IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO SUB-REGISTRY
AT MOROGORO

CRIMINAL APPEAL NO. 56 OF 2023

(*Arising from Criminal Case No. 185 of 2022 before the District Court of Morogoro at Morogoro*)

OMARY ISSA MGAYA @MSWATI..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

12/02/2024 & 28/02/2024

KINYAKA, J.:

In the District Court of Morogoro, Omary Issa Mgaya@ Mswati, the appellant herein and two others who are not parties to this appeal, were jointly charged and convicted for the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap. 16 R.E 2022. Following their conviction, each accused person was sentenced to serve a term of thirty (30) years imprisonment.

Aggrieved by the said conviction and sentence, the appellant who was the third accused in the trial at the District Court preferred the present appeal. In his petition of Appeal lodged in this Court on 15th September 2023, the

appellant advanced six grounds of appeal. However, with the leave of the court through its order dated 18th October 2023, the appellant filed an additional ground of appeal making a total of seven grounds as reproduced hereunder:

1. That, the trial Court magistrate erred in law and in fact to convict the Appellant with the offence charged while there was neither stolen properties nor offensive weapon which was tendered to prove the charge against the appellant.
2. That, the trial court magistrate erred in law and in fact for convicting and sentencing the appellant while the identification of the appellant was not proper.
3. That, the trial court magistrate erred in law and in fact for convicting and sentencing the appellant regardless of the contradictory evidence of the prosecution witnesses which goes to the root of the matter.
4. That the trial court magistrate erred in law and in fact for failure to evaluate and analyze evidence on record properly and hence reaching an erroneous decision.

5. That, the trial court magistrate erred in law and in fact for disregarding the defence of alibi as raised by the appellant hence causing injustice to the appellant.
6. That the trial Court magistrate erred in law and in fact to convict the Appellant while the prosecution side failed to prove their case beyond reasonable doubt, the standard required by law.
7. That, the trial magistrate erred in law and fact to convict and sentence the appellant based on a charge that was amended without being read again to the appellants.

At the hearing of the appeal which was conducted orally, the appellant had the legal services of Ms. Neema Ndayanse, learned advocate, whereas the Respondent was represented by Mr. Shabani Kabelwa, learned State Attorney.

In her submission in support of the appeal, Ms. Ndayanse opted to start with the 1st ground, followed by the 7th ground (the additional ground of appeal), then the 2nd, 3rd, 5th grounds, and lastly, the 4th and 6th grounds which were consolidated.

Arguing in respect of the first ground, the learned counsel for the appellant contended that, in order to prove the offence of Armed Robbery against the

appellant, the prosecution had to prove theft of the stolen properties, use of dangerous or offensive weapons in the act of stealing, and the use of threat or threat to use violence in order to obtain the properties. She contended that in the entire proceedings before the trial court, no element of the offence charged was proved against the appellant. She substantiated that there is no direct involvement of the appellant at the crime scene. Ms. Ndayanse illustrated that PW2 who is the victim, on page 13 of the proceedings, second paragraph, named the second accused, Anderson Razaro @Mudy Kijogoo who cut his finger by using a panga. On page 14 last paragraph, during cross examination, PW2 named the first accused, Idra Omary Komila @Idra who searched his pocket and took his money.

The learned counsel submitted further that from the prosecution evidence, there is no proof of the stolen properties including the stolen phone and money as neither the phone nor the stolen money was tendered in court. Further there was no proof of the use of offensive weapon – panga, which the victim stated to have been used at the crime scene to prove the offence against the appellant. Fortified by the holding of the Court of Appeal in the case of **Ally Saidi @Tox v. R., Criminal Appeal No. 308 of 2018** (unreported) on page 11 last paragraph, the learned counsel stated that the

offence was not proved since the stealing was not proved. She prayed for the first ground of appeal to be allowed.

On the additional ground of appeal, Ms. Ndayanse premised her complaints on the prosecution's contravention of section 234(1) and (2) of the Criminal Procedure Act Cap. 20 R.E. 2022 (hereinafter, the "CPA"), which provides that in case there is amendment of a charge at any stage of the trial, such an amendment must be made without injustice. She stated that under section 234(2) (a) of the CPA, the law dictates the court to call upon the accused person to plead to the altered charge.

