IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 491 OF 2017

1. GIMBU S/O MASELE
2. LUCAS S/O MICHAEL ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the decision of the High Court of Tanzania, at Tabora)

(Mruma, J.)

dated the 22nd day of September, 2014
in
Dc. Criminal Appeal Nos. 56, 57, 58 of 2013
.....

JUDGMENT OF THE COURT

22nd October & 2nd November, 2021

LEVIRA, J.A.:

The appellants, Gimba Masele and Lucas Michael together with two others (not parties in this appeal) were jointly and together charged before Maswa District Court at Maswa with three counts of armed robbery contrary to sections 285 and 286 of the Penal Code Cap. 16 R.E. 2002 [now R.E. 2019] (the Penal Code). Upon full trial, they were convicted and sentenced each to thirty (30) years imprisonment and to suffer twelve (12) strokes of the cane. The sentences were to run concurrently. Dissatisfied, the appellants unsuccessfully appealed to the High Court (Mruma, J.) in

Consolidated (DC) Criminal Appeals No. 56 and 57 of 2013; and hence, the present second appeal.

The background of this case according to the evidence on record is that, on 21st December, 2005 at about 23:00 hours Sospeter Paulini (PW1) while at home, was invaded by a group of at least five robbers whom he knew. He mentioned them to be Gimbu Masele (the 1st appellant), Lucas Michael (the 2nd appellant), Dolla Sitta, Shada Msheye and Ndetuli Yegela. According to him, those robbers who were armed with bush knife "panga", clubs, gun and sword demanded money from him. PW1 gave them TZS. 232,500/= which he was having and TZS. 500,000/= which he had kept at his mother's house, one Mariam Kalemele (PW4). He testified further that three of those robbers entered his bedroom and he managed to identify them as there was light from lamp and the other two who were outside, he was able to identify them because there was a moonlight. The evidence of PW1 was corroborated by that of PW4 who confirmed that those robbers led by PW1 who is her son entered her house, demanded money and she handed TZS. 500,000/= to them. In addition, she said they also took 10 pairs of "vitenge" and 7 pairs of Khanga from her.

In the same transaction, the said robbers invaded the house of Amosi Mabumba (PW2) who also knew them prior to the incident and stole from

him one bicycle valued at TZS. 70,000/=. PW2 identified them through the aid of torchlight which they lightened at the scene and their voices. The robbers proceeded to the house of Chikalu Njile (PW3), they broke the door and started to beat him with clubs while demanding money from him. To serve his life, he gave them TZS. 165,000/= and mobile phone valued TZS. 62,000/=. PW3 also knew the robbers even before the incident and he managed to identify them because in his room there was a lamp which was lightening. The evidence of PW3 was corroborated by his wife, Victoria Mashere (PW5).

All the three victims (PW1, PW2 & PW3) were taken to Nguliguli Dispensary for treatment of the injuries which they sustained. While at the dispensary, they were visited by police officer No. F.91 DC. Rajabu (PW6) who was an investigator. Through the victims, PW6 managed to know the names of all accused persons (including the appellants herein). He recorded the victims' statements and interrogated the appellants before charging them in court.

In their defence both appellants denied to have committed the offence of armed robbery. They challenged the evidence of PW1 to PW5 on identification claiming that those witnesses contradicted themselves on how they identified them at the scenes of crime. They as well challenged the

prosecution for not conducting an identification parade for them to be identified by the victims.

All in all, having considered the evidence by both sides, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt and thus convicted the appellants accordingly as intimated above. Aggrieved, the appellants have presented before us separate memoranda of appeal filed on the same date, 20th February, 2019, with similar grounds of appeal faulting the first appellate court for upholding the trial court's decision without considering the following: -

1. *That they were wrongly charged with armed robbery under sections 285 and 286 of the Penal Code.*
2. *That the appellants were not properly identified at the scene of crime.*
3. *That the trial court failed to specify under which counts the appellants were convicted.*
4. *That two magistrates dealt with the appellants' case without assigning reasons for change of trial magistrates.*
5. *That the appellants were unfairly tried because they were not reminded of the charge before commencement of prosecution case.*
6. *That there no exactly sentence that the appellants were sentenced.*
7. *That the prosecution case was not proved beyond reasonable doubt.*

At the hearing of the appeal the appellants appeared in person, unrepresented, whereas the respondent Republic had the services of Mr.

