IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 365 OF 2008

GODFREY RICHARD .... APPELLANT
VERSUS
THE REPUBLIC .... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Masanche, J.)

dated the 11th day of December, 2007
in
Criminal Appeal No. 80 of 2006

JUDGMENT OF THE COURT

18 & 23 March 2010

MASSATI, J.A.:

The Appellant was charged with and convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code (Cap 16 – RE 2002). He was sentenced to the mandatory term of 30 years imprisonment. His appeal to the High Court was dismissed in its entirety. This is his second appeal.

Before the trial court, it was alleged that the Appellant and another who was acquitted, robbed one DAUDI S/O KIULA, PW1 of a motor vehicle he was driving as a taxi, make Toyota Mark II, Registration Number T 525 AGA, the property of one NUSURA D/O KARIM, on 20th, May 2005. In order to retain the vehicle the robbers threatened the driver with a gun. This offence, it was alleged, took place at 21.00 hours (i.e. 9.00 p.m.). The value of the motor vehicle is not shown.

At the trial, evidence was led to show that as PW1 was driving from Sabasaba to Singida town, he was stopped by one person who wanted to hire it. That person entered the car, and, directed him where to go. At a certain point, the person stopped him and entered into a house. Then some people appeared, car jacked and forced him to sit in the passenger seat infront. It happened that these persons were thugs armed with a gun. One of them drove the car, while the others searched him and made him part with his cell phone and a total of Shs. 37,000/= cash. Later, they handcuffed him and threw him out of the car, and drove away leaving him behind. He

reported the matter to the police. When the car was found, there was no battery. Then on 7/7/2005, the victim of the robbery was called to the police station, where he found the car. There, also, he was asked to identify his suspects in an identification parade. That was where the Appellant was picked.

After hearing the victim of the robbery and 2 police officers, and after hearing the two suspects on oath, the trial court convicted the Appellant and acquitted the other. The High Court also rejected his appeal.

The Appellant, who was unrepresented, filed, and ably argued five grounds of appeal.

In the first ground of appeal, he complained that the identification parade was replete with irregularities; such as that he was not advised of his right to choose where to stand; to have participants of the same size and body build, his right to the presence of counsel or a friend. Finally he said that he was not asked, at the

end, if he was satisfied with the conduct of the parade. On that point, he referred us to the decision of **R v MWANGO MAANA** (1936) 3 EACA 29, which was approved in **MUSOKE v R,** (1958) EA 715, and **TONGENI NAATA v R** (1991) TLR 54 CA. It was his argument that those irregularities reduced the probative value of the identification parade register that was tendered as Exh. P1. The Appellant further criticized the evidence of visual identification. Relying on the tests set in **WAZIRI AMANI v R** (1980) TLR 250, he said that PW1 was the only witness of identification, the occurrence took place at night, the intensity of the light was unknown and he was not known by the victim before. So, he argued that the tests were not met and asked the Court to disregard such evidence.

On the other hand, Ms Neema Mwanda, learned Senior State Attorney who appeared for the Republic/Respondent, opposed this ground by submitting that the identification parade was, on the whole, properly conducted under section 60 of the Criminal Procedure Act (Cap 20 – RE 2002) and submitted that **NAATA's** case held that all that mattered was that the participants in an

identification parade should only resemble, not that they should be in uniform. She further submitted that PW1 sufficiently identified the Appellant by face, attire, with the aid of light and had been so engaged for nearly 10 minutes. So, the tests in **WAZIRI AMANI's** case were met and the identification parade amply corroborated PW1's evidence. She urged us to dismiss this ground of appeal.

In his second ground of appeal, the Appellant complained that it was wrong for the trial court to have relied on the uncorroborated evidence of PW2, the investigation officer, to the effect that the Appellant was found in possession of stolen cell phones belonging to one Zacharia who did not testify, and so his evidence was not corroborated. Ms Mwanda's response was that under section 142 of the Tanzania Evidence Act (Cap 6 – RE 2002) even a single witness can prove a criminal case. She was of the view that, the ground too lacked merit and should be dismissed.

