the one who assembled and interrogate victims, there is nowhere he informed the court that he was given IMEI number and thatthe testimony of PW2 and PW3 are silent on that. There is no full information on availability of IMEI number which is the source of this criminal case.

Second doubt according to Mr. Amos is on the preparation and tendering of Exh 9 and 10. He said PW5 informed the court that he seized Itel Phone which is Exh. 9 by filing the seizure certificate which is Exh 10 but he did not disclose at the time of filing the Exhibit 10 who witnessed. He said the facts are silence while this is the requirement of law under section 38 of the PCA and there are bundle of authorities and refers this court to one decision of **Ndima Kashinje @ Joseph vs. Republic,** Criminal Appeal No. 446 of 2017 CAT at Shinyanga (unreported) at page 12, 1st paragraph the court said the absence of independent witness eroded the credence of the search conducted. He prayed exhibit 10 to be expunged from record and when expunged then even Exhibit P9 which is the phone should also be removed in court record.

Third doubt as pointed by appellant advocate is testimony of PW2 who is the victim, while in court she testified that on September, 2020 she was called to police station in order to identify phone and she identified Nokia and Itel.

The counsel said the problem is identification of exhibit which was done before the hearing. According to this counsel, witness was prepared to identify exhibit and that it was not proper.

Fourth, the Identification mark was not strong as the witness informed the court that she identifies her phone via color and batons of the phone as recorded at page 24.

Fifth, doubt is the testimony of PW4 who is the justice of peace where PW4 informed the court that while he was attending appellant, he was with his assistant, later on he informed the court he was alone with appellants and exhibit have different offence as analyzed in 1st joint grounds of appeal.

Sixth, doubt is where prosecution prayed the court to return Exh. 9 and Exh. 10 to police as they intend to use the same against the 1st appellant in another criminal case and that they pray so under section 353 (3) CPA. According to this counsel, he wounder how can prosecution pray for the exhibit to be returned to them (police) so that they can use it in another case concerning the 1st appellant in the same court.

Seventh, is about identification, the counsel for the appellant counsel complained that PW2 (at page 24 and 25 of the proceedings) informed the

court that she did not manage to recognize the 1st appellant and there is person identified them. Therefore, according to him the offence was proved basing on circumstantial evidence.

Eighth, doubt pointed by the appellants' counsel is about the presence of IMEI number in this case. Mr. Mng'arwe submitted that PW2 was supposed to provide IMEI number to court which in most cases, IMEI numbers are written in the box. To prove she once owned the phone she was supposed to tender IMEI number. in her testimony she said boxes was handled to the investigator but investigators did not tender any box which had IMEI number to clear doubt of where did IMEI number come from.

Nine, the counsel submitted further that prosecution left a gap by failure to parade the important witness who is Tatu Kigongo who was caught with the phones, Itel make, which was stolen at the scene and there is no clarification why Tatu is not among the witnesses. He said in the circumstances like this, court should draw adverse inference against prosecution as was held in **Wambura Marwa Wambura vs. Republic**, Criminal Appeal No. 115 of 2019 CAT at Mwanza at page 11 second paragraph where the court said the law require prosecution to call important witness otherwise the court should

draw adverse inference. The witness who was found with the exhibit which made all appellants to be charged was not called to testify.

Tenth, is about discrepancies concerning caution statement and extra judicial statement which was elaborated while analyzing the previous ground of appeal.

On addressing gaps pointed by counsel for appellants, State Attorney was of general submission that prosecution managed to prove the case beyond required standards and addressed one point after another. First of all, he said in the case of **John Madata vs. Republic**, Criminal Appeal No. 453 of 2017 CAT at Mbeya. The court provided three elements which needed to be proved by prosecution in armed robbery case. First element is that there must be a property which is stollen. On this element he submitted that PW2 proved she was the owner of those property and were stollen. The property which was recovered is Itel and that the evidence of PW2 was collaborated by PW1, PW3, PW5, exhibit 9 and the same was collaborated by caution statement and extra judicial statementwhere appellants confess to be involved in that crime on 13/3/2020. He finally said the best evidence is the one of the accused/appellant who confessed.

It was his submission that in second element which need to be proved is that, there must be a use of weapon. All witness explained weapon were used including PW2 when she was testifying during cross examination at page 69. The third element is that the weapon was directed to the victim who is the PW2 and it was not shaken. He said the prosecution proved the offence without doubt.

Now, what has been proved in the listed element from **John Madata vs. Republic** case this court finds that in the first element that there must be a property which is stolen, the prosecution was supposed to prove that PW2 owned those mobile phones which were claimed to be stolen at the scene. During trial, PW2 did not tender receipts nor boxes to prove that she once owned those mobile phones. To prove stealing, there must be inexistence of those properties. Just as raised by counsel for appellants, it was not proved that PW2 owned those mobile phones and that those mobile phones were used in mobile money business as the said phones claimed to be stolen were four. Second and third element is the use of weapon. In the case of **Shaban Said Ally vs. Republic**, Criminal Appeal No. 270 of 2018 (unreported) which was cited by the court in **John Madata vs. Republic** (supra) Court of Appeal said;

'It follows from the above position of the law that in order to establish an offence of armed robbery the prosecution must prove the following:

1. There must be proof of theft; see the case of ***Dickson Luvana v. Republic,*** *Criminal Appeal No. 1 of 2005 (unreported);*

2. There must be proof of the use of dangerous or offensive weapon or robbery instrument against at or immediately after the commission of robbery.