Tito Ambangile Mwakalinga, learned State Attorney. The appellants sought and were granted leave to add four grounds found in their joint supplementary memorandum of appeal. In essence the additional grounds fall under the above 2nd and 7th grounds of appeal except the third ground which was new. In the said ground, the appellants' complaint is as follows:-

3. That there was un-explained delay in arresting the appellants.

In support of the appeal, the appellants fully adopted the grounds of appeal as part of their oral submissions. Thereafter opted to let the learned State Attorney respond first as they reserved their right to rejoin if need to do so would arise.

On his part, Mr. Mwakalinga started by intimating to the Court that the Respondent contested the appeal.

Responding to the first ground of appeal, Mr. Mwakalinga admitted that the charge sheet under which the appellants were charged was defective having cited sections 285 and 286 of the Penal Code in the statement of offence instead of section 287A. He substantiated that when the appellants were charged, the Pena Code had already been amended by Act No. 4 of 2004 which introduced section 287A dealing with armed robbery. However, despite that concession, he argued that failure to cite

proper provision alone does not make a charge sheet fatally defective as that defect was curable under section 388 (1) of the Criminal Procedure Act, Cap. 20 R.E 2002 (the CPA). To support his contention, he referred us to the Court's decision in **Masalu Kayeye v. Republic**, Criminal Appeal No. 120 of 2017 which cited the case of **Jamal Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (both unreported).

The learned State Attorney submitted further that, in the present case, despite of the citation of wrong provision in the statement of the offence, the particulars of offence, facts of the case and evidence adduced by prosecution witnesses enabled the appellants to understand the charge with which they were charged. He thus urged us to dismiss this ground of appeal.

The appellants had no rejoinder in respect of the first ground of appeal.

Having heard the parties in this ground of appeal and gone through the record of appeal, we think, this ground is straight forward. It is in the record that the appellants were charged on 21st December, 2005 with armed robbery contrary to Sections 285 and 286 of the Penal Code as intimated above. We agree with the learned State Attorney that at that time the law had already been amended by Written Laws (Miscellaneous

Amendments) (No. 2) Act No. 4 of 2004 which introduced Section 287A of the Penal Code specifically creating the offence of armed robbery. It reads:-

> *"287A. Any person who steals anything, and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons and at or immediately before or immediately after the time of stealing uses or threatens to use violence to any person, commits an offence termed "armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment."*

Indeed, the appellants ought to have been charged under Section 287A of the Penal Code but that was not the case. The question that follows is whether that anomaly in the charge prejudiced the appellants. The aim of citing specific provision and particulars of offence in the charge is to give an accused person reasonable information as to the nature of the offence charged. This is in accordance with sections 132 and 135 of the CPA. Also, we may add here that, such information may help him or her prepare his defence.

In the current case, particulars of offence shown above and the evidence adduced by prosecution witnesses clearly indicated that the

appellants invaded PW1, PW2 and PW3, stole various items from them. Further that, immediately before and after such stealing, they used violence on them so as to obtain those properties. We thus entertain no doubt that the appellants were made fully aware of the nature of the offence they were charged with. This can be proved by their defence found at pages 48 to 52 of the record of appeal. At page 49, part of the first appellant's defence reads: -

> *"On 9/5/2006 I was charged in court for the offence of* ***armed robbery*** *where the complainant is one Sospeter Raphael. I object the testimony of Sospeter Paulina as it does not reveal the value of* ***properties stolen****....it is not true that I robbed him as I am not robber as alleged....PW2 Amos Magumba testified that* ***he was hit with a strong object*** *and lost conscious."* [Emphasis added].