Referring this court on page 12 of the typed proceedings, she averred that the prosecution prayed to amend the charge by changing the scene of crime to Twangapepeta, Dindili Morogoro from Mizani area, Mikese ward, in Morogoro District, which was the previous scene of crime indicated in first charge laid before the court. She accentuated that, the amended charge was not read over to the appellant upon amendment, contrary to the mandatory requirement of the law as held in the cases of **Thuway Aakonay v. R. (1987) TLR 92**, and **Omari Salum @ Mjusi v. R., Criminal Appeal No. 125 of 2020** (unreported), on page 8 where in both cases, it was emphasized that it is mandatory for a plea to a new or altered charge to be

taken from an accused person, as failure to do so renders the trial a nullity. She therefore concluded that failure by the trial court to comply with the provisions of section 234(1) and (2) of the CPA, renders the trial court's proceedings a nullity.

On the second ground, the appellant's complaint was on improper identification of the Appellant which was done at night. Ms. Ndayanse said, throughout the proceedings, there is no clear and direct identification of the appellant herein on the fateful night as per the evidence of the victim on page 13 of the proceedings who directly identified the other accused persons and failed to properly identify the appellant.

She submitted further that PW5, testified on page 24, last paragraph, that when he was given the file, the victim did not mention the 3 boys who attacked him at the earliest stage but he so did when he was being interrogated by him. Relying on the case of **Jaribu Abdallah v. R. (2003) TLR 271**, the learned counsel was of the view that in the present case, credibility of the victim is challenged as he failed to identify the appellant at the earliest possible moment.

As regards to the third ground of appeal, the counsel for the appellant argued that there were contradictions as to the number of people who allegedly attacked PW2 and the type of weapon used in the commission of the offence. She illustrated that on page 9 last paragraph of the typed proceedings, PW1 testified that she was told by PW2, the victim, that he was attacked by six people, whereas on page 13 second paragraph, the evidence of PW2, was that he was attacked by three people.

As to the weapon used, PW2 in his testimony on page 13 second paragraph of the typed proceedings stated to have been cut with a panga and that the accused persons took from him TZS 220,000 and his phone worthy TZS 40,000, while on page 21, at the second and third paragraphs of the proceedings, PW2 told PW4 that the accused persons took TZS 200,000 and that he was cut with a sime. According to her, the contradictions go to the root of the matter as reflected in the proceedings and averred that had the trial court considered the contradictory evidence of the prosecution witnesses, it would have found that the evidence was not watertight. To buttress her contention, she cited the case of **Pascal Yoya @Maganga v. R., Criminal Appeal No. 248 of 217** (unreported).

Submitting on the fifth ground, Ms. Ndayanse faulted the trial magistrate for disregarding the evidence of alibi on the ground that it did not meet the requirement of law on notice. Putting reliance on the holding of the Court of Appeal in the case of **Marwa Wangiti Mwita & Another v. R. (2002) TLR 39**, and **Maruzuku Hamis v. R. (1997) TLR 1**, she submitted that the absence of notice required under section 194 of the CPA does not mandate or authorize the outright rejection of an alibi as all that the appellant did was raising a reasonable doubt through his defence.

Addressing the fourth and sixth grounds of appeal, the learned counsel cited section 3(2) of the Evidence Act and the case of **Pascal Yoya@Mganga** (supra) and submitted that the trial court failed to exercise its duty properly that it proceeded in convicting and sentencing the appellant herein, while the prosecution failed to prove their case beyond reasonable doubt, the standard required by law. She stated that among the five prosecution witnesses, it was only the victim (PW2) whose testimony implicated the appellant herein. However, relying on the case of **Athumani Hassan v. R., Criminal Appeal No. 292 of 2017**, Ms. Ndayanse argued that the trial court did not direct itself to consider the coherence of the testimony of PW2,

in relation to the contradictory evidence of other prosecution witnesses hence reaching an erroneous decision.

Further, Ms. Ndayanse complained that the mobile phone that was allegedly stolen from PW2 was never found with the appellant and that PW2 did not provide a receipt of proving that he purchased the mobile phone. In her view had the trial court considered and scrutinized the entire evidence on record, it would have found that such evidence was not watertight as it has left lots of doubt to the prosecution evidence and the same should benefit the accused as held in the case of **Jonas Nkize v. R. (1992) TLR 213**.

In the end, the learned counsel for the appellant urged the court to allow the present appeal by quashing the entire proceedings and the judgement, and set aside the conviction and sentence of the trial court.