In the third ground, the Appellant argued that as there was variance between the charge sheet and the particulars and the

evidence, it was an incurable irregularity. In his oral elaboration, the Appellant pointed out that whereas the charge sheet alleges that the offence was committed at 9 p.m., PW1 said it took place at 8 p.m. But Ms Mwanda, submitted that, although the variance was apparent; it was curable under section 234 (3) of the Criminal Procedure Act (supra). She also referred us to the decision of **MOHAMED SAID MATULA v R** (1995) TLR 54. – where it was held that such errors were not material. She prayed that it too, be dismissed.

In his fourth ground of appeal, the Appellant argued that it was wrong for the two courts below to have convicted him on the uncorroborated evidence of PW1. His view was that the identification parade did not provide corroboration as it itself required corroboration and considering that he was not found in possession of any of the prosecution exhibits. For that point, he referred us to **HAKIM MFAUME v R** (1984) TLR 201. On her part, the Respondent argued that PW1 sufficiently identified the Appellant and the results of the identification parade corroborated it. Her view was

that this ground too lacked merits. She adopted her submissions on the first ground.

In his fifth ground, the Appellant complained that both the trial court and the High Court on first appeal, did not consider the defence case in convicting him. Relying on the case of **ELIAS STEPHEN v R** (1982) TLR 33, the Appellant submitted that the courts below did not consider his defence of alibi and that of his witness. The Republic responded by referring us to certain passages in the trial court's and the High Court's judgments, where the defence case was considered. So, it was her firm view that this ground too lacked merit.

Lastly, although he did not raise it as a ground of appeal, the Appellant observed that the trial court **convicted** him without first finding him **guilty.** He said that this was not proper. With all those, the Appellant prayed that his appeal be allowed.

We have carefully considered all the grounds of appeal. We shall in our deliberations, start with the observations made by the

Appellant to the effect that he was convicted before being found guilty.

This observation need not detain us. It is true that at the end of her judgment the learned Resident Magistrate, proceeded to convict the Appellant, but there was no finding that she found him guilty of the offence with which he was charged. This was surely an irregularity, but we think the irregularity is curable under section 388 of The Criminal Procedure Act, because in his notice of appeal to this Court the Appellant showed that he was fully aware that the High Court "found him guilty of the offence of armed robbery". We do not think that this defect did in fact occasion any failure of justice on the part of the Appellant. This ground of appeal is dismissed.

Next, we shall consider the third ground of appeal because it too, touches on procedure. First, we must admit and so does the Respondent, that there is a variance as complained. According to the particulars of the charge sheet, the offence took place at 21.00 (9.00 p.m.) but according to PW1 he was car jacked at 8.00 p.m. The

Appellant referred us to **MOHAMED SAID "MUHILA's"** case (supra), but Ms Mwanda, relied on Section 234 (3) of the Criminal Procedure Act, and the same case referred by the Appellant.

We have diligently looked for the case cited by the Appellant. If we heard, understood, and quoted him correctly, we think he cited the case wrongly. We believe, he meant to refer to **MOHAMED SAID MATULA v R** (1995) TLR (3) (CA) which was also cited by the Respondent. If that is so, then both cited it out of context, because the case did not decide on the point raised in the ground of appeal. It dealt with inconsistencies and contradictions in the testimonies of witnesses, not variance between a charge and the evidence.

As rightly submitted by Ms Mwanda, the learned Senior State Attorney, the point in question is taken care of by section 234 of the Criminal Procedure Act. Section 234 (1) dictates that where the court notices any variance between the charge and the evidence it may order the charge to be amended and the amended charge to be read over to the accused. But when that variance is as to the **time** at

which the offence is alleged to have been committed, Section 234 (3) provides:-

> " (3) Variance between the charge and the evidence in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance, if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof."

It is clear that the Appellant's complaint is squarely answered by this section. Since he did not go further to elaborate whether the proceedings instituted against him were time barred the implied exception therein does not apply. We therefore find no merit in that ground of appeal and we dismiss it.

The next stand alone ground of appeal, also on procedure is the fifth one. The Appellant complains here that the trial court and the High Court, did not consider his defence.