The second appellant at page 50 of the record of appeal stated: -

> *"I object the whole testimony adduced by prosecution witnesses particularly Sospeter Raphael who is a complainant ....PW1 is the one who was robbed ....PW3 Jigalu Njile testified that he was robbed by 4 people. Gimbu Masele, Lucas Michael, Ndatulu Yegela and Mbasa Gurelya....*

In cross examination by the Public Prosecutor, the second appellant said:-

"I was charged of robbing Sospeter Raphael."

As stated earlier, the record of appeal particularly the particulars of the offence and the entire evidence adduced by the witnesses for both parties bring us back to the established position in **Jamal Ally @ Salum** (supra), when the Court was dealing with an akin situation had the following to say: -

> *"Where particulars of the offence are clear and enabled the appellant to fully understand the nature and seriousness of the offence for which he was being tried for, where the particulars of the offence gave the appellant sufficient notice about the date when offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age and where there is evidence at the trial which is recorded giving detailed account on how the appellant committed the offence charged and* ***thus any irregularities over non-citations and citations of inapplicable provisions in the statement of offence are curable under Section 388 (1)*** *of the Criminal Procedure Act, Cap 20 Revised Edition 2002 (the CPA)."*[Emphasis Added].

Being guided by the position set in the above decision and upon examining the record of appeal, we are satisfied that in the current case,

the defect in the charge was not fatal and the appellants were not prejudiced; hence, curable under Section 388 (1) of the CPA. The first ground of appeal is thus without merit.

Submitting in respect of the second ground of appeal featuring in both, the memorandum and supplementary memorandum of appeal, Mr. Mwakalinga stated that, the appellants were properly identified at the scenes of crime. He went on to state that PW1, PW2 and PW3 knew the appellants even before the incident and they explained how they identified them on the material night. He referred us to page 18 of the record of appeal where PW1 testified that he identified people who invaded him including the appellants by mentioning their names through the aid of lamp light. Besides, Mr. Mwakalinga stated that PW1 spent enough time with the robbers because they ordered him to give them more money apart from TZS. 232,500/= which he surrendered to them. Owing the threat posed to him by the robbers, PW1 had no option except to take them to his mother's house so as to fetch more money where they managed to take TZS. 500,000/=.

The learned State Attorney also referred us to page 25 of the record of appeal where PW2 testified that he knew the appellants and that on the material night they were among the robbers who invaded him. He testified

further that he identified the appellants through the aid of torch light which was lightened by the other robbers who were at the rear side of his house. Mr. Mwakalinga stated further that at page 28 of the record of appeal, PW3 identified the appellants and their fellow robbers through the aid of lamp light.

He was firm that the appellants were properly identified at the scenes of crime through lamp light which he said, was sufficient taking into consideration that the identifying witnesses knew the appellants prior to the incident. In support of his argument, he cited the decision of the Court in **Abdalla Rajab Waziri v. Republic**, Criminal Appeal No. 116 of 2004 cited in **Mussa Saguda v. Republic**, Criminal Appeal No. 440 of 2017 (both unreported) where the source of light which enabled the witness to identify the perpetrator of the offence relied by the Court was the match. According to Mr. Mwakalinga, the lamp light in the present case is brighter than a match and thus he urged us to find that the appellants were properly identified at the scenes of crime.

In addition, he indicated that the victims were injured and were taken to the hospital that is why they were not interrogated immediately after the incident as shown at page 23 of the record of appeal. He also referred us to page 44 of the record of appeal where PW6 testified that when he went

to the hospital to see the victims, they mentioned people who invaded them including the appellants. He reiterated his position that the appellants were properly identified at the scenes of crime and thus urged us to dismiss this ground of appeal.

In rejoinder, the first appellant argued that although the prosecution witnesses claimed that they identified him at the scene of crime, the kind and intensity of light used to identify them was not stated. He went on stating that PW2 and PW5 stated at different times that people who invaded them were using torch. He thus posed a question that if there was light why did they use torch? He submitted further that PW2 at page 22 and PW3 at page 31 did not state the intensity of light and how big was the room.