On the other hand, Mr. Shabani Kabelwa, learned State Attorney strongly opposed the appeal. In respect of the first ground, he submitted that the prosecution are free to choose which form of evidence to use in proving their case. As regards to the use of offensive weapons in the commission of the crime, Mr. Kabelwa told the court that on page 11 of the proceedings, upon being cross examined, PW1, the medical doctor, clearly stated that the victim

was injured with a sharp object. He said, the evidence is supported by the testimony of PW2 as clearly shown on page 13 second paragraph that the second accused person used panga to cut his finger. In view of the above evidence of PW1 and PW2 it was his averment that the offensive weapon of panga was used at the scene of crime.

On the part of stolen items, he contended that the stolen property was proved during the trial by PW2, the victim, on page 13 second paragraph as well as PW4 who stated that the victim told him that the accused persons took TZS 200,000 from him. He stated that since PW1 and PW4 are credible witnesses, it was his view that their evidence is strong enough to prove that the stolen property was actually stolen and the offensive weapon, which is panga, was used at the scene of crime in order to obtain the stolen property.

In respect of the additional ground, Mr. Kabelwa conceded to the fact that it is true that after amendment of the charge as reflected on page 12, the charge was not read to the accused persons in order for them to plead to the amended charge. However, according to him, the same did not prejudice the accused persons as the intended amendment was to change the place of the crime and that prosecution witnesses who were called to prove the place where the crime occurred, had not testified at the time of the

amendment. Citing the case of **DPP v. Danford Roman @Kanani and 3 Others, Criminal Case No. 236 of 2018, Court of Appeal on page 19,** the learned counsel prayed for an order of retrial, in case the Court finds otherwise that the irregularity is incurable, and that the error renders the whole trial a nullity.

In respect of the second ground of appeal, the learned state attorney contended that the identification of the appellant was proper. He said, according to the law as amplified in the case of **Jumapili Msiete v. R., Criminal Appeal No. 110 of 2014**, the best identification evidence is that of recognition. He elaborated that on page 13 of the proceedings, PW2 stated that the accused persons were his friends whom he knew since the year 2007. He stated that in collaboration, PW2 testified in second paragraph of page 13 that he recognized the accused as there was electric light and the incident lasted for 15 minutes. He concluded that, the accused persons together with the appellant herein, were identified by PW2 at the scene of crime.

In respect of the third ground, Mr. Kabelwa submitted that the contradictions are minor since they do not go to the root of the matter as supported by the case of **Dickson Elia Nsamba Shapwata & Another v. R., Criminal**

Appeal No. 92 of 2007. Based on the decision and the evidence before the trial Court, Mr. Kabelwa prayed the Court to find that the discrepancies and contradictions are minor which do not go to the root of the case. He argued that as it is the tendency of a human being to forget, the contradictions were occasioned by the longer period from when the incidence happened, until when the witnesses testified in court.

Submitting on the fifth ground, the counsel explained that, DW3 wanted to tender a bus ticket on re-examination instead of doing the same during his examination in chief. From that reason, the trial magistrate warned herself of the danger of denying the prosecution a room to cross examine on the bus ticket. He viewed the bus ticket as the foundation of the appellant's defence of alibi hence failure to present the same at the right time, led the court to the reject the evidence.

As for the fourth and sixth grounds of appeal, Mr. Kabelwa submitted that the case against the accused persons was proved beyond reasonable doubt as all elements of the offence were proved against them. He elaborated that on the first ingredient, the evidence of PW2 proved that he was cut his fingers by the 2nd accused whereas TZS 220,000 and a mobile phone worthy 40,000 were stolen from him by the 1st and 3rd accused persons. He

accentuated that an element of the use of dangerous or offensive weapon was proved by PW1 on page 11, PW2 on page 13 and PW5 and PW4. On the other hand, the third ingredient was proven by PW1, the medical doctor who examined PW2 and Exhibit P1 which is PF3 admitted in court proving that PW2 was injured by a sharp object which cut him. In his conclusion, the learned state attorney insisted that the charge against the appellant and the other co-accused was proved beyond reasonable doubt. He pressed for the dismissal of the appellant's entire appeal.

