IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

CRIMINAL APPEAL NO 38794 OF 2023

(*Arising from decision of the District Court of Singida in Criminal Case No 64 of 2023)*

SAMWEL MATHAYO PINGA.....1ST APPELLANT

SELEMANI DAUDI@SELEMANI@SABO.....2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGEMENT

Date of last Order: 12/06/2024

Date of Judgment: 27/06/2024

LONGOPA, J.:

The appellants, **Samwel Mathayo @Pinga and Selemani Daudi @ Sabo,** are appealing against conviction and sentence of 30 years imprisonment entered by the District Court of Singida in Criminal Case No 64 of 2023 against both appellants for offence of armed robbery C/S 287A of the Penal Code, Cap 16 R.E. 2022.

It was alleged that on 7th July 2022 at Ilongero Road area, Mtipa Ward Mungumaji Division within Singida District the appellants did steal a motorcycle with registration number MC 412 BQL Make Haojue, the property of Abel S/O Hamisi, valued at TZS 1,600,000/= and that immediately before and after such stealing did threaten one Salim S/O Hamisi with a knife to obtain and retain the said property.

To establish their respective cases, the prosecution side called a total of ten (10) witnesses while the defence case called three (3) witnesses. At the end of the trial, the trial Court on 20th October 2023 convicted and sentenced the first and second appellants to 29 years imprisonment having considered that appellants had been in remand custody for about 14 months. However, trial court acquitted the 3rd accused one Richard Ibrahimu @ Kilongo under section 235(1) of the Criminal Procedure Act, Cap 20 R.E 2022.

The appellants being aggrieved by the whole the conviction and sentence, on 29th November 2023, the appellants preferred this appeal on a total of 23 grounds of appeal, namely:

1. *That, the learned trial magistrate erred in law and fact by convicting the appellants while the prosecution side did not prove the case beyond reasonable doubts.*
2. *That, the learned trial magistrate erred in law and fact by failing to comply with provisions of section 10(3) and 9(3)*

both of the Criminal Procedure Act (Cap 20 R.E. 2022) whereby this enabled the prosecution side to pirate the court and vaguely injects its witnesses hence enabled them to build up their case from the case already heard in court;

3. *That, learned trial magistrate erred in law and in fact by convicting the appellants while the victim (PW 1) failed to give out detailed description of suspect when he reported the incident at police station, see in the case of* ***Selemani Casin Rasuli Bilus John v. Republic****, Criminal Appeal No. 310 of 2007 (CAT) (Arusha Registry) (Unreported) at page 8.*
4. *That, the trial magistrate erred in law and fact by failing to account the chain of custody and preservation of exhibit P.1.*
5. *That, the trial learned magistrate erred in law and fact when improperly admitted exhibit P7 for the identification through PGO.*
6. *That, the trial learned magistrate erred in law and fact by admitting exhibit P5 namely cautioned statement of Selemani S/O Daudi while there was no evidence that it was recorded voluntarily as required by the law*
7. *That, the learned trial magistrate erred in law and fact by convicting the appellants while the memorandum of*

undisputed facts of preliminary hearing were not read to the appellant.

8. *That, the learned trial magistrate erred in law and fact when failed to notice the evidence of PW 4, PW 6 and DW 3 (Third accused) was cooked and fabricated evidence against the appellants due to diverse reasons from the prosecution side.*
9. *That, the trial magistrate erred in law and in fact by failing to notice that the identification at the locus in quo was questionable due to the fact that victim failed to address or disclose whether the said light was of bulb or tubelight leave alone the intensity as the law demands.*
10. *That, the trial magistrate erred in law and in fact when convicting the appellant without consider well the evidence given by PW 1 who told the court that he was a bodaboda driver since 2019 till 2022 but he does not have a driving licence.*
11. *That, the trial magistrate erred in law and fact on the ground that the trial judgment contravened the requirement of provision of section 312 (2) of the Penal Code, Cap 16 R.E. 2022 (Sic!).*
12. *That, the trial magistrate erred in law and fact by failing to consider the defence raised by the appellant.*

13. *That, the learned trial magistrate grossly erred in law and fact when convicted the accused persons (appellants)relied on Exhibit P.1. while there was a conspicuous absence of a proper account of chain of custody of the same motorcycle (Exh P.1.) this is due to the fact that was called at police station to identify Exhibit P1 on 14/07/2022 contrary to PW 3 who clarified before the trial court that the one known as Elibariki Ibrahim brought an Exh. P1 at police station on 20/07/2022 (See page 6&15 of the C/P).*

14. *That, the learned trial magistrate grossly erred in law and fact by admitting the alleged motorcycle (Exh P.1.) whereby the prosecution side failed to tender the certificate of seizure C/S 38(3) of the CPA (Cap 20 R.E. 2022) in order to prove the same.*

15. *That, the learned trial magistrate trenchantly erred in law and fact by failing to evaluate the veracity of the evidence adduced by the prosecution witnesses hence arriving at a wrong verdict against the appellants, this is simply because one PW 5 (Elibariki Ibrahim) was having another new story that he brought the Exh P.1 at Police Station on 30/07/2022 in the morning at 10:00 am contrary to PW 1&PW 3 (see page 32 of the C/P).*

16. *That, the learned trial magistrate grossly erred in law and fact when admitted parade form an Exhibit P.7 whereby the same capsized rule 4 and 11 of the identification parade through PGO.*

17. *That, the trial court grossly erred in law and fact by failing to notice that evidence given by the 3rd accused person against the 2nd accused person (appellant) was an afterthought (see page 3 of the C/P).*

18. *That, the trial court grossly erred in law and fact by failing to notice that identification of PW 4 against the 2nd appellant was a dock identification.*

19. *That, the learned trial magistrate grossly erred in law and in fact by failing to notice that the appellants were arrested on 08/07/2022 but they were arraigned in court on 17/08/2022 contrary to the requirements of the law(S/C).*

20. *That, the trial court improperly admitted Exhibits P4, P5 and P6 as it was revealed that PW 3 H 2582 PC Filiud was the one who recorded the alleged cautioned statement of all the three accused persons while the law does not allow the same; even the prosecution side failed to tender any certificate which was signed by the appellants to prove that they were willing to record their statements in absence of the advocate, relative, friend as it*

has to stand by the law but the same also contravenes the provision of section 57(2)(a) and (b) of the CPA (Cap 20 R.E. 2022).

21. *That, the trial magistrate erred in law and in fact by failing to adhere to the provisions of section 9(3), 10(3) and 192(3) of the CPA (Cap 20 R.E. 2022).*
22. *That, the judgment of the trial court contravenes the provisions of section 312(2) of the CPA (Cap 20 R.E. 2022).*
23. *That, the trial magistrate grossly erred in law and fact when convicted the appellants whilst (victim) failed to give out the detailed description of the suspects when he reported the incident at the police station as the demands of the law.*

The appellants prayed that this Court be pleased to allow the appeal, quash the conviction and set the appellants free from the custody.