It was the first appellant's further contention that according to prosecution witnesses (PW1 - PW5), the first people to arrive at the scene were not police officers but it is doubtful none of the witnesses mentioned the names of invaders to them.

The second appellant argued in rejoinder that, if indeed the prosecution witnesses identified him at the scene of crime, why the Village Executive Officer (VEO) was not called to testify to that effect? He maintained that he was not identified at the scene of crime.

The question as to whether the appellants were properly identified at the scene of crime can correctly be answer after elimination of all the possibilities of mistaken identity in the circumstances of each particular case – see **Waziri Amani v. Republic** [1980] T.L.R 250. While responding to this ground of appeal, Mr. Mwakalinga referred us to the case of **Mussa Saguda** (supra) wherein various decisions of the Court stating about different circumstances under which identification was made were referred; including, **Jimmy Zacharia v. Republic**, Criminal Appeal No. 69 of 2006 (unreported) and **Abdallah Rajab Waziri** (supra). In the latter case the Court quoted the position set by the first appellate court which we adopt to the effect that: -

> *"The source of light was from a match. The court established that such light was sufficient to identify a person who was known prior to the incident. Similarly, in the present case PW1 knew the appellant prior to the incident and since there was light from the torch it was enough to properly identify the appellant. In view thereof, I am in agreement with the trial magistrate and the learned State Attorney that the identification of the appellant was proper in that there was enough light to identify the appellant. In the totality there was no mistaken*

identity whatsoever. This ground fails and is hereby disregarded".

In the above case, identification of the appellant was said to be proper despite the fact that the source of light was a match as it was established that the identifying witness had prior knowledge of the appellant even before the incident. Likewise, in the current case all prosecution witnesses except PW6 testified that they knew the appellants even before the incident. They even mentioned the names of the appellants to be the robbers whom they identified on the material night. To appreciate what they stated, the following are the excerpts from their testimonies: - At page 18 of the record of appeal PW1 testified without being cross examined by the appellants about his identification to the effect that: -

> *"A total of five people robbed me on the material night. I know those three people who entered into my bed room or sleeping room. I know them by seeing them there at inside my bed room as* ***there was a light of lamp,*** *I also identified those three people who had entered into my bed room and two others who were outside after they had taken me outside* ***where there was a moon light.*** *Those who entered in my bed room are* ***Gimbu Masele*** *who is the 1st accused at the dock,* ***Lucas Michael***

who is the 2nd accused at the dock, Dolla Sitta who is the 3rd accused at the dock ...." [Emphasis added].

At page 25 of the record of appeal, PW2 testified that: -

> *"I know the four accused at the dock, I know them from a long ago. I managed to identify one of the* ***robbers as we were lightened by a torch*** *by his fellow robbers ... I identified one* ***Gimbu Masele*** *who is at the dock.* ***Yes I know him prior the incident****."*

At page 28 of the record PW3 testified as follows: -

> *"I identified all who had entered inside including* ***Lucas Michael, Gimbu Masele****, Ndeturu Yegele, Shada Hussein ... I identified them as inside the room there was a* ***light of a lamp*** *which was lighting."*

In cross examination by the 1st appellant, PW3 said: *"Yes I know you prior the incident, you were buying commodities like cigarette at my shop."*

PW4 stated at page 35 of the record of appeal as follows: -

> *"I know the accused at the dock, I know all of them ... I know the accused prior this date ... I identified those who entered inside; these are* ***Gimbu Masele, Lucas Michael****, Dolla and Shada."*

In cross examination by the 2nd appellant, PW4 stated at page 36 of the record of appeal that: *"I identified you through a **lamp light.**"* [Emphasis added].