In rejoinder, as regard to the first ground, the learned counsel for the appellant insisted that the alleged stolen properties was not proved to have been stolen from the victim by the appellant. Regarding the use of violence or offensive weapons, she emphasized that PW2's evidence clearly stated that he was cut with a panga by Mudi, second accused and not the appellant and that the evidence of prosecution witness, PW1 and PW4 concerning the use of the offensive weapon, was contradictory. She contended that PW1 evidence that PW2 was cut by sharp object, did not indicate the kind of the sharp object while PW2 stated that he was cut with a panga and told PW4 that he was cut by a sime.

On the additional ground, Ms. Ndayanse reiterated her submissions in support of the ground. However, she opposed the respondent's prayer for an order for retrial as according to her, it is well known that such an order is only made where the interest of justice demands and not otherwise. She insisted the appeal to be allowed since the mandatory requirement of section 234 (1) and (2) of the CPA was not met. Regarding the fourth and sixth grounds, the learned counsel reiterated his earlier position and prayed that the appeal be allowed and the Appellant be set free.

Having sensibly examined the trial court records, and considering the grounds of appeal as well as the parties' submissions for and against the appeal, I will first determine the additional ground of appeal as in my view, if the same is allowed, will be capable of disposing of the appeal.

The complaint subject of the additional ground is based on the failure by the prosecution to read over the amended charge to the accused persons, and the trial court's failure to require the accused persons to plead to the altered charge. As rightly argued by the appellant's advocate and conceded by learned State Attorney, after the amendment of the charge on the scene of crime depicted on page 12 of the proceedings where the place of commission of the crime was altered from Mizani, Mikese ward to Twangapepeta, Dindili,

the amended charge was not read over to the accused persons. Further, the accused persons were not called to plead to the amended charge, contrary to the mandatory provisions of section 234(1) and (2) of the CPA. An extract of proceedings complained of is as illustrated hereunder:

"Coram:

Date: 20/2/2023

Hon: E. Lukumai – SRM

Accused: All present

Pros: Mary- S/A and Miss Jane PP

CC: Kidawa – RMA

SA: The case is for hearing, we have one witness, however before we proceed we pray to amend the charge sheet so that the scene of crime be read as twangapepeta Dindili Morogoro pursuant to S. 234 (1) of the CPA Cap 20 RE 2022.

Accused: we have no objection.

Court: prayer granted, charge has been amended and signed by SA

SGD

E. LUKUMAI-SRM

20/2/2023

PROSECUTION CASE PROCEEDS

PW2: Khamis Iddi Mohammed, 35 years, Nyature, resident of Mikese, small enterprenuer, Muslim, affirmed and stated....."

From the above extract, it is crystal clear that immediately after the amendment of the charge, the accused persons were not called to plead to the altered charge, instead, the trial magistrate proceeded with the hearing of the prosecution case contrary to the dictates of section 234(1) and (2) (a) of the CPA.

It was Mr. Kabelwa's view that the anomaly did not prejudice the accused persons as during the trial, the State Attorney in charge of the case clearly stated the intended amendment was to change the crime scene. It was his further explanation that the prosecution witnesses who were called to prove the place where the crime occurred, had not testified at the time of the amendment.

Having considering the arguments of the rival parties, I find it pertinent to reproduce section 234(1) and (2) of CPA for the purpose of clarity and proper determination of the issue at hand. The section reads:

"234.-(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to The Criminal Procedure Act [CAP. 20 R.E. 2019] the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just."

(2) Subject to subsection (1), where a charge is altered under that subsection-

(a) the court shall thereupon call upon the accused person to plead to the altered charge;

(b) N/A

(c) N/A".

What I have gathered from the above provision of the law is that once a charge is amended, among other things, the law require the accused person to plead to the altered charge. With that said, I am not at one with Mr. Kabelwa's contention that the accused persons were not prejudiced as they were made aware of the changes and that the prosecution witnesses had not yet testified regarding the amendment that altered the crime scene. I

also do not agree with Mr. Kabelwa that the amendment did not prejudice the accused persons. Under the circumstance, it is doubtful if the accused persons were made aware of the nature of the amendment, how it affected the proceedings, and how it applied to the offence they were charged with in order to prepare for their defence. In the circumstance, I cannot invokes section 388 of CPA. In my firm view, as the provision is couched in mandatory terms, there was no room for the trial magistrate to opt not to strictly adhere to the requirement under any circumstance.