3. That use of dangerous or offensive weapon or robbery instrument must be directed against a person. See ***Kashima Mnadi vs. Republic,*** *Criminal Appeal No. 78 of 2011 (unreported)'*

Element set from the excerpt is that there must be a proof of use of dangerous weapon and that the weapon must be directed **against a person**.

From the record, victims (PW2 and PW3) did not mention any use of weapon, other witnesses, who are police officers, informed the court that they were told by PW2 that gun was used and that, bandits fired on air. If it is true that PW2 told any police that gun was used, why didn't PW2 inform the trial court of the occurrence of that unusual action. No evidence from neighbors who heard that gun was fired. That being not enough, hearsay though not admissible, some witnesses informed the court that they were told that gun

was fired **on air,** there is nothing establishing that a dangerous or offensive weapon (gun) was used against victims or any person. I find this element was not proved as insisted by the cited authorities.

In clearing doubts, Mr. Isihaka submitted that the **first** and **eighth** doubt by appellants was about IMEI number which was created from the testimony of PW5 who explained he was given the IMEI number by OC-CID. He said, the issue is whether the OC-CID is the PW1 or is another person. According to the State Attorney, PW1 is different person and the OC-CID is different person and that if at all there was problem, that issue was supposed to be cross examined by the appellants during trial.

This court finds that submission by the State Attorney amplifier the doubt which was raised by counsel for appellants. This makes this court to find that the prosecution did not discharge the onus of proving the offence to the required standard and the alleged failure of the appellant to cross-examine the victim did not boost the prosecution case. See **Juma Antoni vs. Republic** criminal appeal No. 571 of 2020 CAT at Dodoma.

If PW1 was not OC-CID, then, this witness was not credible witness as he introduced himself at page 18 of the trial court proceedings that when the

crime happened, he was OC-CID of Musoma. That being so, he is the one mentioned by PW5 that he received IMEI number from. His (PW1) testimony is silent about IMEI number even testimony of PW2 and PW3 did not mentioned him. PW2 during cross examination she only said investigator was given the mobile phone box and find IMEI number therein. Questions now are who then is investigator and who was the OC-CID.

At page 19 of the proceedings PW1 declared he was not the investigator because he was informed by investigators that Tatu Maroba and two others were arrested. Further, PW5 at page 42 of the trial court proceedings informed the court he was not the investigator of that case. PW6 who interrogate the 1st appellant informed the court that he was not investigator of the case at page 65. PW7 told the trial court that his duty was to draw sketch map, he didn't saw bullets and he don't know the number of bandits. What I gather from the record is that investigator was not among the witnesses who was supposed to tell the trial court about the IMEI number. Where does IMEI number obtained. This question remained unanswered.

More doubt is created when prosecution requested Exh. 9 and Exh. 10 be returned to police station so that police officers can use the same in another case. That means, as I see, there is possibility that IMEI number was given

by other person in different case and were just used in the case at hand for reasons best known to prosecutors.

I find IMEI number was the central issue in this case as from it, the 2nd appellant was arrested and then the 1st appellant was arrested with the aid of the 2nd appellant. Both appellants (then accused) were arraigned in court due to that IMEI number which is not known its origin. OC-CID and investigator who are said to have IMEI numbers were not paraded as witnesses.

I find these were material witnesses who could have clarified to the trial court on how the IMEI number come to their knowledge. The doubt remained uncleared because the prosecution failed to parade those witnesses and specifically the police investigator. This, entitles this Court to draw an inference adverse to the prosecution. See - **Juma Antoni vs. Republic** Criminal Appeal No. 571 of 2020 CAT at Dodoma (unreported) and **Aziz Abdalla vs. Republic** [1991] T.L.R 71, in the latter case the Court among other things held:

> '*the general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the*

transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution.'

In the case at hand, although it is upon the prosecution to determine the number of witnesses in terms of section 143 of the Evidence Act, it was incumbent on the prosecution to call witnesses to testify on the material fact on how PW5 was given the IMEI number which was used to trace the said stolen mobile phone. More so, the prosecution never told the trial court if those witnesses were not within reach or could not be found.

In the absence of Exhibit 8, Exhibit 9, Exhibit 10 and Exhibit 11 and failure to prove that dangerous weapon was used and was directed to victim, this court find these issues are enough to determine appeal lodged by appellants. I found the appeal has merit as analyzed in foregoing paragraphs and it is hereby allowed.

The conviction of the appellants is quashed and the sentence of 30 years imprisonment and the order for compensation of Tsh 5,030,000 and Nokia mobile phone is set aside. I order for immediate release of both appellants

William Mwita @ Mugerwa and Amos Chacha @ Magumbo from prison unless there is lawful reason to retain them.

Dated at **MUSOMA** this 08 Day of June, 2023

M. L. KOMBA

JUDGE

Judgement Delivered today in chamber in the presence of Advocate Mng'arwe for appellants and in the absence of State Attorneys.

M. L. KOMBA

JUDGE

08 June, 2023