At page 40 of the record of appeal PW5 testified to the effect that: -

> *"**I knew the accused at the dock even prior that date hereinabove.** On 21.12.2005 at about 23:00 hours while at my house I was surprised to see the door hited (sic) and 4 people entered inside therein ... I saw them as when they entered **there was a lamp lightening on.** I manage to identify them; to wit **Gimbu Masele, Lucas Michael,** Shada Hussein and Ndaturu who is not here in court."* [Emphasis added].

When cross examined by the fist appellant at page 41 of the record of appeal, PW5 responded as follows: -

> *"You were my customer and you were often buying my commodities. I asked your name and you told me that your name is Gimbu Masele. I asked you as you were frequently and often visiting at my shop. I identified at a scene you were in possession of a gun. I identified you through a light of lamp which was a light and (sic) the course of counting money you were lightening each other.... **We normally not switch off lamp.** I was shocked when you robbed me but I identified you. **I identified you as there***

was light lamp *and when you were beating my husband".* [Emphasis added].

From the foregoing reproduced excerpts, it is clear that the appellants were not strangers to prosecution witness. We are aware that mistakes in recognition of close relatives or friends are sometimes made – see, **Philimon Jumanne Agala @ J4 V. Republic,** Criminal Appeal No. 187 of 2015 (unreported). However, we entertain no doubt that through the aid of lamp light, torch light and moon light the prosecution witnesses were able to identify the appellants who invaded their bedrooms in village houses. We think, lamp and torch lights are far brighter than a match. Besides, the appellants made conversation with the identifying witnesses while demanding to be given money, we entertain no doubt that they were close that is why the appellants managed to injure them by clubs and pangas, time spent together was sufficient as for instance, having invaded PW1 and collect some money from him, they walked with PW1 from his house up to his mother's house, waited for the door to be opened before invading to PW4's bedroom and take some money and clothes. In the circumstances, as it was in **Abdalla Rajabu Waziri's case** (supra), we are satisfied that the appellants were properly identified and the credibility of prosecution witnesses remained intact throughout, as such, they are entitled to credence – (see **Goodluck Kyando v. Republic** [2006] T.L.R 363) as we

could not find any justifiable reason why they should not be believed as despite being intensively cross examined by the appellants; particularly, by the first appellant they remained firm and the substance of their evidence on identification was not shaken. We have thoroughly gone through the record of appeal and we did not find any reasonable doubt raised by the appellants against those witnesses' evidence. We take note that the appellants challenged the prosecution evidence as why the VEO was not called to testify and why no other prosecution witness other than PW6 were called to testify that they were mentioned to be involved in the incident.

The law is settled that there is no specific number of witnesses required to prove a fact- see section 143 of the Evidence Act and **Ally Shenyau v. Republic**, Criminal Appeal No. 27 of 1993 (unreported). It is on record that PW6 who arrived at the scene of crime on the material night testified that the victims mentioned to him the names of the robbers in the same night when he visited them at the hospital. We as well do not find any merit regarding the question posed by the first appellant regarding the evidence of PW2 and PW5. We have thoroughly scrutinised the record of appeal and noted that, it was not PW5 who said that she identified the appellants through a torch light but PW2. However, PW2 stated that he was lightened by torch by those robbers while standing at the entrance door to

his bedroom to obstruct. He also testified that he identified the robbers particularly PW1 as he was lightened by his fellow robbers through a torch. Logically, if PW2 was standing obstructing the entrance to his bedroom, we think, it was possible to see those people who were approaching the said room through the aid of torch light lightened by the robbers who were outside the room.

In the circumstances, we do not find any reason to fault the first appellate Judge in his findings that the appellants were properly identified at the scene of crime by the prosecution witnesses. The second ground of appeal is thus without merit as well.