The position above has been amplified in a number of cases in our jurisdiction. For instance, in **Kurubone Bagirigwa & Others v. Republic Criminal Appeal No. 132 of 2015** (unreported) on page 6, the Court of Appeal emphasized on the compliance with section 234(1) and (2) of the CPA and observed that:

> *"Whenever the charge is amended, in terms of section 234 (2) (a) of the Criminal Procedure Act, the court is duty bound to take new pleas on the amended charge. It is mandatory for a plea to a new or altered charge to be taken from an accused person, failure to do so renders a trial a nullity. (See THUWAY AKONNAY VS. REPUBLIC (1987) TLR 92)".*

In view of the above authority and the law governing amendment of charge stated earlier on, I agree with the learned advocate for the appellant that the omission by the trial court to comply to the dictates under the said provision, vitiated the trial proceedings that followed immediately after the amendment of the charge, rendering the same a nullity.

With that being said and done, this appeal is allowed. Consequently, I nullify the said proceedings from the point the charge was amended on 20/2/2023 and set aside the judgment of the District Court of Morogoro in Criminal Case No. 185 of 2022. As a result, the conviction and sentence of thirty (30) years imprisonment meted out by the trial court, not only against the appellant herein, but against all accused persons is also quashed and set aside.

As to the way forward, the task before me is testing whether this is a case fit to order retrial based on the conditions set in the case **Fatehali Manji v. Republic (1966) E.A 343,** in particular reanalyzing and re-evaluating the entire evidence of the prosecution witnesses so as to ascertain as to whether an order for retrial will enable the prosecution side to fill gaps in its case at the trial.

At the trial, in a bid to prove its case against the accused persons, the prosecution had a total of five witnesses and relied on two exhibits, PF3 and the caution statement. What is gathered from the prosecution is that on 01/08/2022 at 23:00 hours, PW2 met the accused persons at Twanga Pepeta area. The 2nd accused took a panga and cut his fingers whereas the 3rd accused person took from him TZS 220,000 and a phone worthy TZS 40,000.

It was the prosecution evidence that PW4, a watchman at Focus Shop at Mikese-TwangaPepeta area heard PW2 screaming "nakufaa", hence he decided to go to the crime scene where on the way, he met the accused persons whom he identified through electric lights. Upon reaching the crime scene, PW4 found PW2 bleeding with his left hand cut. PW2 informed him that he was attacked by three boys whom PW4 met on the way. As PW2 was injured, on 02/08/2022, he went at Fulwe Dispensary in Mikese where he met PW1 and told her that he was attacked by six people who cut his left hand fingers. Being a medical doctor, PW1 attended him and filled the PF3 which was later on admitted as "Exhibit P1" during the trial. PW2 reported the matter to the police who on 05/09/2022, arrested the first accused. It is on record that upon being interrogated by PW5, the first accused confessed to have committed the offence of armed robbery and further mentioned the

other accused persons, including the appellant, to have been involved in the said incidence. The caution statement indicating that the first accused so confessed was tendered and admitted as "Exhibit P2" at the trial.

In their defence, the accused persons all denied each detail in the testimony of the prosecution witnesses. They insisted that they don't know each other and that they didn't commit the offence. On his part, the appellant claimed further that on 01/08/2022, he was in Dar es Salam attending his grandmother who was sick in Muhimbili hospital.

In her judgment, the trial magistrate believed the prosecution evidence to be cogent. She was satisfied that through the testimony of PW1, PW2, PW4, and Exhibit P1, the prosecution proved that the offence of Armed Robbery was committed against PW2. As to who committed the offence, the honourable magistrate concluded that through the testimony of identification witnesses, the accused persons were the ones who committed the offence. He held that the accused persons were identified at the crime scene by PW2 and PW4 by recognition in the incident that lasted for about 15 minutes, sufficient to identify the culprits.

On that basis, the trial court was satisfied that the identification of the accused persons was properly done and further, relied on the first accused person's caution statement to ground the accused persons' conviction. It faulted the defence of alibi raised by the appellant for not complying with the requirements under section 194 (4), (5) and (6) of the CPA. My re-evaluation of the prosecution evidence has led me to a finding that it is undisputed that, the conviction of the accused persons was based on the identification of the accused persons as well as the caution statement of the 1st accused person.

I have found that the trial court did not outright reject the appellant's defence of alibi but the bus ticket to prove the appellant's defence of alibi at the stage the appellant's re-examination. I hold the position that the trial court did not err by rejecting admission in evidence of the bus ticket that the appellant sought to produce at the stage of re-examination. The same would highly prejudice the respondent and would deny him an opportunity to cross examine the appellant on the bus ticket. The appellant was expected to produce the bus ticket to prove his alibi at the earliest opportunity at least at the stage of his examination in chief, regardless of his failure to issue a notice.