On 12th June 2024, the parties appeared to argue their respective positions in this appeal. The appellants appeared in person and fended for themselves while the respondent was represented by Mr. Francis Mwakifuna, learned State Attorney.

The first appellant argued that PW 1 stated that on 14/07/2022 was called to Police Station and conducted the identification parade where he identified the appellants, and a Motorcycle Haujoe Black in colour with registration number MC 412 DQL. That motorcycle is one which was subject of the trial. On the other hand, Mr. Elibariki Ibrahim (PW 5) stated that the motorcycle was recovered on 20/07/2022. The evidence of PW 1 and PW 5 is contradictory thus it was a fabrication. It was PW 5 who stated to have handed over the motorcycle to the police. PW 6, PW 3 and PW 4 testimonies corroborate the testimony of PW 5 and not that of PW 1.

Also, the second defendant argued that the appellants were in remand prison for long time from 08/07/2022 to 17/08/2022. It reveals that a case against them was fabrication as the police were making concoction of evidence.

Further, the cautioned statements were challenged on the following aspects, namely: First, PW 3 stated to have recorded the cautioned statements of all the three accused persons without sending them to a justice of peace for making a confession. PW 3 knew that there was no evidence against the appellants and all the same was a fabrication. Second, PW 3 did not afford accused's rights to call a relative or a lawyer of their own choice to participate in the recording of the cautioned statement. The law requires that there should be independent witnesses as per section 57(2)(a) of the Criminal Procedure Act. Third, in cross-examination, PW 3

stated did not respond to that question. Fourth, the court failed to evaluate the evidence of PW 3 thus conviction was not proper as the law was contravened.

Moreover, PW 1 who was the complainant stated to be a motorcycle (bodaboda) driver but failed to tender a driving licence thus he was not a bodaboda driver neither owner of the motorcycle. A driver must have a driving licence otherwise it is a mere fabrication as such person has nothing to identify him as a driver. The whole of PW 1 testimony ought to be discarded as it was worthless for failure to tender the driving licence to validate that he was a motorcycle driver.

Additionally, it was stated that identification parade was conducted, and it was reiterated that participants of the same must be people of similar samples/outlook, size etc. He stated further that suspected persons must say if they are willing to participate in identification parade. Despite, requirement of taking photographs in identification parades, there are no photographs tendered, and no civilian was called to testify before the trial court to have participated in the identification parade. The whole testimony is nullity.

Furthermore, DW 3 stated that 2nd appellant sold the motorcycle, but DW 3 was not in possession of any document to show that such transaction occurred. The court failed to evaluate the evidence of DW 3 as

he is the one found in possession of the motorcycle. He is the one who led the police officer to the discovery of the motorcycle. The exhibit was for the 3rd defence witness. The transaction must have been evidenced by the writing before witnesses who participate. Indeed, failure to tender any documentary evidence makes the whole DW 3 evidence as against the 2nd appellant was an afterthought.

It was argued further that prosecution failed to prove their case. This is because PW 1 stated to have been threatened by knife but he failed to describe the make or colour of the knife in question. Also, no member of the bodaboda group where the victim was alleged to be working was called to testify.

On the other hand, the respondent is not supporting the appeal. We are concurring with judgment both conviction and sentence of the trial court as the grounds advanced by the appellants lack merits.

On proof beyond reasonable doubt, it is submitted that the appellants were charged with armed robbery contrary to Section 287A of the Penal Code Cap 16 R.E. 2022. The elements are categorically that there must be theft, use of dangerous weapon and that it is the accused who did commit the offence. PW 1 stated that appellants threatened to use knife to injure the victim if the victim would resist the taking of the motorcycle. It was the second appellant who was in possession of the knife used to threaten

whereby the appellants threatened to kill the victim if he would have resisted.

This evidence was corroborated as the appellants laid foundation for finding or discovery of the motorcycle. The first appellant stated to have participated in the commission of the offence and informed the police to have given to the second respondent the stolen motorcycle. Also, the second appellant stated to have sold the motorcycle to the third accused. DW 3 who was the third accused person admitted being in possession of the motorcycle having obtained it from the second appellant as he was selling it. All these set of evidence made the proof of the case against the appellants satisfactory in terms of elements of the offence.

Regarding the issue of identification parade, it was submitted that the same was properly conducted as the victim did not know the appellant before the date of the incident. The record of identification parade was tendered admitted and marked as Exhibit PE. 7 as revealed in page 39 of the proceedings where identification parade exhibit was admitted.

Further, regarding violation of section 9(3) and 10(3) of the Criminal Procedure Act, Cap 20 R.E. 2022, it was submitted that there was no request on the Complainant statements. The appellants were afforded the right to cross examination of the witness PW 1 who was the Complainant. Also, all other witnesses who were listed appeared before the Court and

adduced evidence. The witnesses were recorded their statements and appeared in court.

Regarding description of the appellants during reporting to the police station, it was submitted that PW 1 testified that he managed to identify the appellants as there was sufficient light from the mosque and the appellants spent time with the victim while negotiating the fare. It is the description that was given to the police by the victim which led to arrest of the appellants. The identification parade was conducted, and PW 1 stated the manner he managed to identify the duo in the line of about 14 persons.

On chain of custody, it was submitted that chain of custody was established as PW 8 stated that upon receipt of the motorcycle, he kept it until the same was tendered in Court. Exhibit PE. 8, the chain of custody was record was admitted validating the proper account of the chain of custody. The nature of exhibit is the one which does not easily change as it had a registration number and the chassis number that is distinctive. The same was kept at the Police Registry. The case of **Paulo Maduka and Four Others versus Republic**, Criminal Appeal No. 110 of 2007 was cited to reiterated that the Court noted that chain of custody must be shown to indicate that exhibit was not easily tempered with.

On dates of the identification parade and identification of the motorcycle, it was reiterated that PW 1 stated that on 14/07/2022 he was

called to do identification parade only. Later, he went back to police to identify the motorcycle. It is nowhere stated that the identification parade and identification of the motorcycle were done on the same day.

On admission of identification parade record, it is submitted that the same was done in accordance with the Police General Orders. Inspector Juma stated that he informed the appellants on the identification parade, and they were fully informed on all the rights whereas all the participants were of the same size, appearance and PW 1 managed to clearly identify the appellants. The other persons who participated in the identification parade recorded their statements. For those reasons, the ground is devoid of merits. The appellants never disputed the tendering of Parade Identification Register.

On evidence of DW 3, it is submitted that DW 3 stated categorically that he obtained the motorcycle from the second appellant. The second appellant was properly identified at the identification parade. It is the second appellant who informed the police that stolen motorcycle was in custody of DW 3. There was no doubt on evidence of DW 3 as the second appellant failed to cross examine on material issues.