We now turn to consider the third ground of appeal in the supplementary memorandum of appeal. The submission of Mr. Mwakalinga was to the effect that the appellants disappeared after the incident that is why there was delay in arresting them. He referred us to page 44 of the record of appeal where PW6 testified that on 1.5.2006 he received a phone call that the appellants were arrested at Singida. After that information they brought them to Maswa where they were interrogated and charged in court. He referred us to page 49 of the record of appeal where the first appellant's defence is found and argued that the appellant did not challenge in his defence, regarding where he was arrested. He added that the

second appellant stated at page 51 of the record of appeal that he was arrested at Singida. According to Mr. Mwakalinga, it is obvious that the appellants disappeared immediately after the incident and they were arrested at Singida. Therefore, he urged us to find this ground of appeal baseless and dismiss it.

In rejoinder the first appellant stated that it took about six months before the appellants were arrested. He doubted why they were not arrested immediately after the incident. However, he confirmed that he was arrested at Singida. The second appellant had no specific rejoinder in this ground of appeal. He only stated that he was arrested at Singida in respect of a civil case. He urged the Court to consider his grounds of appeal.

There is no dispute between the parties that the appellants were arrested six months after the incident. We are aware of the settled position that unexplained delay in arresting the appellant casts doubt on the credibility of prosecution witnesses - see – **Chakwe Lekuchela v. Republic**, Criminal Appeal No. 204 of 2006 and **Samwel Thomas v. Republic**, Criminal Appeal No. 23 of 2011 (both unreported). In the current case the incident occurred on 21st December, 2005 at Mwashengeshi village within Maswa District in Shinyanga Region but the

appellants were arrested at Singida six months later after the incident. They were arraigned before the trial court on 9th May, 2006. According to PW6 who was the investigator of this case, upon receiving the information about the incident, they arrived at the scene of crime at the same night around 00:00 hours while the robbers had already disappeared. They found the victims have already been taken to the dispensary. They went there and the victims mentioned the appellants and their fellows to be the robbers. PW6 did also testify that he relayed the information about the robbers to other police stations. He mounted investigation and on 1st May, 2006 they received an information that the appellants were arrested in Singida and later brought to Maswa where they were charged. At page 51 of the record of appeal the second appellant confirmed that he was arrested at Singida during cross examination by the public prosecutor. This tells the reason as to why the appellants were not arrested immediately after the incident as correctly argued, in our view, by Mr. Mwakalinga. We thus find no substance in this ground of appeal.

We shall combine the third and sixth grounds in the memorandum of appeal which basically, challenge the decision of the trial court that it did not specify the counts under which the appellants were convicted of and sentenced, respectively. Mr. Mwakalinga submitted that the judgment is

very clear on which counts the appellants were convicted of and their sentences were also indicated at page 12 of the record of appeal. Therefore, he urged us to dismiss these grounds for being misconceived. The appellants had no rejoinder in respect of these grounds.

Without taking much time, we do not find any merit in these grounds of appeal. As stated by Mr. Mwakalinga, at page 12 of the judgment, the trial magistrate sentenced the appellants in respect of the 1st count to 30 years imprisonment and 3rd count to 30 years imprisonment. The sentences were to run concurrently. These grounds are therefore unfounded.

In the fourth ground of appeal the appellants are complaining about change of magistrates without indicating reasons. Mr. Mwakalinga concurred with the appellants in this ground. He submitted that the magistrates in this case are two, Hon. H. R. Mzonge, Senior District Magistrate (SDM) who took the appellants' plea and Hon. E. B. Luvanda, Resident Magistrate (as he then was) who conducted the trial and wrote the judgment which was read by Hon. Mzonge, SDM. However, it was Mr. Mwakalinga's contention that Hon. Mzonge, SDM did not take or record any evidence from witnesses of both parties. According to him, the trial was conducted by Hon. Luvanda, RM therefore, the requirement under section 241 of CPA of assigning reasons in case of change of magistrates does not

arise. He added that in terms of section 214 (3) of the CPA a trial magistrate who composed a judgment can forward it to another magistrate to deliver it without assigning reasons. He was of the view that this section does not make it as a mandatory requirement that reasons must be assigned and in the case at hand the appellants were not prejudiced. He thus urged us to find this ground baseless and dismiss it.