Upon further scrutinizing the proceedings of the trial court, I agree with the learned advocate for the appellant that there were some discrepancies in the evidence of the prosecution witnesses that ordinarily create doubt on the prosecution case. These include the variances on the time the accused persons were arrested, the exact amount of money stolen from PW2, type of weapon used to attack the victim, and number of people who attacked him. Irrespective of the fact that there may arise differences in the testimonies of witnesses occasioned by human error, the same should not be fundamental to affect the prosecution case. In my position, the variance between the stolen amount of TZS 220,000 by PW2 and TZS 200,000 by PW4 is minor especially in this case where PW2, the victim, consistently testified that the money stolen was TZS 220,000.

The difference between PW2's span of one week between the incident and their arrest, and that of PW5 that he arrested them on 05/09/2022, which is more than a week from 01/08/2022 when the incident occurred, is not fundamental. I am saying so because, it is not PW2 who arrested the accused persons and his testimony is a hearsay that he heard the accused persons were arrested a week after the incident. Further, the time when the accused persons were arrested does not prove any ingredient of the offence.

The difference between the weapons used as testified by PW2 as panga, PW4 as sime and PW1 as sharp weapon, is also not fundamental, in my opinion. Again, PW2, the victim was consistent that he was cut by panga. DW1 in his caution statement testified that he had a panga. PW1 and PW4 were not victims. Their evidences were hearsay from PW1 and cannot be heavily relied to disregard the evidence of PW2.

Similarly, the variances as to the number of the attackers between PW2 and PW1, does not shake the evidence of prosecution. PW2, the victim testified that he was attacked by three people whereas PW1 informed the court that PW2 told her that he was attacked by six people. Again the hearsay evidence cannot be heavily relied to disregard the evidence of PW2, the victim, that he was attacked by three people. The evidence of PW2 was also corroborated by the evidence of PW4 that he met three boys on the way to rescue PW2.

In view of the above I safely hold that the contradictions pointed out by the learned advocate for the appellant were minor and insignificant. The trial court was correct to disregard them.

I now direct my mind to determine whether the prosecution proved all key ingredients of the offence of Armed Robbery without leaving any gaps to be filled in case an order for retrial is made.

Deducing from section 287 of the Penal Code, Cap. 16 R.E. 2002, for a person to be convicted of the offence of Armed Robbery, the prosecution has to prove that there was theft; use of a dangerous or offensive weapon or robbery instrument against, at, or immediately after the commission of robbery; and that said dangerous or offensive weapon or robbery instrument was directed against the victim.

Having considered the evidence adduced at the trial, I am of the view that the prosecution failed to prove theft, the first element of the offence of Armed Robbery. I so state on the reason that at the trial, there was no evidence adduced as to whether the alleged stolen items were in possession of PW2. In his testimony, PW2 told the trial court that the robbers took from him a mobile phone worth TZS 40,000, and TZS 220,000 at the crime scene. However, he neither furnished particulars of his mobile phone including, its make, its colour, its size, nor adducing any evidence proving that he was in possession of the stolen items on the material date, including the particulars of the mobile phone and the evidence of his possession or ownership. As

regards to the money alleged to have been stolen from the victim, the prosecution also failed to adduce evidence to prove that the same was in possession of the victim at the crime scene. In my view, it cannot be said that the crucial element of theft was proved under the circumstances.

That was the position in the case of **Ally Said @Tox v. Republic, Criminal Appeal No. 308 of 2018**, (unreported), where the Court of Appeal underlined that the failure of the victim of the offence to both furnish particulars of her mobile phone distinct from any other mobile phone and produce any receipt creates doubts in the prosecution's case in proving stealing as an essential ingredient in the offence of armed robbery.

With that being said, I hold the view that in the absence of proof of the theft, the offence was not proved against the Appellant and other accused persons on the required standard.

In view of the above, it is not in the interest of justice to subject the accused persons to retrial under the circumstance of this case. In the upshot, I order that the appellant and the other two accused persons Idra Omary Komola@Idra and Anderson Lazaro @Mudy Kijogoo should forthwith be released from prison unless they are held therein for other lawful cause.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 28th day of February 2024.

H. A. KINYAKA

JUDGE

28/02/2024