Regarding PW 4 testimony on identification of second appellant, it was articulated that the motorcycle was brought to police by PW 4 but he was not relevant to identify the second appellant.

On long incarceration at the Police Station from 08/07/2022 to 17/08/2022, it is submitted that the matter was under investigation thus on completion of the same immediately the matter was instituted, and hearing conducted. This was not raised at the hearing as the investigator was called, testified and the appellants did not cross examine on that aspect.

Regarding PW 3 evidence on the cautioned statements, it was submitted that cautioned statements were recorded properly, and the appellants were arrested on different circumstances. First, they were objected on voluntariness and being tortured. Second, he appellants did not raise the question on right to call a friend, relative or a lawyer of their choice. Third, appellants signed the cautioned statement to indicate that they knew the contents and consented to the truthness of the same. The cautioned statements are the ones that led to discovery of the motorcycle stolen. The respondent cited case of **Manje Yohana and another versus Republic**, Criminal Appeal No 147 of 2016, to cement the holding that caution statement must lay foundation to the commission of the offence.

On the issue of preliminary hearing (PH), it was submitted that the memorandum of Agreed Facts was signed by all the accused persons signifying that the same was read out to the appellants. It adhered to all requirements of the law.

In respect of judgment contravening the provisions of section 312(2) of the Criminal Procedure Act, it was submitted that the same was complied with all the requirements of the law. All the requirements are contained in the judgment as there was lucid explanation on all the required aspects. This ground of appeal has no merits.

On fabrication of the PW 6, PW 5 and DW 3, it is reiterated by the respondent that the witnesses are the ones who were in possession of the motorcycle, and they handed over the same to the police. The same was handed over on 20/07/2022. They testified on the way the motorcycle had moved from one person to another.

In respect of the lighting at the scene of crime, it was argued that evidence of PW 1 stated clearly that there were tubelights at the mosque thus sufficient light to be able to identify appellants. Thus, the question of lighting was categorically stated and addressed as there was lucid evidence of PW 1.

Regarding driving licence of PW 1, it was submitted that he was a bodaboda driver and PW 2 corroborated the testimony of PW 1. He tendered the registration card of the motorcycle to show the ownership.

On defence evidence, it was submitted that the same was considered throughout. First, the appellants were informed on exercise their right to

defence. Second, in the judgment it was noted that the evidence of the defence did not dent on the prosecution evidence. The appellant did not testify regarding the core issues. They were evasively denying the offence. The defence evidence was analysed well in the judgment. The motorcycle was recovered as a result of the statements of the appellants. It was the respondent's prayer that this Court be please dismiss the appeal for being devoid of merits.

On rejoinder, it was argued that there were three issues: the theft occurred and there was use of weapon. It was restated that there was no weapon tendered to the trial court. The section requires that weapon must be used and there was none tendered in court.

Further, it was reiterated that on identification parade, there were no witnesses brought to court to substantiate that appellants were properly identified. There are no photographs produced though they were required to be tendered.

It was also emphasized on cautioned statements that there were failure to ensure that extrajudicial statements were recorded before justice of peace. Absence of the extrajudicial statement impaired the validity of the cautioned statements.

It was concluded that generally, proof of the case was wanting. There was failure to bring other bodaboda riders signify that the incident never happened. Also, there were no documentary evidence regarding the sale of motorcycle by the second appellant to the third accused person. It is a common knowledge that every sale must be evidenced by writing that seller did sell to the buyer. Furthermore, PW 1 failed to tender the driving licence, thus there was no incident on armed robbery.

I have dispassionately considered the grounds of appeal in light of the available evidence on record, it is pertinent to cluster the analysis of the appeal in related grounds. It is my settled view that all grounds of appeal may be categorized into broad grounds relating to the following main aspects, namely: first, Chain of custody, identification of the appellants, tendering of exhibits and documentary evidence, preliminary hearing, cautioned statement and proof of the case to the required standard.

Chain of custody is one of the important aspects contained in the grounds of appeal. Chain of custody is crucial in respect of the physical item that forms the basis of the case. In the instant appeal, chain of custody relates to the motorcycle that was allegedly to have been stolen.

PW 3 testified to the effect that he seized the Motorcycle when it was brought to police and kept the same to the Exhibit Keeper. PW 9 testified

to the effect that on 20/07/2022 he received an Exhibit from PW 3 namely a motorcycle MC 412 BQL make Haoujue black in colour. He identified the Exhibit P.1 and tendered the Chain of Custody record, the same was admitted and marked as Exhibit P. 8.

In **Chacha Jeremiah Murimi & Others vs Republic** (Criminal Appeal 551 of 2015) [2019] TZCA 52 (4 April 2019) (TANZLII), at pages 23-24, the Court of Appeal reiterated that:

> *In establishing chain of custody, we are convinced that the most accurate method is on documentation as stated in* ***Paulo Maduka and Others vs. R.****, Criminal Appeal No. 110 of 2007 and followed in* ***Makoye Samwel @ Kashinje and Kashindye Bundala****, Criminal Appeal No. 32 OF 2014 cases (both unreported). However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked at depending on the prevailing circumstances in every particular case. For instance, in cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in* ***Paulo Maduka (supra)*** *would be relaxed. In the case of* ***Joseph Leonard Manyota v. Republic****, Criminal Appeal*

No. 485 of 2015 (unreported), the appellant challenged the chain of custody of a motorcycle. In differentiating the chain of custody in respect of exhibits which can change hands easily and those which cannot, this Court stated at pp. 18-19 of the typed judgment: "... it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, 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. Of course, this will depend on the prevailing circumstances in every particular case.

The evidence on record reveals that Exhibit P1 which is the stolen motorcycle, Exhibit P3 which is Seizure certificate and Exhibit P.8 as well as oral accounts of the PW 3 and PW 9 have effect of indicating without iota of mistake that there was unbroken chain of custody of the Exhibit P. 1.

In **Paschal s/o John Munisi vs Republic** (Criminal Appeal No. 155 "A" of 2021) [2024] TZCA 71 (20 February 2024) (TANZLII), at page 9, the Court observed that:

> *The law on chain of custody has been settled by the Court to the effect that documentation and oral evidence can both be used as reliable ways of establishing chain of custody depending on the nature of the case. See:* ***Alexandris Athanansios v. Republic****, (Criminal Appeal No. 362 of 2019) [2021] TZCA 614 (28th October 2021, TANZLII) and* ***Marceline Koivagui v. Republic****, (Criminal Appeal No. 469 of 2017) [2020] TZCA 252 (26th May 2020, TANZLII).*

From the analysis of the evidence on record, it is settled that the chain of custody was strictly complied and established before the court of law. It has not been broken at any point in time. There is sufficient evidence that the same motorcycle that was stolen on 07/07/2022 and seized on 20/07/2022 is the one that was tendered as Exhibit P.1. Both documentary and oral evidence have pointed to only one direction that there was a proper account of the chain of custody. As a result, I am fortified that 4th and 13th grounds of appeal have no merits thus they are hereby dismissed for want of merits.

The appellants raised the question of procedural irregularities touching on the case at hand. These relate to identification parade, memorandum of undisputed facts, contents of judgment and long incarceration of the appellants. The main aspect is whether such irregularities existed and whether the same impacted on the validity of the evidence on record.

The first aspect was on identification parade. The appellants complained about irregularities on the regarding the way the identification parade was conducted. The guidance on identification parade can be found in the **James s/o Msumule @ Jembe & Others vs Republic** (Criminal Appeal No. 284 of 2021) [2024] TZCA 176 (13 March 2024) (TANZLII), at pages 17-18, the Court of Appeal stated that:

> *The Police General Order (PGO) No. 232 gives guidance on the manner identification parades are to be conducted. It is issued by the Inspector General of Police under section 7 (2) of the Police Force and Auxiliary Services Act, [Cap 322 R.E. 2002]. Generally speaking, the PGO provides for the procedure on how to conduct identification parades, who can conduct such parades (the Assistant Inspector of Police or above); the rights of the suspects and how to prepare and maintain the record (register of such exercise) It is, therefore, incumbent that the said procedure must be*

complied with whenever an identification parade is conducted - See: ***Maisa Lucas Mwita @ Kipara v. Republic,*** *Criminal Appeal No. 119 of 2011 (unreported). It is also important to emphasis that, if the said procedure is not followed, the evidence thereof would be rendered worthless - See also:* ***Raymond Francis v. Republic*** *(1994) TLR 100 in which it was stated that, if rules governing the conduct of identification parade are breached, then it would render the identification parade evidence of little value. Also see: Mussa Hasan Barie and Another v. Republic, Criminal Appeal No. 292 of 2011 (unreported).*

The requirements for identification parade calls for the person who conducts such identification parade to be of the rank of Assistant Inspector of Police, existence of register the exercise and observance of the rights of the accused persons.

Also, in the case of **Zilim Hamis vs Republic** (Criminal Appeal No. 489 of 2022) [2024] TZCA 402 (6 June 2024) (TANZLII), at pages 20-21, the Court reiterated that:

Principally, an identification parade conducted during investigation by police officers is not substantive evidence.

It is meant to test a witness's alleged visual identification of a suspect during the commission of a crime. This is clearly provided for in section 60 (1) of the CPA that an investigative officer may hold an identification parade for the purpose of ascertaining whether a witness can identify a person suspected of the commission of an offence. For the identification parade to have a probative value, it must comply with the laid down procedures set out in PGO 232 issued by the Inspector General of Police pursuant to the authority granted to him under section 7 (2) of the Police Force and Auxiliary Services Act, and further, elaborated in the celebrated case of the ***Rex v. Mwango Manaa*** *(1936) 3 E.A.C.A. One of the requirements is to line up persons as far as possible "of similar age, height, general appearance and class of life" as the suspect. In the case of* ***Adriano Agondo v. The Republic (supra)****, the Court reiterated that: "It is settled law that for any identification parade to be of any value, the identifying witnesses must have earlier given a detailed description of the suspects."*

According to this decision, there must be compliance to the requirement of persons that participate in the identification parade are those od similar age, height and general appearance and class of life. Such similar features of the persons participating in identification parade.

PW 8 Inspector Juma Baltazar is the one who conducted the identification parade. It was PW 8's testimony that he arranged for persons who resembles the suspects in body structure and age. All the 12 persons were informed about the identification parade. It is only the first and second appellant who were to be identified in that parade. The appellants were standing as number 5 and 9 respectively in the line of 14 persons. PW 8 filled an identification parade report. PW 1 did manage to identify first and second appellants. PW 8 tendered Exhibit P 7 which was the Identification Parade Register to substantiate the completion of the process of identification parade.

This evidence of PW 8 tallies squarely with that of PW 1 who testified to have been called on 14/07/2022 to go to police station where he was required to identify suspects in a line of 14 persons. He identified the 1st and second appellants standing as number 5 and 9 in that line of persons with similar features in terms of apparent age and height. PW 10 further cemented on this evidence. He stated to have prepared identification parade that was conducted by PW 8 and participated to bring civilians who participated in the identification parade. He tendered statements of the persons as Exhibit P.9 collectively.

Accordingly, all the requirements for identification parade were strictly complied with in the instant appeal. This evidence was not seriously challenged by the appellants. The evidence on identification parade is

watertight evidence that was strictly adhered to pertinent conditions of conducting identification parade.

Closely related to identification parade was the lamentation on failure by the victim to describe the appellants at the police station on reporting of the alleged commission of the offence. This aspect was addressed by the testimonies of PW 1. It was PW 1's evidence that appellant spent 10 minutes with the victim negotiating the fare to take them to Ilongero area. PW 1 met the appellants at Instagram Mosque where there are sufficient electricity lights that are very bright, according to PW 1.

This evidence is corroborated by PW 3 who stated that after the police were informed through an informer, he went to the 1st appellant's home. Upon interrogation, 1st appellant admitted having participated in stealing the motorcycle registered MC 412 BQL. PW 3 stated further 2nd appellant was arrested after the 1st appellant agreed to meet with him at Kilima bar upon being informed by 2nd respondent that stolen motorcycle has been sold.

Indeed, the testimonies is further corroborated by PW 8 who explicitly stated that on 14/07/2022 PW 1 managed to identify the appellants from a line of 14 persons of similar height size and appearance. With all these testimonies on record, I have nothing to doubt that the identification of appellants by the victim was proper.

The other aspect is on contents of the judgment. Section 312 (2) of the Criminal Procedure Act, Cap 20 R.E. 2022 is relevant to the circumstances. It provides as follows:

> *312(2) In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced*

It is on record as revealed in page 14 of the trial court judgment where partly the trial court observed that "Now therefore, I hereby convict, the first accused person one Samwel S/O Mathayo@Pinga, and the 2nd accused person one Selemani Daudi@Sabo for the offence of armed robbery C/S 287A of the Penal Code, Cap 16 R.E. 2022, under Section 235(1) of the Criminal Procedure Act, Cap 20 R.E 2022. The 3rd accused person is acquitted forthwith under Section 235(1) of the Criminal Procedure Act.

It is lucid that the conviction and stating the section contravened are the most fundamental aspects in judgment. In the case of **John Naoyo & Another vs Republic** (Criminal Appeal No. 308 of 2021) [2024] TZCA 120 (23 February 2024) (TANZLII), at pages 8-11, the Court stated as follows:

We must emphasize that clarity and compliance with the law in composing a judgment of the court is of paramount importance. It is acknowledged that a conviction is one of the fundamentals of a judgment in terms of section 312 (2) of the CPA (see ***Shabani Iddi Jololo and 3 Others v. The Republic****, Criminal Appeal No. 200 of 2006 (unreported). It follows that failure by the trial court to enter conviction is an incurable illegality which will render such a judgment and the sentence passed a nullity.*

There is no flicker of doubt that there is conviction of the first and second appellants in accordance with tenets of law. The trial magistrate did convict each of the appellants and stated the specific section of the Penal Code that had been contravened by the appellants. There was nothing to complain about the conviction as it complied with the law pertaining to judgments.

Further, the issue of Preliminary hearing weakness has been addressed. There were lamentations that memorandum of undisputed facts did not comply with the law governing conduct of preliminary hearing. This is conducted under section 192 of the Criminal Procedure Act to accelerate trial. Normally, preliminary hearing intends to accelerate trial by ensuring that admitted facts are not necessarily required to be proved as they are regarded to be established.

I have perused the trial court's proceedings and found that on page pages 2 and 3 reveal what happened on date set for preliminary hearing. It is indicated that the charge was read and explained to both appellants, and they were invited to plead. They pleaded not guilty to the offence and the trial Court entered Plea of Not Guilty (EPNG). It is at this juncture that facts of the case were read over and explained to the appellants. It is also on record that both appellants admitted to their personal particulars and that they were arrested and arraigned to the trial court.

On the effect of failure to read out the undisputed facts in Preliminary Hearing, the case of **Jovin Daud vs Republic** (Criminal Appeal No. 4821 of 2020) [2024] TZCA 97 (23 February 2024) (TANZLII), pages 6-7, is illustrative. The Court stated that:

> *The law is clear that, the aim of preliminary hearing is to accelerate criminal trials so that matters which are not disputed will be identified and thus, there will be no need to prove them; hence, saving court's time and costs. This has been the pronouncement by the Court in its various 6decisions; including the case of* ***Kalist Clemence @ Kanyaga v. R****, Criminal Appeal No. 1 of 2000 (unreported). The law also goes on to state that failure or erroneous preliminary hearing only vitiates its proceedings*

and does not vitiate the proceedings of the trial. In the case we have just cited, it was observed that non-compliance with section 192 of the CPA, only vitiates the preliminary hearing proceedings, and not the trial proceedings. The omission does not vitiate trial proceedings because, like in the instant case, the trial was fully conducted where the prosecution called witnesses to support their case, the appellant cross-examined them and he was availed with an opportunity to give his defence. See also ***DPP v. Jaba John****, Criminal Appeal No. 206 of 2020,* ***Mwita Nyamhanga Mangure v. R****, Criminal Appeal No. 130 of 2015 and* ***Hassan Said Twalib v. R****, Criminal Appeal No. 95 of 2019 (all unreported). Consequently, on the strength of the cited authorities, we are settled in mind that the omission did not vitiate the trial court's proceedings.*

The question of irregularity on the preliminary hearing appears to be misplaced and an afterthought. The PH appears to have been conducted in a proper manner thus there is nothing to lament. It should be noted that even if the same would have been conducted in contravention of Section 192 of the Criminal Procedure Code, Cap 20 R.E. 2022 still such anomaly would be curable under section 388 of the Criminal Procedure Act.

Moreover, on contravention of Section 10(3) and 9(3) of the Criminal Procedure Act, Cap 20 R.E. 2022, the parties were not in agreement. The appellants complained that there was violation while the respondent argued that all persons who were interrogated by police officers were brought to court as witnesses. The appellants were afforded opportunity to cross examine the evidence of each of the witnesses.

It is noted that the provisions of Section 10(3) and 9(3) of the Criminal Procedure Act have bearing to the requirement of the police officer to record any statement of persons that are aware of the offence. It also requires the magistrate to avail such document to the accused person.

My perusal of the record of the trial court, it is noted that there is nowhere in the proceedings where the appellants did request for statements of the complainant or any other persons. It is on record that all the prosecution's witnesses testified before trial court and the appellants were afforded every opportunity to challenge the evidence as cross examination was allowed.

I concur with the respondent's submission that having accorded all opportunity to the appellants to cross examine all the prosecution's witnesses there is nothing that would vitiate the proceedings as appellants had chances to question the witnesses in all necessary aspects relevant to the case.

Having analyse all these aspects on irregularities, it is a settled view of this court that 5th, 7th, 11th, 16th, 19th, 21st, 22nd and 23rd grounds of appeal are without any cogent merits. They deserved a dismissal for being unmeritoriously. I proceed to dismiss them in their totality.

Tendering and admissibility of exhibits forms another category of the issues forming grounds of appeal. The lamentation on this category relates to improper admission of the documentary evidence, absence of certificate under the cautioned statement as well as voluntariness of the cautioned statement.

In **Abraham Sykes vs Araf Ally Kleist Sykes** (Civil Appeal No. 226 of 2022) [2024] TZCA 20 (7 February 2024) (TANZLII), at page 14, the Court reiterated as follows:

> *Nevertheless, we are also alive to the settled position of the law that the contents of an exhibit admitted without any objection are effectually proved. However, it is important to also take cognizance of the fact that each case should be considered in its particular circumstances.*

In respect of Exhibits P1 which was a motorcycle with Registration Number MC 412 BQL make Haojue black in court, P2 which was registration card of the motorcycle and sale agreement collectively and

Exhibit P3 which was a Seizure Certificate were not objected during tendering in court.

These Exhibits P1, P.2 and P3 have effect of establishing that there was a property stolen in the incident. They cater for one of the important aspects of the offence for which the appellants stood charged.

In **Ngesela Keya Ismail Joseph & Others vs Republic** (Criminal Appeal No. 603 of 2020) [2024] TZCA 224 (22 March 2024) (TANZLII), at page 17-18, the Court observed that:

> *It is a well-established principle that an exhibit admitted in evidence must be read out in court to the appellants. The omission to read out the exhibit or failure to read the contents of the exhibit after it is admitted in evidence is a fatal irregularity which is prejudicial to the appellants. Apart from that, it is a clear violation of the right of fair trial of the accused to understand the contents of the evidence tendered and admitted against him.*

It was evidence PW 3 that he interrogated the appellants and recorded the cautioned statements. PW 3 tendered Exhibit P4, Exhibit P.5 and Exhibit P.6. These are cautioned statement of the First appellant,

second appellant and 3rd accused person who was acquitted under section 235(1) of the Criminal Procedure Act, Cap 20 R.E. 2022.

All these Exhibits P.4, Exhibit P5 and P. 6 were admitted, marked and read out loudly to the accused persons before the trial Court. The tendering of the same strictly adhered to requirements of the law on admissibility of the documentary evidence.

It is crucial to noted that cautioned statement formed an important part of the record of this case. The appellants are complaining that: first, the cautioned statement was recorded by only one investigation officer without being back up of extrajudicial statements. Second, that there is no certificate that appellants' rights were complied with. Third, voluntariness of the cautioned statements was not established.

It is on record that Exhibit P.4 relating to the first appellant and Exhibit P.5 relating to cautioned statement of the 2nd appellant were objected during tendering. The Court was satisfied that such cautioned statements were admissible having found out that the cautioned statements were made voluntarily by the appellants.

In the case of **Flano Alphonce Masalu @ Singu vs Republic** (Criminal Appeal 366 of 2018) [2020] TZCA 197 (30 April 2020) (TANZLII), at pages 30-31, the Court of Appeal illustratively stated that:

Above all, we agree with Mr. Katuga that following the amendment of section 58 of the CPA by section 15 of the Written Laws (Miscellaneous Amendments) Act, Act No. 2011, by inserting new subsections (4), (5) and (6) immediately after subsection (3), PW11, as a police investigator, was competent to record the cautioned statement when he did so on 30th December, 2015. See also ***Kadiria Said Kimaro v. Republic,*** *Criminal Appeal No. 301 of 2017 (unreported) where the Court held that the above provision settles that a police investigator is competent to record a cautioned statement of an arrested suspect. Accordingly, we find Exhibit P.7 to have been lawfully recorded. The above finding leads us now to interrogate the issue whether conviction against the first appellant and his two accomplices that he implicated could be founded solely on the retracted cautioned statement, As rightly found by the courts below, the appellant's cautioned statement, detailing his involvement in the armed robbery along with the second and fourth appellants, amounts to a confession to the charged offence. But, as hinted earlier, he retracted this statement. The law is that where an accused person retracts his confession the court can convict him on the uncorroborated confession provided*

that it warns itself of the dangers of acting solely on such confession and if it is fully satisfied that the confession cannot be but true. See, for instance, ***Hatibu Ghandi & Others v. Republic*** *[1996] TLR 12. As a matter of practice, however, a retracted confession requires corroboration - see, for instance,* ***Ali Salehe Msutu v. Republic*** *[1980] TLR 1.*

It is lucid that the superior court of the land had settled the dust on the fact that an investigation officer can interrogate the accused persons. Also, it articulates the manner of addressing retracted, confession by corroboration of such evidence. It is in accordance with the prevailing laws in Tanzania that an investigation officer is not precluded from recording cautioned statement for an offence he is investigating. There can be no wrong committed where evidence is tendered in respect of cautioned statement having been recorded by an investigation officer. Both oral testimony and documentary evidence is admissible.

In **Frank Richard Shayo vs Republic** (Criminal Appeal No. 333 of 2020) [2024] TZCA 230 (22 March 2024) (TANZLII), at page 13, it was stated that:

On the retracted cautioned statement, the law is settled that it is always desirable to look for corroboration in support of a confession which has been retracted or

repudiated before acting on it to the detriment of the accused. See ***Dickson Elia Nsamba Shapwata and Another v. Republic****, Criminal Appeal No. 192 of 2007.*

It is on record that apart from evidence of PW 3 one H2582 PC Filiud's evidence, testimonies of PW 1, PW 4, PW 5, PW 6 and PW 7 testified to the effect that cemented on the evidence contained in the cautioned statements. The totality of evidence of PW 1, PW 2, PW 4, PW 5, PW 6 and PW 7 indicates existence of motorcycle MC 412 BQL owned by the PW 2, it was ordinarily being used by PW1 and how the same was seen and found from the village where it was sold. All those testimonies consolidated the evidence contained in the Exhibits P.4. and P 5 which are cautioned statements.

In **Fred Maiko & Others vs Republic** (Criminal Appeal No. 652 of 2021) [2024] TZCA 68 (20 February 2024) (TANZLII), at pages 10-11, the Court observed that:

It should be clearly understood that, as we poke our fingers into and fault the trial process that led to the admission of the said exhibits, we are not oblivious of the enduring position of this Court which was accentuated in numerous decisions, including the case of ***Nyerere Nyague v. Republic****, Criminal Appeal No. 67 of 2010 (unreported), in which we held that admission of evidence*

obtained in contravention of the CPA is in the absolute discretion of the trial court, and that the court must take into account all necessary matters before a decision is made to admit or reject it. The decision to admit must be for the benefit of the public and without trampling the rights and freedoms of the accused. We observe in the instant matter, that while matters relating to admissibility were in the absolute discretion of the trial court, when they were contested, nothing can be inferred from the record that admission of the said statements was for the benefit of public interest, and that the appellants' rights were not unduly prejudiced. We are of the considered view that, given the gravity of the patent anomalies on the statements (exhibits P1, P2 and P3), exercise of such discretion was injudicious and prejudicial to the rights of the appellants. In consequence, we accede to the counsel's prayer and we hereby expunge the said statements from the record.

As per evidence on record, there is nothing to doubt on the veracity of the evidence contained in Exhibit P4 and Exhibit P5. The same were tendered, admitted and marked as exhibits properly. They are vital part of the evidence on record.

Further, the question of voluntariness of the cautioned statement, there is no flicker of doubt that evidence of PW 3 was clear and certain that the statements were made voluntarily. The voluntariness aspect was categorically ruled to have existed. Having afforded the right to be heard to both parties, trial court ruled that Exhibit P 4 and Exhibit P.5 were properly made with free will of the appellants.

The contents of Exhibit P.4 recorded on 08/07/2022 at between 15:00 -16:00 hours and that of Exhibit P 5 recorded at 16:10 to 16:55 hours share some facts in common. First, both appellants admitted having robbed motorcycle with registration No. MC 412 BQL black in colour make Haojue from the victim on 07/07/2022. Second, it the second appellant who had a knife that was directed to the victim, and it is one who uttered the word directed to the victim to choose between death and letting the motorcycle go. Third, the second appellant is the one who went to find a potential customer to purchase the stolen motorcycle. Fourth, prior to recording of statement both appellants consented that statement should be record without presence of any other persons. Fifth, each of the appellant signed a respective cautioned statement at the end of the statement. Sixth, the officer who recorded the statement certified to have properly recorded the statements under section 58(4), (5) and (6) of the CPA.

Indeed, I do not know of a law that compels that cautioned statement must be supported by extrajudicial statements as the appellants would like this Court to believe. Cautioned statement is a confession of its

own nature and it may warrant to conviction as there is no best evidence than that of the accused person himself. This was a decision in the case of **Chande Zuber Ngayaga & Another vs Republic** (Criminal Appeal No.258 of 2020) [2022] TZCA 122 (18 March 2022) (TANZLII), pages 13-14, the Court of Appeal illustratively stated that accused person who confesses to have committed an offence is the best witness.

Having analysed the available evidence on record in light of various grounds of appeal on this category, I am of the settled view that it is certain that 5th, 6th, 16th and 20th grounds of appeal lack merits and are hereby avoided for being devoid of merits.

Proof the case beyond reasonable doubt is yet another serious ground raised by the appellants. to address this ground, it is pertinent to address ingredients of the offence, the standard and burden of proof of the offence to arrive to a conclusion on whether the proof the case was established.

It is a trite law in this jurisdiction and universally accepted that in criminal cases, it is the prosecution that bears the burden of proof to establish that a particular case is established to the required standard. It is also the settled position of the land that standard of proof applicable to the circumstances is that of proof beyond reasonable doubt. The trial court or appellate court in the first instance must demonstrate that totality of

evidence on record leaves no flicker of doubt that it is accused/ appellant that committed a particular offence.

In respect of the elements of armed robbery that must be proved before a trial court to warrant the conviction, the law is settled. Section 287A of the Penal Code have the following important ingredients. First, there must be stealing. Second, the use of dangerous weapon to threaten the victim to steal or retain the property. Third, the weapon must be directed the victim. In the case of **Flano Alphonce Masalu @ Singu vs Republic** (Criminal Appeal 366 of 2018) [2020] TZCA 197 (30 April 2020) (TANZLII), at page 36, the Court of Appeal reiterated that:

> *As rightly argued by Mr. Katuga, in the instant case the prosecution could not produce the stolen properties and the hand gun used in executing the robbery because none of them were recovered.* ***Indeed, stealing is a crucial element of armed robbery, the other key ingredient being using or threatening to use violence to any person in order to obtain or retain the stolen property. Proving the actus reus of armed robbery is wholly evidential; it is not in any way tied to producing the stolen goods and the offensive weapon.*** *In the instant case, sufficient proof of the act of armed robbery was provided by the testimonial accounts of*

PW1, PW2, PW3 and PW5 as well as that of the owner of the stolen properties (PW12). The complaint under consideration is, therefore, without merit, It falls by the wayside.

This decision of the Court in effect provides that absence of the stolen goods or dangerous weapon used in commission of the alleged crime does not vitiate conviction if there is evidence to prove that the offence was committed.

In the instant matter, it was PW1's evidence that motorcycle was stolen. It is the first and second appellants who did stole the motorcycle and a knife was used to threaten the victim. PW 1 stated that second appellant one Selemani Daudi who pointed at the neck of the victim with a knife to facilitate the stolen motorcycle. Such evidence was supported by Exhibit P.1 that is recovered stolen goods. Evidence of PW 2, PW 3, PW 4 and PW 5 reiterated that first and second appellants participated in the commission of the offence of armed robbery.

PW 1's evidence on the appellants having a knife that was used to threaten the victim immediately before and after the incident od stealing. It is a law that failure to cross examine on important aspect amount to admission. In the case of **Mapinduzi Mgalla vs Republic** (Criminal Appeal No. 406 of 2020) [2024] TZCA 21 (6 February 2024) (TANZLII), at page 12, the Court of Appeal reiterated that:

The law is settled to the effect that failure to cross examine on an important matter ordinarily implies the acceptance of the truth of witness's evidence on that aspect.

As the appellants did not cross examine the PW 1 in respect of use of knife by the second appellant to threaten the victim in facilitation of the stealing of the motorcycle, the testimony of PW 1 on this aspect remained intact. Indeed, Exhibits P 4 and P 5 which are confessional statements from the appellants explicitly admit the commission of the offence of armed robbery. They cement the evidence of PW 1 that a knife was used to threaten the victim in facilitation of the stealing of the motorcycle. It is my view that on ingredients of the offence the available evidence is sufficient.

In respect of absence of certificate of seizure, it can be noted that PW 3 testified that certificate of seizure was prepared and PW 3 tendered Exhibit P3 that was Seizure Certificate. He tendered the same and it was admitted as one of the exhibits without any objection.

It a settled position of the law in our jurisdiction that where Certificate of Seizure is prepared and signed by the accused person is available that certificate serves the purpose of the receipt of acknowledgment. In the case of **Shabani Ally Athuman vs The Republic** (Criminal Appeal No. 151 of 2021) [2024] TZCA 192 (19 March 2024), at page 18, the Court of Appeal stated that:

Further, we are of the strong view that, by signing a certificate of seizure, the appellant admitted to be found in possession of the government trophy. Given that circumstance, we find that the omission to issue a receipt was not fatal.

[See also **Alphonce Bisege Mwasandube vs Republic** (Criminal Appeal No. 630 of 2020) [2024] TZCA 28 (12 February 2024) (TANZLII) at page 5]

As the tendering of the Exhibit P3 which is the Seizure Certificate was not objected by any of the appellants and its contents were read over in court as required by the law. Any lamentations on the admissibility of the same this far-fetched and an afterthought. It is not correct at all to state that Exhibit P1 motorcycle were irregularly tendered as the there was no tendering of seizure certificate. It is on record that PW 3 tendered the seizure certificate as Exhibit P. 3.

Further, on contradictory nature of the prosecution evidence I have revisited the evidence on record to verify its truthfulness. PW 1 testified to have called to identify the motorcycle black in colour make Haojue with registration number MC 412 BQL. This tallies squarely with testimonies of PW 3 and PW 5. Both PW 3 and PW 5 testified that PW 5 handed over the motorcycle to the police and signed the seizure certificate. It was on

20/07/2022. In totality, evidence of PW 1, PW 3 and PW 5 tally in the sense that the stolen motorcycle was recovered on handed over to police on 20/07/2022. Further, PW 4 testified to have seen the 2nd appellant and the 3rd accused at her place of business where the stolen motorcycle was parked. That makes the evidence to point out to the same direction that the same motorcycle that DW 3 admitted having purchased from 2nd appellant is the one that was identified by PW 1 after it had been seized by police on 20/07/2022.

Indeed, aspect of failure by the PW 1 to tender as driving licence that appellants have seriously challenged is not worth taking. Absence of driving licence does not in any way vitiate the proceedings. Driving licence alone is not a legal requirement for establishing that victim was on that particular day driving the motorcycle. Evidence of PW 2 who is the owner of the stolen motorcycle gave a thorough account that since 2019 he entrusted his motorcycle to the victim (PW 1) as a bodaboda driver. Also, PW 1 and PW 2 described the details of the said motorvehicle lucidly. Such evidence was also supported by PW 3 who stated to have been handed over and seized the motorcycle from PW 5.