In rejoinder, the first appellant stated that it is doubtful that there was change of magistrates without assigning reasons. The second appellant had no rejoinder in respect of this ground of appeal.

Our starting point in determining this ground will be on the issue as to whether the second magistrate was under obligation to put forward the reasons of taking over from the trial magistrate and proceed to sentence the appellants. It is a requirement of the law under section 214 (1) of the CPA that a successor magistrate must assign reasons why he takes over from the predecessor magistrate if change of magistrates occurs in a trial. The change of magistrates in the current case occurred at the stage of the delivery of the judgment which was composed by a predecessor magistrate; wherein having pronounced it, the successor magistrate proceeded with mitigation and sentencing of the appellants. As intimated above, in terms of section 241 (3) of the CPA a successor magistrate is

allowed to deliver the judgment written by a predecessor magistrate and in case of conviction proceed to pass sentence. It reads: -

> *"(3) Nothing in subsection (1) shall be construed as preventing a magistrate who has recorded the whole of the evidence in any trial and* ***who, before passing the judgment is unable to compete the trial,*** *from writing the judgment and forwarding the record of the proceedings together with the judgment to be read over and, in the case of conviction, for the sentence to be passed by that other magistrate."* [Emphasis added].

It can be learnt from the above provision that a trial is complete after passing a sentence. If a trial magistrate fails for whatever reason(s) to complete a trial as in the case at hand, but he prepared a judgment, he/she can forward it to another magistrate to read it over. It is our considered view that this provision does not make redundant the requirements under subsection (1) of the same provision, instead, it complements it. In other words, the requirement of assigning reasons when the successor magistrate takes over is intact. In **Juma Kayuni & Another v. Republic**, Criminal Appeal No. 525 of 2015 (unreported), the judgment was written and delivered by the trial magistrate but the successor magistrate proceeded to sentence the appellants without assigning reasons. The Court found that

failure to record reasons for taking over was fatal and the sentences meted out to the appellants were illegal for being excessive. It allowed the appeal - see also **Adam Kitundu v. Republic**, Criminal Appeal No. 360 of 2014 (unreported).

In the current appeal, much as we agree with the parties that the successor magistrate did not give reasons for taking over, we think in the circumstances of this case with the overriding objective principal in place, it is in the interest of justice to consider whether the appellants were prejudiced by such failure.

As we intimated earlier, the appellants were charged with and convicted of armed robbery. In terms of section 287A of the Penal Code they are liable to imprisonment for a term of not less than thirty years with or without corporal punishment. The appellants herein were sentenced to 30 years imprisonment and twelve strokes of corporal punishment. The sentences meted out on the appellants (30 years imprisonment) is statutory as it can be seen from the record.

As regards corporal punishment, it is apparent from the wording of the provision that, the sentencing magistrate has discretion to order such punishment. In terms of section 214 (3) of the CPA, the magistrate who receives the record of proceedings and the judgment from the trial

magistrate is allowed to pass sentence as it was in the current case. The appellants were availed opportunity to mitigate and both of them admitted that they had previous convictions in Criminal Case No. 55 of 2006 with no more. Under the circumstances, we are settled that the appellants were not prejudiced for being sentenced by another magistrate other than the trial magistrate taking into consideration that their sentences are statutory. In total we find this ground of appeal without any merit.

We proceed to consider the fifth ground of appeal in which the appellants claim that they were unfairly tried because they were not reminded the charge before commencement of prosecution case. Mr. Mwakalinga submitted that it is true that the record of appeal does not indicate that the appellants were reminded the charge. However, he said, this does not mean that they were unfairly tried. He referred us to page 14 of the record where on 18th January, 2007 the substituted charge was read over to the appellants and the trial court entered a plea of not guilty. Mr. Mwakalinga argued that, from that date (18/1/2007) to 7th February, 2007 when prosecution case commenced at page 18 of the record of appeal, it was only 19 days that had lapsed, so he argued that the appellants cannot claim that they had completely forgotten the charge. He argued that the appellants were not affected in any way to the extent of saying that the trial

was unfair. However, he argued further that there is no law that requires accused persons to be reminded a charge before commencement of prosecution case. In that sense, he prayed for this ground to be dismissed for being baseless. There was no rejoinder by the appellants in respect of this ground of appeal.