It is true that as Ms Mwanda has shown, the trial magistrate referred to the defence case, but only by way of summarizing it. Section 312 of the Criminal Procedure Act 1985, requires a judgment to contain a point or points of decision, the decision(s) and the reasons for such decision(s). It must therefore contain a critical analysis of the prosecution and the defence cases. In this case, the Appellant had given his defence and produced a witness to prove his alibi. The trial court mentioned it in its summary but gave no reason why it rejected it. The High Court attempted to rescue the situation by assigning the reason for rejecting the alibi, as that of, failure to give notice of intention to raise that defence. That may be so, but Section 194 (6) of the Act vests discretion in the trial court to accord or to accord no weight to an accused's defence of alibi if no notice is given. But that is judicial discretion and it must be used judiciously. It means that, like any other piece of evidence, it should have been evaluated and the reasons for its rejection given. This is what consideration of one's case is all about. It is about giving reasons for deciding any point in issue one way or the other. But this was not

done in this case. It was not enough for the trial court to have just summarized the defence evidence. And it was not open for the High Court to assign a reason for the trial court's rejection of the appellant's **alibi** which the said court did not give. So, the Appellant's criticism was well founded.

The Appellant has referred us to the case of **ELIAS STEPHEN v R** (1982) TLR 313 where the High Court held that in failing to consider the defence case the trial court wrongly shifted the burden of proof to the accused. In this case the Appellant has not gone that far; but we are satisfied that the failure to consider the defence case is as good as not hearing the accused and is fatal. (See **HUSSEIN IDDI AND ANOTHER v R** (1986) TLR 166).

Grounds one, two and four of appeal can, we think, conveniently be disposed of together, as they all relate to sufficiency of evidence that was used to convict the Appellant. The conviction having been based on the identification of the Appellant, the issue is whether he was sufficiently identified.

There is no dispute that the Appellant was said to have been identified by only one witness; PW1. Apart from the identification parade, there is also no dispute that there was no other piece of evidence that connects him with the offence. The law regarding evidence of visual identification is now settled.

First:

> "Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions favouring identification are difficult. In such circumstances other evidence circumstantial or direct, pointing to guilt is needed."
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> (**ABDALLAH BIN WENDO AND ANOTHER v R** (1953) 20 EACA 166:)

Two:

> "To convict an accused person, relying on the identification by a single witness is dangerous, but a conviction so based, cannot, in law, be regarded as invalid."

(**THAIRU s/o MUHORO AND OTHERS v R** (1954) 21 EACA 187.)

Three:

> "Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction."

(**MWALIM ALLY AND ANOTHER v R** CAT DSM Criminal Appeal No. 39 of (1991) (Unreported))

And lastly:-

> "No court should act on evidence of visual identification unless all possibilities of

> mistaken identity are eliminated and the court is fully satisfied that the evidence is watertight but, the following factors have to be taken into consideration, the time the witness had the accused under observation; the distance at which he observed him, the conditions in which such observation occurred for instance whether it was day or night (whether it was dark, if so was there moonlight or hurricane lamp etc; whether the witness knew or had seen the accused before not."

(**WAZIRI AMANI v R** (1980) TLR 252 (CA))

In this case, it was submitted by the Respondent that all the tests in **WAZIRI AMANI** case (supra) were met. The Appellant says they were not.

We have revisited the evidence of PW1. It is clear that the robbery took place at night. There is no evidence that he had known any of the bandits before. In cross examination by the Appellant, PW1 said he was able to identify him by face and with the aid of

"light". There is no indication what type of light it was or its intensity. PW1 also said he was able to identify the Appellant by the red shirt he was wearing. In cross examination by the 2nd accused (who was acquitted) he said he observed the appellant for 10 minutes. So, of the tests put forward in **WAZIRI AMANI's** case only one was met; the time the witness had the appellant under observation, which was 10 minutes. The rest of the conditions such as distance, whether there was enough light, and whether he had known the appellant before, were not in our view proved.

But there is more. If the witness had stayed with the Appellant for that long and recognized him by face and attire, there is no evidence that he described him to any one before he picked him from the identification parade more than six weeks later, (the robbery was on 20/5/2005, but the identification parade was conducted on 7/7/2005). This aspect also is important in cases of identification for it was held in **R v MOHAMED BIN ALLUI** (1942) 9 EACA 72, that:-

> "In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given."

One would have expected PW1 to have given a description of the person(s) who robbed him immediately to a person to whom he first met or reported. Of the remaining prosecution witnesses, none gave such evidence. PW2 suggested that the Appellant was found with mobile phones but no evidence was led to identify the said phones or the owner, nor were they produced in evidence as exhibits. So it remains as a fact that the Appellant was not found with any of the properties stolen from PW1.

Taken in its totality, we think the evidence of identification of the Appellant cannot be said to be watertight. Coming from a single witness, it was a matter of practice that his evidence should have been corroborated. We have already held above that the Appellant was not found with anything stolen from PW1 that would have corroborated the evidence of identification.

Ms Mwanda, learned Senior State Attorney has submitted that the identification parade supplied the requisite corroborative evidence. But the Appellant has attacked the credibility of the parade.

Identification parades have their legal roots in Section 60 of the Criminal Procedure Act, section 38 of the Police Force and Auxiliary Services Act (Cap 322 RE – 2002) and the Police General Orders issued by the Inspector General of the Police from time to time but they trace their origin in the decision of the East African Court of Appeal in **R v MWANGO s/o MANAA** (1936) EACA 29. There, 13 rules are set out. We do not have to reproduce all of them, but,

suffice it to mention only two of them which form the basis of complaint in the present appeal.

The Appellant has complained among others that, he was not informed of his right to have a lawyer or friend to be present when the parade was taking place; or to be asked whether he was satisfied with the way the parade was conducted. In **R v MWANGO s/o MANAA** (supra) the first rule enumerated is:-

> (1) The accused person is always informed that he may have a solicitor or friend present when the parade takes place

Rule II stipulates:-

> (II) At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply."

The trial court was not addressed on these procedure in conducting identification parades, but the High Court was fully aware of it as is

reflected in its judgment. In his judgment the High Court correctly, directed itself that the value of identification parades is to back up eye identifications. It is not substantive evidence. It is only admitted for collateral purposes (See **MOSES DEO v R** (1987 TLR 134.

Now, the law is that if any of the rules is not complied with, the identification parade becomes of little value. In **RAYMOND FRANCIS v R** (1994) TLR 100 (CAT) the Appellant had also complained among others, that he was not asked if he was satisfied that the parade was conducted in a fair manner. The Court held that:-

> "In those circumstances, it appears to us that the Identification Parade was not carried out properly in terms of the applicable procedure set out in the case of **REX v MWANGO s/o MANAA** (1939) 3 EACA 29. As such it was of little value as evidence against the appellant."

Similarly, in the present case Ms Mwanda admitted that according to the identification parade register (Exh. P12) there is no indication that the Appellant was asked whether he was satisfied with the way the parade was conducted and his answer noted. We have also seen the testimony of PW3. There is no evidence from that witness that the Appellant was informed of any of his rights. In the premises we think that the parade was of little value against the appellant. So, we think there is merit in the Appellant's grounds one, two and four, as well as the fifth; and we uphold them.

At the end of the day, we think that the conviction of the Appellant having been based on the evidence of identification by a single witness, in unfavourable conditions, would only be safe if there was corroboration. Since there was no corroboration, the conviction cannot be said to be safe. Had both courts below properly directed themselves on identification and considered the Appellant's defence they would not have returned a conviction. It is for these reasons that we allow the appeal. The conviction is quashed and the

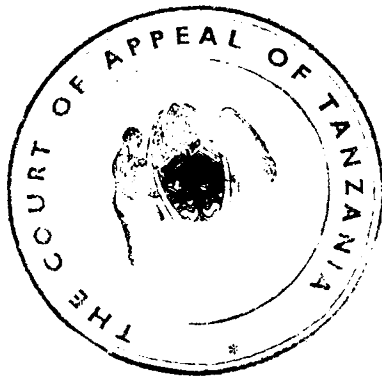
sentence is set aside. We order that the Appellant be released from prison, forthwith unless he is otherwise lawfully held.

Order accordingly.

DATED at DODOMA this 22nd day of March, 2010.

E.A. KILEO

JUSTICE OF APPEAL



S.A.L. MASSATI

JUSTICE OF APPEAL

K.K. ORIYO

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(E.Y. MKWIZU)

DEPUTY REGISTRAR