The fact that PW 1 did not mention the date when he was later called to Police station to identify the recovered motorcycle and absence of tendering driving licence by the victim may seem to affect the evidence of PW 1. It is my settled view that such aspects are minor in nature. It is

within the curable nature of the contradiction. That position was reiterated in the case of **Priva Constantine Shirima vs Republic** (Criminal Appeal No. 437 of 2020) [2024] TZCA 237 (22 March 2024) (TANZLII), at page 12, where the Court of Appeal lucidly stated that:

> *The law on this point is clear that the court will only take into consideration contradiction which are not minor which do not go to the root of the matter. The Court has said so in various cases, amongst others, M**ohamed Said Matula v Republic** [1995] TLR 3, **Issa Hassan v. Republic**, Criminal Appeal No. 129 of 2017 (unreported) and **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 [2008] TZCA 17 (30 May, 2008) TanzLII. In the latter case, the Court stated that: "In evaluating discrepancies, contradictions, and omissions, it is undesirabie for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

The discrepancy should not be one that goes to the root of the case. It should be minor in nature to warrant the same being ignored. It is common that human mind cannot be accurate on every aspect especially

when time passes from the time of commission of the offence to the time of testifying. That is the reason, evidence must be considered in its totality.

Another important aspect of lamentation by the appellant is that of possibilities of fabrication of the evidence, namely 4, PW 6 and DW 3. The reasons for lamentation might have arisen out of the fact that such evidence had led to the recovery of the stolen motorcycle. It is on record that PW 4 stated on 08/07/2022 saw the second appellant and 3rd accused person at her place of business in Ngamu village. PW 4 also saw a motorcycle parked outside. PW 6 testified that on 19/07/2022 took the motorcycle in question as he went to another village called Kitamasi and that motorcycle was registered as MC 412 BQL.

These testimonies tally with that of DW 3 stated that on 08/07/2022, he met with the second appellant at a restaurant in Ngamu village. It is the second appellant who sold the motorcycle to the 3rd accused. In essence, PW 4, PW 6 and DW 3 cemented the part of the prosecution evidence on participation of the second appellant in the commission of the alleged offence.

However, this evidence does not stand alone as the appellants wish this court to believe that it is fabrication. It is corroborated by the evidence of other witnesses. PW 1 and PW 2 testified to the effect that on 07/07/2022 a motorcycle that belongs to PW 2 was stolen. The description

including the registration number, colour and make of the motorcycle that PW 4, PW 6 and DW 3 testified is the same.

As I have pointed out, it is settled law that prosecution is duty bound to prove the criminal case beyond reasonable doubt. The standard of proof is beyond reasonable doubt and duty is always on the prosecution. In **Matibya N g'habi vs Republic** (Criminal Appeal No. 651 of 2021) [2024] TZCA 34 (14 February 2024) (TANZLII), at page 8, the Court of Appeal reiterated that:

> *At the outset, it is instructive to state that, this being a criminal case, the burden lies on the prosecution to establish the guilt of appellant beyond reasonable doubt. In **Woodmington v. DPP** [1935] AC 462, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. The term beyond reasonable doubt is not statutorily defined but case laws have defined it. For instance, in the case of **Magendo Paul & Another v. Republic** [1993] T.L.R. 219 the Court held that: "For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed." It is noteworthy that, the duty and standard of the prosecution to prove the case beyond reasonable*

doubt is universal in all criminal trials and the duty never shifts to the accused.

Further, in the case of **Hezron Ndone vs Republic** (Criminal Appeal No. 263 of 2021) [2024] TZCA 15 (6 February 2024) (TANZLII), at 12-13, the Court noted that:

> *It is momentous to state that, in our criminal justice system like elsewhere, the burden of proving a charge against an accused person is on the prosecution. This is a universal standard in all criminal trials and the burden never shifts to the accused. As such, it is incumbent on the trial court to direct its mind to the evidence produced by the prosecution in order to establish if the case is made out against an accused person. This principle equally applies to an appellate court which sits to determine a criminal appeal in that regard. In our earlier decision in* ***Phinias Alexander and Others v. Republic****, Criminal Appeal No. 276 of 2019 (unreported), we cited with approval the decision in* ***Jonas Nkize v. Republic*** *[1992] T.L.R. 214 in which the High Court stated that: "the general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not*

worth taking." The term beyond reasonable doubt is not statutorily defined but case laws have defined it, in the case of ***Magendo Paul & Another v. Republic*** *(1993) T.L.R. 219 the Court held that: "For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

It is on record that prosecution rallied a total of ten (10) witnesses who testified on the ingredients of the offence of armed robbery. These witnesses tendered a total of eight (8) exhibits. The oral testimonies revealed that circumstances of commission of the offence in question.

PW 1 testified to have taken 10 minutes in negotiation with both appellants about the appropriate fare to pick them. It was PW 1 evidence that it was appellants who stole his motorcycle and threatened to use a knife to injure him if he would resist from the stealing of the motorcycle. PW 2 testified on the ownership of the respective motorcycle and that it was entrusted to PW 1 to run it since 2019. PW 3 testified vividly to have interrogated both appellants who admitted to the offence. Cautioned Statements were tendered by PW 3. He also testified as to the seizure of the motorcycle from PW 5. Evidence of PW 4 was to the effect that on 08/07/2022, she saw the 2nd appellant and 3rd accused at Ngamu Village

with the motorcycle in question. The evidence of PW 5 and PW 6 commonly relate to the seizure of the motorcycle from the persons who were in possession. PW 8 established on the identification parade while PW 9 testified as to the chain of custody of the stolen property from the seizure and keeping the same at the Police Exhibit Keeping and tendering of the same to the Court.

I have noted that Exhibit P.4 and Exhibit P.5 are lucid on the confession by the appellants. They leave no doubts at all that 1st and 2nd appellants committed the offence of armed robbery on 07/07/2022 where they robbed the victim a motorcycle with registration number MC 412 BQL black in colour make Haojue a property of PW 2.

In totality the prosecution evidence is not in any way watered down by the evidence of the defence. The defence evidence of the 1st and 2nd appellants did not raise any reasonable doubts. Totality of the prosecution evidence left no reasonable doubts on this case against the appellants. Without further ado I hereby dismiss the 1st, 8th, 10th, 12th, 14th, 15th, 17th and 18th grounds of appeal for being devoid of merits as I have demonstrated in the foregoing analysis.

In the circumstances of this appeal having demonstrated that there are no merits on all the preferred grounds of appeal, it is lucid that

there are no cogent reasons to interfere with such decision of the trial Court.

This appeal against the decision in Criminal Case No 64 of 2023 before the District Court of Singida which entered conviction and sentence against the 1st and 2nd appellants lacks merits. It is hereby dismissed in its entirety for being destitute of merits. The appeal shall stand dismissed.

It is so ordered.

DATED and **DELIVERED** at Dodoma this 28th day of June 2024.

THE HIGH COURT TANZANIA

Longopa

E.E. LONGOPA
JUDGE
27/06/2024.