The issue as to whether the appellants were reminded the charge has been resolved following concession by Mr. Mwakalinga and the reference made in the record of appeal showing that they were not reminded. Now whether that omission is fatal, we agree with Mr. Mwakalinga's position. We also think that in the peculiar circumstances of this case, chances that appellants had forgotten charges they were facing were very minimal. In fact, as argued by Mr. Mwakalinga, there is no law requiring that an accused must be reminded a charge before commencement of prosecution case; see **Rehani Said Nyamila v. Republic**, Criminal Appeal No. 222 of 2019 (unreported). For that reason, we find that the omission to remind them the charge was not fatal and this ground is baseless.

In respect of the seventh ground of appeal which was argued together with the first and fourth grounds in the supplementary memorandum of appeal, Mr. Mwakalinga submitted that the case against the appellants was proved beyond reasonable doubt. He argued that the

appellants' complaint that the case was not proved beyond reasonable doubt because the person who arrested them was not called to testify is unfounded. He went on stating that the law does not require a specific number of witnesses to prove a case as it was decided in **Ally Shenyau v. Republic** (supra). He added that the question as to whether they were arrested in relation to this case or otherwise was answered by PW6 at page 44 of the record of appeal. That the appellants were arrested at Singida a fact which shows that the information that they were wanted was almost everywhere and thus they were arrested in relation to this case. To prove so, he said, when the appellants were arrested, PW6 was informed for him to go to collect them and that is what he did.

Besides, he said, the appellants' complaint on how was it possible that all the three offences were committed at 23:00 hours by them, is also baseless. According to him, the charge sheet did not state the exact time but it was estimated that it was at about that hour when the offences were committed. Therefore, Mr. Mwakalinga submitted that, the charge against the appellants was proved beyond reasonable doubt. He urged us to dismiss this appeal.

In rejoinder the first appellant argued that the evidence of PW6 is doubtful on how he conducted investigation. He questioned, as a way of

raising doubt, as to why PW6 did not state categorically how he conducted investigation and whether he went to search for him at his house. He added that the prosecution failed to prove their case because they failed to produce, as a witness, a person who arrested him at Singida. He thus prayed for the appeal to be allowed. The second appellant insisted that the case was not proved against him. Finally, he as well prayed for the appeal to be allowed.

The burden of proof in criminal cases lies with the prosecution to prove each ingredient of the offence. In this case the appellants were charged with armed robbery. To prove this offence, the prosecution was required, which they did, to prove that there were stolen properties obtained from the victims through the use of or threat to use force. Apart from that, it is a requirement of the law that perpetrators must be identified. In this case all those elements have been extensively discussed above and we are satisfied that they were proved by PW1, PW2, PW3, PW4, PW5 and PW6. The argument by the first appellant that PW6 did not state how he conducted investigation is without merit. It has been shown above that through the information relayed by PW6 to other police stations, the appellants were arrested at Singida. Therefore, we have no justifiable reason to fault the findings of the first appellate Judge to the effect that the

appellants were properly identified at the scene of crime committing the offences with which they were charged.

As a result, we find no merit in this appeal. Consequently, we dismiss it in its entirety.

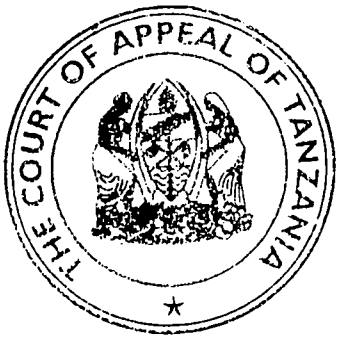
DATED at **TABORA** this 1st day of November, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of November, 2021 in the presence of Appellants in person and Mr. Deusdedit Rwegira, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL